

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 245  
3077892

BETWEEN	DEBORAH FINDLAY Applicant
AND	STEVES PAINTING & DECORATING LIMITED (IN LIQUIDATION) Respondent
AND	STEVEN MURDOCH Proposed Second Respondent

Member of Authority: Helen Doyle

Representatives: Paul Mathews, advocate for the Applicant  
Grant Reynolds Liquidator  
Steve Murdoch, in person

Investigation meeting: On the papers

Application and further information received: 27 May and 19 June 2020 from the Applicant  
5 June 2020 from the Respondent  
5 June 2020 from the proposed Respondent

Date of Determination: 24 June 2020

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A** The proposed respondent is joined to the proceedings and directions have been made for the lodging of a statement in reply and statements of evidence.
- B** Costs are reserved until after the substantive determination.

## **Employment Relationship Problem**

[1] The applicant seeks to join the proposed respondent to the application before the Authority under s 221 of the Employment Relations Act 2000 (the Act). The respondent and the proposed respondent do not accept that there should be joinder.

## **History of the matter**

[2] On 11 May 2019 Mr Mathews on the applicant's behalf raised personal grievances of unjustified disadvantage and dismissal by email; "To Steven Murdoch (for Steve's Painting & Decorating Limited)."

[3] On 15 October 2019 a statement of problem was lodged with the Authority naming the respondent as Steves Painting & Decorating Limited.

[4] On 31 October 2019 a statement in reply was lodged on behalf of the respondent.

[5] On 12 February 2020 the respondent was placed into liquidation.

[6] On 10 March 2020 Mr Mathews advised the Authority that the Liquidator Mr Grant Reynolds had given consent for the proceedings in the Authority to continue and had indicated that the company did not intend to take part in any investigation meeting.

[7] On 15 May 2020 after a case management conference with the Authority the matter was given an investigation meeting date of 20 July 2020. Mr Reynolds indicated that he did not intend to participate in the investigation meeting.

[8] On 27 May 2020, an application was received on behalf of the applicant seeking to join under s 221 of the Employment Relations Act 2000 (the Act) the proposed respondent to the proceeding. The basis of this was put in paragraphs 2 and 3 of the memorandum provided by Mr Mathews:

It has just come to my attention recently that when taking instructions on this matter, almost a year ago, I erred in assuming the identity of the employer. I realised this when assisting my client to source IRD Summary of Earnings information as directed by the Authority.

We filed this matter assuming the employer was Steve's Painting and Decorating Limited. The applicant has now described to me the nature of her employment was that she was employed by Steve Murdoch personally. She says that the employment started because she was a personal friend of Steve Murdoch's and it was very informal in the way it developed initially.

## **Application for joinder**

[9] Section 221 of the Act provides as follows:

### **221 Joinder, waiver, and extension of time**

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

(a) direct parties to be joined or struck out; and

...

[10] The proposed respondent is the sole director of the respondent. He does not accept in communications received on his behalf that he employed Ms Findlay personally.

[11] I have considered the material provided on behalf of the respondent and the proposed respondent. There is no evidence of a written employment agreement. That is a requirement under the Act and has been for almost 20 years. It would have potentially removed any uncertainty or confusion about the identity of the employer.

[12] A letter from the respondent's accountant confirms that all payments to "contractors" were paid from the respondent's business bank account.

[13] On 27 November 2019 there was a voluntary disclosure by the accountant to IRD on behalf of the respondent for the PAYE period 30 June 2018 to 21 July 2019. The letter sent on that date by the accountant stated that the respondent had employed contractors since June 2018 onwards but had not returned any withholding tax on the contractor payments. The Authority was provided with monthly pay schedules filed with Inland Revenue in the name of the company that included the applicant.

[14] Mr Reynolds confirmed these matters in his email of 5 June 2020 on behalf of the respondent.

### *Conclusion on joinder*

[15] Mr Mathews says that he erred in his description of the respondent in the statement of problem and that the applicant now instructs him that she was employed personally by Mr Murdoch.

[16] This is viewed from the communication received by the Authority opposing joinder with a measure of scepticism in light of the liquidation.

[17] There is limited information about the identity of the employer. As earlier stated there is no employment agreement. I accept what information there is supports payment of the applicant from the respondent's bank account, voluntary disclosure for tax payments and employer monthly schedules naming the applicant for the period she worked. Payment however is not determinative of the identity of the employer.

[18] The applicant bears the onus of establishing the identity of the employer on the balance of probabilities. The question about who the employer was needs to be determined at the outset of the employment relationship with knowledge of all of the relevant communication between the parties. The Authority will need to ask who an independent but knowledgeable observer would have said the employer was. Failure to notify or make an employee aware of the identity of the employer is not conclusive.<sup>1</sup>

[19] I return to s 221 of the Act and whether in order to more effectually dispose of this matter according to its substantial merit and equities I need to join the proposed respondent to the proceedings.

[20] Mr Mathews has raised an issue about the identity of the employer in light of what he says was a failing on his part. Some information has been provided about the identity of the employer but for the Authority to properly investigate and determine the issue it will need to hear evidence. If the proposed respondent is not joined to the proceedings the Authority may not hear evidence from him and there is a possibility of further proceedings which would increase costs.

[21] The proposed respondent Steven Murdoch is to be joined as a respondent to this matter which is set down for investigation on 20 July 2020.

### **Next Steps**

[22] Mr Murdoch is to be provided with all proceedings and statements of evidence lodged in this matter.

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<sup>1</sup> *Wilson v Bruce Wilson Painting & Decorating Ltd* [2014] NZEmpC 83 at [13] with reference to *Colosimo v Parker* (2007) 8 NZELC 98,622 (EmpC) at[28], [29] and [31].

[23] He is to have until 10 July 2020 to lodge and serve a statement in reply to the statement of problem lodged in this matter.

[24] He will have until 15 July 2020 to lodge and serve any statements of evidence.

[25] If there are difficulties with the time frames then Mr Murdoch should advise the senior Authority Officer as soon as possible.

**Costs**

[26] I reserve the issues of costs until the substantive matter has been determined.

Helen Doyle  
Member of the Employment Relations Authority