

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 197
ARC 89/12**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VINCE ROBERTS ELECTRICAL LIMITED Plaintiff
AND	SCOTT PHILLIP CARROLL First Defendant
AND	VINCENT FORSMAN ROBERTS (TRADING AS VINCE ROBERTS ELECTRICAL) Second Defendant

Hearing: 24 October 2014

Appearances: No appearance for the plaintiff
M Lewis, counsel for first defendant
G Collecutt, counsel for second defendant

Judgment: 24 October 2014

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

[1] The application before the Court today is an application relating to disclosure of documents and application for an “unless” order. In addition to that, in view of what has transpired in this matter, there is an application to adjourn the substantive hearing of these proceedings, which is due to commence at 9.30am next Tuesday, 28 October.

[2] The matter relating to the documents has a history. On at least two separate occasions the issue of the documents, which relate to some rosters dated between

2002 and approximately 2006, have been the subject of directions from Judge Corkill, who also presided over the Judicial Settlement Conference.

[3] Unfortunately, there has been some obstruction and at the very least, unsatisfactory behaviour on the part of the plaintiff relating to these documents. The assertion that is now made on behalf of both the plaintiff and the second defendant, who is also a director and shareholder of the plaintiff, is the documents in question have been destroyed. If that is the position then it seems clear, because of what transpired before the Employment Relations Authority, that those documents were destroyed after the investigation by the Authority. On the face of it there may have also have been some misleading of the Court in the way that the directions were procured from Judge Corkill. Those are matters which I cannot resolve today. This is simply a chambers hearing to deal with what are now quite urgent applications made by Mr Carroll, the first defendant. It would not be appropriate at this stage, on the basis of purely inferential evidence that is before the Court by way of affidavits, there being no cross-examination of the deponents, for the Court to draw a concluded view on the issues that I have mentioned and make an “unless” order.

[4] Up until now, Ms Lewis, on behalf of Mr Carroll, the first defendant, has taken the view that it would not be possible for Mr Carroll to comply with the direction upon him to file an amended statement of defence and cross-claim without the documents in question being available. Ms Lewis today has agreed that that is not necessarily now the position and that amended pleadings can be filed on behalf of the first defendant in the present circumstances, accepting for the moment that the documents which have been requested are no longer available. That is not the end of those issues though. When this matter does proceed to a substantive hearing, the actions of Mrs Roberts, who has been representing the plaintiff company up until now, and Mr Roberts will be the subject of questioning. This will come not only from counsel, but also I imagine from the Judge who presides over the hearing.

[5] In addition to the adjournment application and the documents issue, Ms Lewis in the application also seeks an order for security for costs against the plaintiff. At the hearing today she also sought an order for costs, against both the plaintiff and the second defendant, in respect of today’s application.

[6] If I could turn briefly to the application for security for costs. There is clear evidence by way of public record that the plaintiff company is on the point of being struck from the register for compliance default. There would be insufficient assets of the company, if indeed any assets of the company, which would be sufficient to meet any award of costs made against the plaintiff in the event that the plaintiff was unsuccessful in its challenge.

[7] Of course the first defendant procured from the Authority reasonably substantial awards under determinations of a monetary nature. These have not been met to this point by the plaintiff. Ms Lewis informs me that Mr Carroll did endeavour to take steps to enforce the determination but of course at that particular time the award was against Vince Roberts Appliance Warehouse Limited and there would have been difficulties in that regard. So far as Vince Roberts Electrical Limited, which is now substituted as the plaintiff, is concerned, there have been no steps to enforce the determinations.

[8] Now as I have already indicated there has been some unsatisfactory behaviour on the part of the plaintiff company and Mr Roberts as second defendant in respect of the directions which Judge Corkill made. Later after the initial directions were given Judge Corkill was called back into the matter to make further quite strict directions against the plaintiff and Mr Roberts. There is an issue as to whether even now they have complied with those directions. So far as today's application is concerned, Mrs Roberts, on behalf of the company, indicated to the Court yesterday that she simply would not be appearing on behalf of the company, as she has to attend employment. So we have not heard from her. Mr Roberts has arranged for Mr Collecutt to come and represent him today and Mr Collecutt has made submissions on his behalf.

[9] The issue of the documents and their disappearance has been dealt with by the plaintiff and Mr Roberts by a notice of opposition and affidavit in support of the notice of opposition. However, the company has not opposed, nor presented evidence or submissions in respect of the application for security for costs.

[10] So far as the adjournment application is concerned, the issues that are quite pertinent in that regard are that Mr Carroll resides in Australia and the hearing of this matter is due to start on Tuesday after the Labour Day holiday on Monday. Today is the Friday before that holiday weekend. It would be dreadful indeed if Mr Carroll incurred the expense of travelling to New Zealand to find that this matter could not proceed next week. Hence the urgency of the adjournment application now.

[11] The other issues to be taken into account in the adjournment application are that with Ms Lewis having to prepare amended pleadings on behalf of Mr Carroll, as I am going to grant her leave to do, there then arises the issue of the timing for the plaintiff and the second defendant to file their pleadings in answer. There is also the issue of a witness from the Labour Inspectorate who has been summonsed to come and give evidence. So there are a number of issues which lead to the view that the application for an adjournment should be considered sympathetically in this case.

[12] So far as the adjournment application is concerned then, I intend to grant that application and the fixture which is due to commence on Tuesday next week is vacated. I know that Mr and Mrs Roberts want to have this matter resolved as soon as possible, as indeed does Mr Carroll, but in the circumstances which have led up to today's hearing, there is really no alternative but to grant the adjournment. There has been good reason, in my view, why Mr Carroll has not, in compliance with the directions given by Judge Corkill, filed the amended statement of defence and the amended cross-claim before now. I do not need to go further into that.

[13] There was a suggestion that perhaps the matter could proceed as a daylong fixture on Wednesday of next week to at least deal with the narrower issue of who was the true employer of Mr Carroll in this case. But unfortunately wider evidentiary matters play on that issue as well, and I would be reluctant to embark on a fixture just dealing with that narrow issue. In any event, I don't think it would, in reality, finally resolve the issues between the parties.

[14] So the application for an adjournment is granted and a new fixture will be allocated. Counsel have agreed to the possibility of a backup fixture being considered. That option will be pursued but it will be dependent upon any back-up

fixture being satisfactory to counsel and Mr Carroll in particular who still has to travel from Australia for any fixture. It must also take account of the needs of Mr and Mrs Roberts who now have positions of employment separate from the plaintiff company. If there are any difficulties with a back-up fixture, then we will simply have to allocate a suitable fixture in the New Year.

[15] The unsatisfactory nature of destruction of documents will now become an issue to be pursued by way of pleading perhaps, but also certainly by way of evidence at the substantive hearing of the matter. So in addition to granting the adjournment, the first defendant is granted leave to file an amended statement of defence and cross-claim. That is to be filed within 14 days. The plaintiff and the second defendant are then to have a further 14 days to file a statement of defence to the amended cross-claim. If a back-up fixture is able to be granted then those time limits for the filing of pleadings might need to be truncated.

[16] Counsel have leave to refer the matter back to the Court if there is a need to alter any time limits. For the moment it will remain the 14 days for the filing of the amended statement of defence and cross-challenge and then 14 days thereafter for the other parties to file statements of defence.

[17] I turn now to the question of security for costs against the plaintiff. In view of the evidence which is before the Court, and from what I have already said, there is really a great danger in this case that the first defendant will succeed in defending the challenge and be faced with a totally impecunious plaintiff. In my view, it is appropriate that there be an order for security for costs particularly now as the hearing is to be adjourned. No opposition has in fact been made to the application for security for costs. Mrs Roberts has chosen not to deal with that in any way in the documents filed on behalf of the plaintiff and of course she is not here today. So there will be an order for security for costs against the plaintiff in the sum of \$7,500. That is to be paid into Court within 10 days. That is on or before 4pm on 3 November 2014. It is to then be held in an interest bearing account by the Registrar.

[18] Dealing with costs on the applications heard today it is appropriate to make an award of costs against the plaintiff. That is particularly so because of the manner

in which the plaintiff has dealt with the application today. It has not had any representation and dealt in an inadequate way with the application itself and the evidence presented on behalf of the first defendant. So there will be an order for costs of \$500 in any event, against the plaintiff in respect of today's applications. That is to be paid to the first defendant on or before 4pm on 3 November 2014. If the security is not lodged within the time specified or the costs are not paid within the time specified, then the plaintiff's challenge will be stayed, and the plaintiff will be barred from defending the first defendant's cross challenge.

[19] I do not consider it is appropriate to make any award of costs in any event against the second defendant at this stage. There are substantial issues involving him still unresolved in this matter which mean that it is impossible at this stage to make any decision on the merits. In the interests of justice, so far as Mr Roberts is concerned, as second defendant, any costs against him should be reserved until the merits of the entire matter have been resolved. Accordingly, costs against him are reserved in respect of today's application.

[20] Finally leave is reserved for either party to apply back for further directions.

M E Perkins
Judge

Oral judgment delivered at 11.40 am on 24 October 2014