

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 248
5420420

BETWEEN	JOHN GRANT WALKER Applicant
A N D	STEPHEN LAING First Respondent
	LIQUID FRANKTON LIMITED Second Respondent
	LIQUID GROUP HOLDINGS LIMITED (in liquidation) Third Respondent
	MT ROSA ESTATE LIMITED Fourth Respondent

Member of Authority: M B Loftus

Representatives: John Walker, on his own behalf
Stephen Laing, on his own behalf and also representing
the second and fourth Respondents

Investigation meeting: 13 November 2013 at Queenstown

Submissions Received: At the investigation meeting

Date of Determination: 3 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, John Walker, claims he was constructively dismissed in March 2013.

[2] The citation of four respondents does, however, raise a preliminary issue both the parties and I agree should be determined before the substantive claim can proceed.

[3] That question is – *Who employed Mr Walker?*

Background

[4] Mr Laing has, over the years, been a director and/or shareholder in a number of companies.

[5] Mr Walker was initially engaged by one of Mr Laing's companies, Liquid Frankton Limited, in May 2009. He was employed to re-brand its restaurant and bar at Frankton.

[6] It was originally intended he continue working there once that was done. There is debate as to whether the terms of employment were reduced to writing. Mr Laing believes they were, while Mr Walker doubts it. Irrespective, the parties agree Mr Walker worked for, and was paid by, Liquid Frankton at the time.

[7] Towards the end of 2009 Mr Laing purchased two businesses in Wanaka. Mr Walker states he was transferred to oversee the renovation and re-branding of one of those – the Wanaka Ale House which was operated by Liquid Wanaka Limited.

[8] Following that re-branding exercise Mr Walker's role was changed to that of general manager. This saw him responsible for four establishments, each of which had their own site manager. A fifth was added soon thereafter.

[9] Both Mr Walker and Mr Laing agree they signed a written employment agreement when this change occurred. There was, however, uncertainty as to which entity was cited as the employer party – Liquid Wanaka Limited or Liquid Group Holdings Limited (LGHL). LGHL was an asset-less entity set up for the purpose of employing staff engaged by any of Mr Laing's establishments. This would facilitate their deployment across any of the businesses without secondary tax issues.

[10] Having discussed this during the investigation meeting both Mr Walker and Mr Laing concluded LGHL was, in all probability, the employer at the time.

[11] In early 2010 Mr Walker became responsible for the management of a vineyard operated by another of Mr Laing's businesses – Mt Rosa Estate Limited. There is a debate between the two over the circumstances with Mr Walker claiming he was directed to do so. Mr Laing says he raised the fact he had a problem. He asked Mr Walker if he could assist, to which the response was *yes*.

[12] Toward the end of 2011 Mr Laing sold two of the Wanaka establishments for which Mr Walker was responsible. The sale coincided with difficulties at another of his businesses, Dunedin based Boat Building Company, Southern Boats (2007) Limited. Southern Boats was relocating but had been without a manager for approximately six months. Mr Walker says he was appointed for a three month period and given *a general mandate to get the business relocated*.

[13] The relocation was completed over the Christmas New Year period 2011/2012 but Mr Walker's initial three month's was extended, with him being asked to *sort the business out* and establish operating systems. Around this time Mr Walker was also asked to perform some work relating to Cone Peak Station; a high country station owned and farmed by Mr Laing.

[14] During these changes there was, at least according to Mr Walker another change of employer. Mr Walker says one of the things he had to do at Southern Boats was introduce written employment agreements. This gave him cause to think about his own situation and he raised his terms and conditions with Mr Laing. Some changes were agreed, though the extent thereof is disputed.

[15] Mr Walker claims Mr Laing then instructed him to draft a new employment agreement and cite Mt Rosa Estate Limited as his employer. Mr Walker says he did as instructed and he signed the document on 29 February 2012. It was not, however, signed by Mr Laing who now portrays it as fraudulent. With respect to the issue of who employed Mr Walker he (Laing) says all he intended was Mr Walker's salary be apportioned between the various entities for which he performed work on a pro rata basis and that be reflected in the agreement. He claims he instructed the accounting firm who worked for his various companies accordingly.

[16] The accountants deny Mr Laing's claim and says it was instructed to pay Mr Walker's salary through Mt Rosa Estate Limited with effect 2 July 2011. It claims Mr Laing advised the employer had changed, as had Mr Walker's duties.

Determination

[17] Subservient to the question being determined here is another, *where's the money?* It is a case, at least from Mr Walker's perspective, of identifying a respondent who might have the resources to pay the awards he believes will accrue when his grievance claim succeeds.

[18] Mr Laing has an opposing goal. He seeks to attribute possible responsibility to an entity without assets and prefers one in liquidation so a continuation of the claim is precluded by section 248(1)(c) of the Companies Act 1993. He claims Mr Walker was employed by LGHL but adds that if there was a transfer it was to Southern Boats (now in liquidation) by virtue of the time Mr Walker spent attending to its business.

[19] While he cites four possibilities, Mr Walker's prime contention is he was employed by Mr Laing acting in a personal capacity. This assertion is based on Mr Walker's assertion all decisions were made, and control exercised by, Mr Laing.

[20] Mr Laing's response is it would be nonsense for him to employ someone personally when he had a plethora of companies capable of doing the task and simultaneously shielding him from personal liability and responsibility. From a purely practical perspective his argument makes sense

[21] With respect to the issue of control Mr Laing accepts he made a number of decisions but disputes the extent there-of. He denies all encompassing control and claims he often did nothing more than concur with advice tendered by either Mr Walker, his accountants, or a combination of both. He says he was doing nothing more than exercising the responsibilities of a director. Given the evidence, this argument also has merit.

[22] There is then the fact the evidence supporting this claim was weak. There is no evidence the two ever discussed, or even openly contemplated, the possibility Mr Laing was the employer and it is clear Mr Walker was never paid by Mr Laing personally. Most of the supporting evidence was accompanied by phrases such as *I thought* and *I assumed*. That falls a long way short of reliable evidence upon which I could conclude Mr Walker was the employer.

[23] To that I add the fact that while Mr Walker worked for a number of Mr Laing's companies, he willingly signed an agreement with an entity he admits he knew to have been designed for no purpose other than to allow staff to be deployed across Mr Laing's interests. Here I refer to LGHL and note, given the evidence, had the two not agreed I would have concluded it was the employer in question.

[24] It would be difficult, given the evidence, to conclude Mr Laing personally employed Mr Walker.

[25] Turning to the other options. Liquid Frankton can be discounted given the parties agree the arrangement was superseded by another the parties willingly concluded. Similarly I discount Mr Laing's suggestion of Southern Boats. It appeared speculative and no evidence was tendered to indicate the two either contemplated or discussed the possibility.

[26] Turning to LGHL. There can be no doubt it was, at one stage, Mr Walker's employer. Both he and Mr Laing say they willingly agreed, then signed, an agreement to that effect. They then acted on it with LGHL paying Mr Walker between 15 December 2009 and 1 July 2011.

[27] The question then becomes whether or not the agreement with LGHL was superseded by another identifying Mt Rosa as the employer. Mr Walker says he was instructed to make the change and did. Mr Laing disagrees (see paragraph 15 above).

[28] My conclusion is the answer is yes – the arrangement did change to one under which Mr Walker was employed by Mt Rosa. I reach this conclusion for the following reasons.

[29] Mr Walker had already exhibited a willingness to work over a multiplicity of Mr Laing's interests while being contracted to only one. Indeed, he accepts he knew that was why LGHL was incorporated and with that knowledge he then entered into a written agreement identifying it as his employer.

[30] He says the change to Mt Rosa occurred after a discussion between himself and Mr Laing. Putting aside disagreements over the detail of what was agreed, it is clear a discussion occurred. It is also clear Mr Walker though he had agreed to a change of employer which he then acted upon by drafting the new employment agreement.

[31] That agreement, at least with respect to the identity of the employer, did nothing more than confirm the arrangement already in place given Mr Walker had been paid by Mt Rosa since 2 July 2011. He was aware of who he was paid by and had not challenged it. Similarly, and despite his contrary protestations, the evidence leads me to conclude Mr Laing took sufficient interest in his company's that he was, or at least should have been, aware of the payment arrangements. There is, however, no evidence he did anything to rectify what he now portrays as an error. He must therefore live with the result.

[32] Finally, and perhaps most importantly there is the accountant's evidence. He was a relatively independent witness who had been subpoenaed. He exhibited some reluctance about the situation and at one stage even asked Mr Laing if he really wanted answers to a range of question he asked. Mr Laing said *yes*. The accountant's evidence was clear and remained consistent in the face of attempts to attain an alteration. Mr Laing gave an instruction Mr Walker be paid by Mt Rosa as both his employment and duties had changed. The instruction was given just prior to 2 July 2011 and that was the date it was acted on.

Conclusion

[33] For the above reasons it is my conclusion Mr Walker was, at the time of his cessation, employed by Mt Rosa Estate Limited.

[34] The other respondents are therefore struck out and the grievance application is to proceed against Mt Rosa Estates Limited.

[35] It is normal costs follow the event but both participants were self-represented. That means recoverable costs are, in all probability, limited to the cost of filing the application. That can be addressed with the substantive claim. Therefore, and in order to avoid additional effort or expense, I choose to dispose of the issue and order that costs, at least in respect of this preliminary issue, lie where they fall.

M B Loftus
Member of the Employment Relations Authority