

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2014] NZEmpC 21  
ARC 89/12**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER of an application for joinder of parties to  
the proceeding

BETWEEN VINCE ROBERTS ELECTRICAL  
LIMITED (IN SUBSTITUTION FOR  
VINCE ROBERTS APPLIANCE  
WAREHOUSE LIMITED)  
Plaintiff

AND SCOTT PHILLIP CARROLL  
First Defendant

AND VINCENT FORSMAN ROBERTS  
(TRADING AS VINCE ROBERTS  
ELECTRICAL)  
Second Defendant

Hearing: On papers filed on 27 November and 17 December 2013 and 14  
February 2014

Appearances: Mary Roberts, agent for plaintiff and second defendant  
Margaret Lewis, counsel for first defendant

Judgment: 14 February 2014

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**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] This judgment determines whether another person should be joined in the proceeding as a party to allow to be heard and decided the cross-challenge of the former employee that another person was in fact his employer.

[2] In light of the plaintiff's consent to the joining of Vince Roberts Electrical Limited as a party and acknowledgment by Mrs Roberts as its agent that this

company was Mr Carroll's employer at the date of his dismissal on 11 February 2014, I made an order that Vince Roberts Electrical Limited was to be substituted as plaintiff in the proceeding. The plaintiff still opposes Mr Carroll's application to join Vincent Forsman Roberts as a party to the proceeding

[3] Mr Carroll was unrepresented in the Employment Relations Authority. His personal grievance filed with it on or about 7 May 2012 nominated "Vince Roberts Electrical" as the respondent employer. This included Mr Roberts's home address and home telephone number. Mr Carroll's uncontradicted evidence is that his employer's identity was not considered by the Authority during its investigation meeting, at least insofar as this involved Mr Carroll. The Authority's determination issued on 13 November 2012<sup>1</sup> cites "Vince Roberts Appliance Warehouse Limited" as the respondent in the entitling. Mr Carroll's further uncontradicted evidence is that when he began employment with what I will call generically "Vince Roberts", he was not provided with an employment agreement which may have identified his employer formally, and there was no discussion about who was to be the employer. Mr Carroll says he was a salesman who reported to Mr Roberts directly and was subject to his management until employment was terminated on 28 November 2011.

[4] Mr Carroll's evidence is that the business in which he was employed was located at 6A Link Drive, Glenfield, and traded under a variety of names. The common feature of these was the name "Vince Roberts" although in association with a number of other words, so that, at various times, the business was known as "Vince Roberts Appliances", "Vince Roberts Betta Electrical", and "Vince Roberts Electrical". Mr Carroll says that from the commencement of his employment in 2002 his salary appears to have been paid by Vince Roberts Appliance Warehouse Limited although this changed unilaterally without advice to, or agreement by, him on or about 1 April 2006 when the paying entity became Vince Roberts Electrical Limited. While the nominated salary payer is often a useful factor in deciding the identity of an employer, it is not alone the determiner of this question.

[5] The parties agree that the entity substituted by the Authority as the employer, Vince Roberts Appliance Warehouse Limited, was not Mr Carroll's employer at the

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<sup>1</sup> [2012] NZERA Auckland 395.

date of his dismissal. Mrs Roberts, who was also the respondent's agent in that forum, could not explain how it came to be substituted for "Vince Roberts Electrical" in the Authority's determination. The determination does not account for this change.

[6] Company registration records show that Mr Roberts and his wife, Mary Roberts, were the directors and shareholders of the two companies, Vince Roberts Appliance Warehouse Limited and Vince Roberts Electrical Limited.

[7] Mr Carroll says that in discussions with both Mr and Mrs Roberts in the second half of 2013, they told him repeatedly that neither of the companies had any funds and that he would not be paid. Mr Carroll says that he has recently been told by their accountant that they are in the process of closing down Vince Roberts Electrical Limited and establishing new companies to operate in its place. Companies Office records show that these new companies are Forsman Trading Limited which was incorporated on 31 October 2013, the directors of which are Mr and Mrs Roberts, each holding 50 per cent of the company's shares. It appears that a further company has recently been established, Stillwater Trustee Limited, the registered office of which is also at 137 Glenfield Road, Hillcrest, and the directors of which are Mr and Mrs Roberts, each owning 50 per cent of the issued shares with the remainder held by their children. Stillwater Trustee Limited was incorporated on 14 October 2013.

[8] The plaintiff's opposition to joining Vince Forsman Roberts as a party is based on the merits of its contention that Mr Roberts personally was never Mr Carroll's employer. The grounds for Mr Roberts's opposition to being joined rather puts the cart before the horse in the sense that while Mr Carroll claims to have been employed by Mr Roberts personally during at least some of the period of his employment for which he says there is compensable employer liability, Mr Roberts says that he should not be joined in the proceeding because he was not ever Mr Carroll's employer. That being a live and respectable question, the appropriate course is for Mr Roberts personally to be joined as a party. If the Court determines on the merits of Mr Carroll's claim that Mr Roberts was not his employer, then the claims against him will be dismissed and, if Mr Roberts has incurred identifiable

costs in defending that position, he may apply to the Court to be reimbursed for those costs by Mr Carroll. If, on the other hand, the Court determines that Mr Roberts was liable to Mr Carroll as employer, it will be necessary and appropriate that Mr Roberts be a party to the proceeding. Put another way, if Mr Roberts is not a party to the proceeding, he will not be in a position to defend the claims against him by Mr Carroll.

[9] In these circumstances, pursuant to s 221 of the Employment Relations Act 2000, I make an order joining Vincent Forsman Roberts (trading as Vince Roberts Electrical) as second defendant in the proceeding and reserve costs on the first defendant's application. The entitling to this judgment will reflect the necessary role changes that are a consequence of this decision.

[10] The first defendant will now need to file an amended statement of claim on his cross-challenge setting out his allegations against the plaintiff and the second defendant. Mr Carroll will have 14 days within which to file and serve that amended pleading. The plaintiff and the second defendant will thereafter have the period of 21 days within which to file and serve their statement or statements of defence to Mr Carroll's amended cross-challenge. Once those amended pleadings have been filed and served, the Registrar should arrange a further directions conference to set the proceeding down for hearing.

[11] I reserve costs on this application.

GL Colgan  
Chief Judge

Judgment signed at 10.30 am on Friday 14 February 2014