

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 118
3107412

BETWEEN BRYCE CAIRD
 Applicant

AND BUILD N' STYLE LIMITED
 Respondent

AND BRENDAN AKEROYD
 Proposed Second Respondent

Member of Authority: Helen Doyle

Representatives: Justine Foden, advocate for the Applicant
 Damien Pine, counsel for the Respondent

Investigation Meeting: On the papers

Application and 15 March 2021 from the Applicant
Opposition received: 22 March 2021 from the Respondent

Date of Determination: 25 March 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A The proposed second respondent is joined to the proceedings.**
- B Leave is granted to lodge and serve the amended statement of problem attached to the application.**
- C Directions have been made for the lodging of a statement in reply and if required a supplementary statement of evidence.**
- D Costs are reserved.**

Employment Relationship Problem

[1] The applicant seeks leave to join the proposed second respondent to the proceedings before the Authority and amend the statement of problem as attached to the application for joinder. The respondent opposes the application for joinder.

Notice of Direction 28 September 2020

[2] The Authority held a telephone conference with Ms Foden and Mr Pine on 28 September 2020 and issued a notice of direction. The matter was set down for investigation meeting on 13 April 2021 in Invercargill. In the notice of direction there is reference to an issue raised about the identity of the respondent.¹

Ms Foden raises an issue around the identity of the respondent. Reference was made to the letter containing the employment offer. Ms Foden will look into this and if she intends to lodge an amended statement of problem with an additional respondent or respondents then leave will be required as the matter has been given an investigation meeting date.

Application for joinder

[3] The application for joinder refers to the letter containing the offer of employment to the applicant dated 20 October 2019. This letter offers a position to the applicant at Stonewood Homes Southland.

[4] It was signed by the proposed second respondent as director of Stonewood Homes Southland Limited. There was at that time no company registered as Stonewood Homes Southland Limited.

[5] Ms Foden says in the application that the applicant accepted the offer of employment.

[6] Subsequently the applicant was provided with an employment agreement that named the respondent as the employer. Ms Foden says that no attention was paid to the name of the employer by the applicant. The employment agreement was signed.

[7] There has been an application for removal of the respondent from the Companies Register. Ms Foden says that it is not clear whether this is the business that trades as

¹ Notice of direction dated 28 September 2020 at [2].

“Stonewood Homes Limited” which is how the respondent is described in the employment agreement.

The opposition to the application

[8] Mr Pine opposes the application for joinder

[9] He says that the joining of a further respondent was not progressed after 28 September 2020 until 15 March 2021 and this is unreasonable. Mr Pine says the statements of evidence have been provided and the investigation meeting date is 13 April 2021.

[10] Mr Pine does not dispute that Stonewood Homes Southland Limited did not exist at the time of the offer and that it had no association with the respondent. He says it was incapable of making an offer.

[11] Mr Pine does not agree that there was offer and acceptance on the basis of the letter of 20 October 2019. He says the parties intentions were always to enter into an individual employment agreement which they did.

[12] Mr Pine says that the employment relationship is governed by the employment agreement. He says that the employer is named as the respondent trading as Stonewood Homes Southland and there is an entire agreement clause at clause 25.2.

[13] Mr Pine says that payslips were headed up with the respondent’s name and work time was recorded using an application in the respondent’s name.

Conclusion on Joinder

[14] 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

...

[15] The proposed second respondent is one of two directors of the respondent.

[16] In terms of substantial merits and equities the applicant bears the onus of establishing the identity of the employer on the balance of probabilities. There was a lack of clarity at the time of the offer of employment. The proposed second respondent signed the offer letter as director of an entity that did not exist. A written employment agreement was then provided. It named the respondent as employer. It was provided before employment commenced but not signed by the applicant for a period. There appears a dispute as to when it was signed. The employment agreement contains an entire agreement clause. The Authority will need to ask who an independent but knowledgeable observer would have said the employer was.

[17] It was foreshadowed by Ms Foden that there was an issue about the identity of the respondent at an early stage. There was considerable delay in applying for leave to lodge an amended statement of problem to join the proposed respondent. In terms of the effect of any delay the proposed second respondent has provided a statement of evidence on behalf of the respondent in which he has addresses many of the issues raised in Ms Foden's application for joinder. He is intending to be present at the investigation meeting and there will be no additional cost in that respect. The evidence about the identity of the employer is documentary in the main.

[18] If the Authority was to hear evidence and determine the identity of the employer was other than the respondent then there is a possibility of further proceedings and that would increase costs for all parties. The Authority will be able to more effectually dispose of the issue by joining the proposed second respondent and determining the issue about the identity of the employer.

[19] I grant leave to join the proposed second respondent Brendan Akeroyd to the proceedings and to lodge the amendment of the statement of problem.

Next step

[20] Mr Akeroyd is to have 14 days from the date of receipt of this determination to lodge and serve a statement in reply.

[21] If Mr Akeroyd wishes to lodge any supplementary evidence then he has until 8 April 2021 to do so.

[22] If there are difficulties with the timeframes given the rapidly approaching date for the investigation meeting then Mr Pine should advise the Authority Officer as soon as possible.

The Authority would view any extension sympathetically provided the investigation meeting date is maintained.

Costs

[23] I reserve the issue of costs until the substantive matter has been determined.

Helen Doyle
Member of the Employment Relations Authority