IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 112
ARC 89/12

IN THE MATTER OF	challenges 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:	10-11 December 2014 and 5 March 2015
Appearances:	No appearance for the plaintiff M Lewis, counsel for first defendant G Collecutt, counsel for second defendant
Judgment:	14 July 2015

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] In a determination of the Employment Relations Authority dated 13 November 2012, Mr Carroll was unsuccessful in personal grievances he had raised against his employer.[1] The reasons for this were held to be that both grievances had been raised out of time, no application for leave to extend the time had been made and the Authority accordingly had no jurisdiction to deal with them. The grievances related to unjustifiable disadvantage in his employment and unjustifiable dismissal.

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1 *Carroll v Vince Roberts Appliance Warehouse Ltd* [2012] NZERA Auckland 395.

[2] The employer named in the determination was Vince Roberts Appliance Warehouse Limited.

[3] Mr Carroll was successful in the determination in respect of his claim for annual holiday pay and statutory holiday pay for the period 16 May 2006 to 28 November 2011. The total award was $18,116.35. He was also awarded interest on that sum at the rate of five per cent per annum, from 28 November 2011 until payment. An order was made reimbursing him for his filing fee of $71.56.

[4] On 11 December 2012, Vince Roberts Appliance Warehouse Limited filed a non-de novo challenge to the determination seeking a de novo hearing. The challenge related to only that part of the determination dealing with annual holiday pay and statutory holiday pay. Mr Carroll opposed the challenge and there were exchanges of pleadings between the parties leading up to the substantive Court hearing.

[5] On 11 February 2014 the Employment Court made an order by consent substituting Vince Roberts Electrical Limited for Vince Roberts Appliance Warehouse Limited as plaintiff. In an interlocutory judgment dated 14 February 2014 Vincent Forsman Roberts was joined as a second defendant in the Employment Court proceedings.[2] This was on the basis that Mr Carroll had asserted that Mr Roberts personally, not the company, was his true employer. Mr Carroll filed a statement of defence and subsequently a cross-challenge against the plaintiff and the second defendant. The identity of Mr Carroll's employer was put in dispute. The cross-challenge was also in respect of the quantum of awards in his favour in the determination and the decision that there was no jurisdiction to consider his personal grievances. The final version of the cross-challenge related to the whole of the determination of the Authority and thereby sought a hearing de novo.

Disclosure, security for costs and stay

[6] Further interlocutory issues arose prior to the substantive hearing. There was a dispute as to the disclosure to Mr Carroll of his wage and time records. When the

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2 *Vince Roberts Electrical Ltd v Carroll* [2014] NZEmpC 21.

proceedings were before the Authority, the wage and time records required to be held by the employer were not available. It appears that they had not been kept. The times when Mr Carroll attended work were recorded in the form of handwritten notes and rosters. These were produced. They dated from commencement of employment in 2002. Once the matter came before the Court the rosters prior to 2006 were no longer available. They had apparently been returned to Mr Roberts and his wife, Mrs Susan Mary Roberts, at the Authority's investigation meeting; being considered irrelevant having regard to limitation. There was conflicting evidence from Mr Roberts and Mrs Roberts about these documents. They are the directors of both Vince Roberts Electrical Limited and Vince Roberts Appliance Warehouse Limited. At a directions conference, prior to the substantive hearing, Mrs Roberts misled the Court into believing that the notes which existed for the period 2002 until 2006 were still available, when she knew that they had been destroyed.

[7] Mr Carroll made an application for disclosure of documents and security for costs. The disclosure issues had to remain unresolved because of the unsatisfactory way Mr and Mrs Roberts had acted, particularly in respect of the records prior to 2006. Nevertheless, Mr Carroll's application for security for costs was granted.[3] There was no dispute that the plaintiff company, Vince Roberts Electrical Limited, was in a parlous financial state and it was also on the point of being struck from the company register. An order was made that the plaintiff was to pay the sum of $7,500 into Court by way of security for costs. The sum of $500 in costs was awarded against the plaintiff on the applications in any event. Both payments were to be made within a specified time, failing which the plaintiff's challenge would be stayed and the plaintiff would be barred from defending the cross-challenge. The payments were not made at all and the plaintiff's challenge was stayed. It was not permitted to participate in the subsequent hearing of the cross-challenge. In any event a major part of the cross-challenge was to be the claim that Mr Roberts personally, rather than the company, was Mr Carroll's employer.

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3 *Vince Roberts Electrical Ltd v Carroll* [2014] NZEmpC 197.

The determination and the pleadings

[8] The determination of the Authority dealt with three issues that had been presented in the statement of problem by Mr Carroll. First, he claimed that his employment was unjustifiably affected to his disadvantage by his employer whom he named as Vince Roberts Electrical. He alleged Vince Roberts Electrical had cancelled the credit card it had supplied to him. He also alleged that the employer had unjustifiably reduced his work hours. The second issue was that he claimed to have been unjustifiably dismissed. The third issue was the claim to arrears of holiday pay and statutory holiday pay.

[9] The Authority took the view that the correct employer at the time of termination of Mr Carroll's employment was a company known as Vince Roberts Appliance Warehouse Limited. This was a company which had ceased trading many years prior to the termination of Mr Carroll's employment. It is not entirely clear from the evidence but it appears that the earlier company entity had been replaced by the company known as Vince Roberts Electrical Limited. It was this company which was trading at the time of the termination of employment. When matters reached the Court there was an order substituting this latter company for Vince Roberts Appliance Warehouse Limited. However, Mr Carroll continued to maintain that he was employed throughout by Mr Roberts personally. Mr Roberts was joined as a second defendant so that all issues could be resolved by the Court at one hearing.

[10] The Authority held that Mr Carroll's personal grievances were not raised within the prescribed period of 90 days.[4] It held that the first time any notice of grievances may have been given to the employer was at the time of lodging the statement of problem and its service.

[11] The claims to arrears of annual holiday pay and statutory holiday pay were decided in favour of Mr Carroll. The Authority wrongly held that Mr Carroll's claim to holiday pay prior to 2006 was precluded by the limitation applying in the Employment Relations Act 2000 (the Act) to wage arrears claims.[5] That issue will

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4 Employment Relations Act 2000, s 114(2).
5 Section 142.

be dealt with later in this judgment. In any event, the arrears awards made in the determination only dated from 2006. When the hearing in this Court proceeded, counsel for Mr Roberts conceded that the limitation applied by the Authority was in error. There was agreement between counsel as to quantum of the arrears. Whether the arrears are to be payable by the plaintiff or Mr Roberts personally is one of the primary issues to be decided in this judgment.

[12] In the challenge to the determination, the initial pleadings sought a de novo hearing of the entire matter. However, the then plaintiff did not dispute the finding of the Authority as to the personal grievances and an amended statement of claim was filed clarifying this point. As indicated, Vince Roberts Electrical Limited was subsequently substituted as plaintiff but its challenge has now been stayed. The first defendant, Mr Carroll, filed a statement of defence to the initial statement of claim. That clearly put at issue the findings on the identity of the employer. No challenge was filed at that point by Mr Carroll to the findings on the personal grievances. He was then representing himself. Once Mr Carroll was represented by legal counsel, the applications were made to the Court to have the present plaintiff's name substituted for Vince Roberts Appliance Warehouse Limited. In addition Mr Roberts personally was joined as second defendant. Mr Carroll then filed a statement of defence with cross-challenge. An amended statement of defence was then filed by his legal counsel. That pleading did not raise a cross-challenge on the findings as to the personal grievances. That was rectified in a further amended cross-challenge filed with leave on the first day of the substantive hearing in this Court on 10 December 2014. It was also at this point that a claim to a penalty for the employer's actions in the dismissal as breach of good faith was raised for the first time. It was a claim which had not been before the Authority.

[13] Mr Roberts personally as second defendant had filed a statement of defence to Mr Carroll's first cross-challenge. He disputed that he personally was the employer of Mr Carroll. He has raised an affirmative defence that the true employer was Vince Roberts Appliance Warehouse Limited until 2006 and Vince Roberts Electrical Limited thereafter. In view of the evidence, which was subsequently adduced at the hearing, Vince Roberts Appliance Warehouse Limited may never have played any part in the employment of Mr Carroll.

[14] In the final version of Mr Carroll's cross-challenge he seeks the following remedies against Mr Roberts personally and/or in the alternative against the plaintiff:

a) A declaration as to the identity of the employee's employer;

b) an enquiry into the amount of compensation payable arising from the personal grievances raised in 2010 and 2011 respectively;

c) an enquiry into the wage arrears arising in the period March 2002 to May 2006;

d) lost remuneration arising from the unilateral reduction of working hours from 30 hours per week to 22 hours per week amounting to $15,501 gross;

e) payment of unpaid wage arrears of $25,017.82 in the period May 2006 until November 2011;

f) interest on the judgment sum of 5 per cent per annum from 28 November 2011 until payment;

g) a penalty arising from breach of s 4 of the Act's good faith provisions;

h) any such other remedies the Court deems to be just and/or equitable; and

i) costs.

Issues now to be determined

[15] Prior to the commencement of the hearing on 10 December 2014, counsel reached agreement on the quantum of Mr Carroll's wage arrears claim from 2002 when he commenced employment until termination of that employment on 28 November 2011. The final agreed figures are contained in the closing submissions of Ms Lewis on behalf of Mr Carroll. There is no dispute that Mr Carroll was owed substantial holiday pay upon termination of employment. The issues remaining to be

determined are: First, the identity of Mr Carroll's employer, ie was it Vince Roberts Electrical Limited or Mr Roberts personally? Secondly, did Mr Carroll raise his personal grievances within time? Thirdly, if he did, are they proved and to what remedies is he entitled, including lost wages and compensation? Fourthly, can a claim for penalty be raised in the way it has?

[16] An ancillary issue arises from the stay of the challenge by the plaintiff Vince Roberts Electrical Limited and also staying it from defending Mr Carroll's cross-challenge. While there is no stay of execution or enforcement of the determination of the Authority, the plaintiff is in fact insolvent and Mr Carroll has not pursued enforcement very far. Mr Carroll seeks all remedies against Mr Roberts personally and, in addition or in the alternative, against the plaintiff. The plaintiff did not, by virtue of the stay, participate at the hearing. It was not represented, although Mr and Mrs Roberts are directors. They both gave evidence in defence of the claim against Mr Roberts personally. Despite the behaviour of the plaintiff leading to the stay and the stay itself, it would be preferable for the Court to finally dispose of any issues remaining against the plaintiff, its challenge, and arising from Mr Carroll's cross-challenge against it.

Legal principles applying

Identity of the employer

[17] While it does not deal precisely with the identity of an employer, s 6 of the Act does provide some assistance. This section covers the meaning of an employee. However, subs (2) and (3) deal with the issue of whether one person is employed by another person under a contract of service. Those statutory provisions provide as follows:

> …
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.
> (3) For the purposes of subsection (2), the Court or the Authority—
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[18] Principles which apply to determination of the identity of the employer have been the subject of several decisions. In *Hutton v Provencocadmus (In Receivership)* it was held that the Court (and the Authority) has jurisdiction under s 6 to determine the identity of the employer.[6] This case involved the status of the receiver of the company in receivership.

[19] In *Taylor v von Tunzelman* it was held that the onus was on the employee to prove the identity of the employer and that this assessment was generally to be made at the outset of the employment relationship.[7] That case also provided that it is for the Court to make an objective assessment of the evidence in determining the identity of the employer.[8]

[20] In *Colosimo v Parker* the Court confirmed that the onus rests on the employee and that the standard of proof is on the balance of probabilities.[9] *Colosimo* considered a number of previous decisions dealing with this issue, one of which was *Mehta v Elliot (Labour Inspector)* in which the Court stated:[10]

> [22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. Because Messrs Sheikh and Mehta give different accounts of who they believed employed Mr Sheikh, it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was Mr Sheikh's employer when he commenced employment?

[21] In *Mehta*, after considering all of the evidence, the Court came conclusively to the view that the employee in that case was employed by the individual involved rather than the limited liability company as alleged.[11] In *Colosimo* the Court reached

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6 *Hutton v Provencocadmus Ltd (In Receivership)* [2012] NZEmpC 207, [2012] ERNZ 566.
7 *Taylor v von Tunzelman* EmpC Auckland AC8B/08, 15 October 2008 at [10].
8 At [11].
9 *Colosimo v Parker* (2007) 8 NZELC 98, 622 (EmpC) at [28].
10 *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451(EmpC) at [22]; see also *Weston v Fraser* [2008] 5 NZELR 575 (EmpC).
11 The point was also considered in *Orakei Group (2007) Ltd v Doherty* [2008] ERNZ 345 (EmpC), which in turn considered authorities from other jurisdictions as well as other New Zealand authorities on the point.

the view that the company was the true employer. In making an objective assessment each case must be determined on its own individual circumstances.

[22] Relevant in this case also is the issue of whether there is a prospect that an employee can be employed jointly by two employers. In this case Mr Carroll is seeking remedies jointly and severally against both Mr Roberts personally and his company Vince Roberts Electrical Limited.

[23] In *Hutton* where the priority of the creditors was under consideration and where a number of corporate entities were involved, the issue of whether there was more than one employer became material. Judge Inglis in that case held as follows:[12]

> [79] It is common ground that it is possible to have joint employers. Common control by the joint employers is usually a feature of such a relationship. Whether the plaintiffs can establish that PPL was joint employer with PCL requires objective consideration. Who would an independent but knowledgeable observer have said was the plaintiffs' employer?
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> [80] A useful starting point is the documentation evidencing any written agreement between the parties. This is generally a good indicator of the parties' intention. At the date of receivership, there was a written employment agreement, and that was between each of the six plaintiffs and the first defendant. (Footnotes omitted)

[24] In the present case, of course, the Court does not have the assistance which would have been provided by a written agreement between the parties as no such document was executed.

Limitation under the Holidays Act 2003

[25] As already indicated, the Authority Member decided that limitation precluded her from considering Mr Carroll's claim to holiday pay prior to 2006. Counsel are agreed that this was not correct. The quantum of the sum owing to Mr Carroll prior to 2006 has been agreed.

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12 *Hutton*, above n 6.

[26] The Holidays Act 2003 provides for holiday and leave entitlements and how such entitlement to leave may be accumulated. The Act provides separately for the calculation of payment for such holidays. The entitlement does not expire. The obligation to make payment for the accumulated leave arises when the leave is actually taken during the course of employment. If at the time of the termination of employment there is accumulated leave, which has not been taken or paid for, then there are prescribed formulae for calculating the amount owing for such outstanding leave at that date. While limitation applies, it cannot commence to run until completion of the leave having been taken and not paid for during the course of employment; or, if it is accumulated leave owing at the date of termination, limitation runs from the date of termination of employment. As the failure to make payment to an employee amounts to an employment relationship problem, the limitation period prescribed in s 142 of the Act would apply. If it does not, then the Limitation Act 2010 would apply. In any event the limitation period would be six years after the date on which the cause of action arose.

[27] The entitlement to payment for leave not taken before termination of employment does not crystallise until the date of termination. This has been confirmed in *Burns v Radio Pacific Ltd*[13] and *Napier Aero Club v Tayler.*[14] The Authority itself also confirmed the position in *Myatt (Labour Inspector) v Antipodean Growers Ltd.*[15]

The raising of a personal grievance – time for doing so

[28] The issue which arises in the present case is whether the oral statements which Mr Carroll made to Mr Roberts at the time when his hours were reduced and when he was dismissed for redundancy, would constitute the raising of a personal grievance. If they do not, then while the filing of a statement of problem in the Authority might rectify the position, that statement was filed well outside the 90-day period prescribed in s 114 of the Act. No steps have been taken by Mr Carroll pursuant to s 114, for leave to raise the personal grievance after the expiry of the 90-day period.

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13 *Burns v Radio Pacific Ltd* [1998] 3 ERNZ 559 (EmpC) at 562.
14 *Napier Aero Club v Tayler* [1998] 1 ERNZ 241 (EmpC) at 244.
15 *Myatt (Labour Inspector) v Antipodean Growers Ltd* AA 153/10, 1 April 2010.

[29] Section 114(2) states that:

> … a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[30] The matter has been the subject of discussion in *Creedy v Commissioner of Police*[16] and *Coy v Commissioner of Police*[17] which followed *Creedy*. The following paragraphs from *Coy* set out the principles which apply in assessing whether a grievance has in fact been raised and also deal with the limitation of the 90-day period which applies:

> [12] When did the 90 days under s 114 for the raising of personal grievances begin to run? This is covered by s 114(2) that provides that a grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This test has been the subject of definition in case law. Ironically, perhaps, one of the most recent cases to confirm when a grievance has been raised is another police case, *Creedy v Commissioner of Police* [2006] 1 ERNZ 517. This issue is not one affected by subsequent appeals in that case.
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> [13] In *Creedy* at paragraph [35], the Court confirmed previous interpretations to the effect that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This means that the grievance should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not the raising of a grievance, for an employee to advise an employer that the employee considers that he or she has a personal grievance or even simply by specifying the statutory type of personal grievance. For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. That is not to say that a grievance may not be raised orally or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates. The requirement is certainly not for the sort of detail that may subsequently be required when lodging a statement of problem in the Employment Relations Authority.
> [14] In this case that test was certainly met by the 14-page letter written by the plaintiff to the Commissioner on 20 March 2003. Equally certain is the failure to meet the test in Ms Coy's oral advice to Inspector DH Gaskin on 3 or 4 December 2002 that: "I can tell you now I am going ahead with a Personal Grievance because I think I have been personally treated very badly." Ms Coy did not contend that this oral advice raised her grievance. The more difficult question is whether an intermediate written

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16 *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC). Though aspects of this case were reversed on appeal, the meaning of s 114 was not before the Court of Appeal.

17 *Coy v Commissioner of Police* EmpC Christchurch CC 23/07, 19 November 2007.

> communication from Ms Coy to Inspector Gaskin dated 22 December 2002 constituted the raising of a personal grievance.
> …

[31] While it is not ideal as a method of enabling the parties to resolve their differences, the filing of a statement of problem, if it is done within the period prescribed in s 114(1), can constitute the "reasonable steps" required in s 114(2). That matter came before the Court in *Premier Events Group Limited v Beattie (No 3).*[18] In that decision Chief Judge Colgan held that an employee could raise a personal grievance by lodging in the Authority a statement of problem which outlined the grievance. The consequences of doing so are set out in the following paragraphs from *Premier Events*:

> [11] Further, I consider that this approach is mandated by the terms of s 114(2) itself which define the raising of a grievance with an employer as occurring "as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware". What is required is that the employee has made the employer aware of the grievance and that awareness occurred in this case when the employer was served with the statement of problem. In addition, the inclusion of the words "has taken reasonable steps to make", a phrase which was absent from the Employment Contracts Act, also clearly allows a grievance to be raised where reasonable steps have been taken even if the employee has not succeeded in directly raising the grievance with the employer. I consider that Parliament's use of this phrase confirms this Court's interpretation that a "circuitous route" for raising a personal grievance may be permissible depending on the facts of the case. In this case, the reasonable steps taken were the filing of the claim with the Authority.
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> [12] Interpreting s 114 in this way might seem to permit a party to short circuit the normal process of dispute resolution which the Act envisages will occur in most cases. That is, a grievance is raised first with the employer and then there is an opportunity for negotiation and discussion so that a resolution may occur before the matter is lodged with the Authority. Such an approach is to be encouraged. But there will remain ample opportunity for the employer to address the grievance and, perhaps, resolve that grievance through discussion and/or mediation between the parties even after the matter is officially before the Authority. If unmeritorious claims are lodged in the Authority, but which could have been resolved by earlier discussion for instance, then the party lodging the claim may well have to bear the costs' consequences of such a claim.

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[18] *Premier Events Group Limited v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ 257.

Penalty for breach of good faith

[32] The claim to a penalty appears to have been raised for the first time in Mr Carroll's amended cross-challenge against the second defendant Mr Roberts, dated 10 November 2014. The claim to a penalty in that amended cross-challenge is confined to an allegation that Mr Roberts did not act in good faith when dismissing Mr Carroll while assuring him that unpaid wage arrears would be paid in full.

[33] The claim has been carried through into the second amended cross-challenge dated 10 December 2014. Again the claim has been simply added into the second amended cross-challenge without adequate particulars.

[34] In any event, in this case the claim to the Court for the penalty is precluded by s 133 of the Act. The claim can only be raised in the first instance before the Authority. In addition, s 135(5) of the Act requires that an action to recover a penalty must be commenced within 12 months after the date when the cause of action first became known to the person bringing the action, or the date when the cause of action should reasonably have become known to the person bringing the action. The time limit had well expired under either option by the time it was first included as a remedy sought in the amended cross-challenge; but in any event the Court in this case has no jurisdiction to consider it.

[35] Quite apart from these substantial impediments, it is not appropriate to make a claim for a penalty in this way tagged onto what are effectively the pleadings relating to the personal grievance. Section 4A of the Act requires proof of what amounts to egregious conduct before a penalty would be imposed. It should be separately pleaded if it is to be appropriately raised in a challenge to the Court (which is not the case here) and there should be adequate evidence presented at hearing to justify the claim.

[36] While the actions of the employer in this case would be in breach of s 103A of the Act, no real basis is put forward for imposing an additional penalty for those actions. The matter is not advanced in the closing submissions, and indeed the only

reference in those submissions to the claim for penalty is repetition of the claim as it is inadequately set out in the pleadings.

Factual discussion and findings

[37] When Mr Carroll commenced employment, the subject of this dispute, in March 2002 Mr Roberts, the second defendant, clearly marketed his business using his personality and long family history in the retail home appliance trade. His shop premises' livery made no mention of limited liability companies as proprietors, and the face the business presented to the public was that the business was owned by Mr Roberts individually. While this would not always be conclusive, in this case it indicates the way Mr Roberts, a relatively small home appliance trader, used his individual personality to market the business. Over the years it appears that associations or franchising arrangements were entered into and that these may have been connected to appliance suppliers or financiers.

[38] Mr Carroll stated against this background that when he first commenced employment it was Mr Roberts personally who offered him the position, employed him, and over the years supervised him and other employees in their employment. It may well be that Mr Roberts administered the business and employed staff via a limited liability company. However, the evidence discloses that except on rare occasions, he did not present the position to, or indeed operate his relationship with his employees in that way.

[39] This case shows the danger of not being clear at the outset and formalising the position so that the employee is made certain of exactly who the identity of the employer is. No formal written employment agreement was executed by the parties. If at the outset they had entered into a written agreement as required by s 65 of the Act, then the present confusion may not have arisen.

[40] Mr Carroll's wages were in the main paid by automatic bank transfer to his own bank account. The entries as to the wages appearing in his own bank statements invariably showed non-corporate entities as the payer; at best trading names including the name of the trade associations with which Mr Roberts clearly

connected his business. Occasionally, when Mr Carroll worked extra time, payment was made to him by a company cheque. However, this was not a regular occurrence. Mr Carroll was also issued with a credit card in the name of the plaintiff but for his own limited use to purchase fuel for his vehicle.

[41] Mr Roberts, or more probably Mrs Roberts who administered the business, may have nominated the corporate entities as employers when dealing with the Inland Revenue Department on Mr Carroll's wages. This information, which was relied upon by the Authority in its determination, probably did not come to Mr Carroll's attention until after he ceased employment and these proceedings were in train.

[42] The factors relied upon by Mr Carroll to support his claim that Mr Roberts personally employed him are as follows:

a) The circumstances surrounding Mr Carroll initially being employed. Mr Roberts personally contacted him. Mr Roberts invited Mr Carroll to be interviewed. Mr Carroll was interviewed by Mr Roberts and employed by Mr Roberts personally.

b) Mr Roberts held himself out to be the employer. There was no mention of any limited liability company.

c) The periodic pay records provided to Mr Carroll would have confirmed to him that no entity other than Mr Roberts or Mr Roberts trading with franchise entities was paying his wages.

d) Mr Carroll took direction from Mr Roberts personally during the employment. This is also corroborated by the evidence of another employee.

e) The business was marketed and advertised in the name of Vince Roberts personally.

f) Staff completed those business records, invoices and other documents required as part of their duties in the name of Mr Roberts personally. Delivery dockets associated with delivery of appliances to the premises invariably referred to Vince Roberts personally with few exceptions.

g) Sales invoices contained Romalpa clauses in the name of Vince Roberts or the unincorporated franchise trading names.[19] These Romalpa clauses if enforceable would have been unenforceable by anyone other than Mr Roberts personally and are a strong indicator that Mr Roberts traded in his own name rather than through a corporate entity.

h) Livery on the façade of the shop premises, business cards and advertising paraphernalia was all under Mr Roberts' name personally.

[43] Those factors which Mr Roberts relies upon to allege that the employer was indeed a corporate entity and this was known to Mr Carroll, are as follows:

a) Documents which Mr Carroll filed with both the Authority and the Court when he was acting in person referred to the employer as being a "company".

b) Tax records showed that his employer was recorded as Vince Roberts' corporate entities.

c) Automatic payments of wages referred to the payer with business names (but not corporate entities) as opposed to just Vince Roberts personally.

d) Mr Carroll was paid by company cheque on several occasions for extra work performed. He was also issued with the credit card for his own use but which would have been in the name of the plaintiff company.

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[19] A Romalpa clause is "a provision in a contract for the sale of goods that the right of ownership of the goods shall not pass to the buyer until the buyer has paid the seller in full or has discharged all liabilities owing to the seller." P Spiller, *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis NZ Ltd, Wellington, 2011).

e) As a matter of practicality Mr Carroll would have had to sign an IR12 form at the start of his employment which recorded his employer as the relevant company.

f) Mr Carroll would have filed tax returns through his tax agent. Therefore, he would have been aware that the incorporated companies were his employer, as that was information which would be set out on the summaries of earnings supplied and by virtue of the way that the Inland Revenue Department held records of his employment.

g) Mr Carroll endeavoured during his evidence to retract statements he had previously made where he recognised that he was aware that he was employed by a corporate entity. It is submitted on behalf of Mr Roberts that Mr Carroll's retractions on this point lack credibility.

h) The Vince Roberts business was a small family business and Mr Carroll was employed by the business for a lengthy period of time. Against that background, it was submitted on behalf of Mr Roberts that Mr Carroll must have known that the business was being run as a corporate entity.

i) Mr and Mrs Roberts were not particularly diligent or punctilious in the preparation of their documentation but the documentation is of only secondary relevance. That, along with the ambiguity in the identity of the relevant employer, is dispelled by the other collateral evidence relating to details applying to Mr Carroll's employment over a very lengthy period.

[44] A major problem associated with the assertion by Mr Roberts that the corporate entity was the employer was the fact that no wage and time records were kept.[20] The records relating to employees' periods of work and associated leave matters was simply recorded in a handwritten roster kept by Mr Roberts personally. Some of that roster has been produced in a separate bundle of documents but the earlier records, as already indicated, were destroyed. The handwritten documents referred to as "the rosters" provide very little help in resolving this problem.

[20] See Employment Relations Act 2000, s 130.

However, if a corporate entity was the employer, it should be expected that more formal records would have been maintained.

[45] Insofar as the tax records are concerned, while these might provide strong corroborative evidence in the present case, there are circumstances prevailing which make them of less assistance to Mr Roberts. Mr Carroll did not always file tax returns, and when returns were filed, they may have been prepared by a tax agent who was also associated with Mr and Mrs Roberts. Mr Carroll stated in evidence, and I believe him, that it was not until after he left employment and commenced proceedings and obtained copies of the records from the Inland Revenue Department that he was informed for the first time that insofar as the Inland Revenue Department was concerned, his employer was Vince Roberts Electrical Limited. The other company, Vince Roberts Appliance Warehouse Limited, may at an earlier time have been nominated as employer insofar as the Inland Revenue Department records were concerned. That changed around 2006. Mr Carroll also maintained that even though the original IR12 form provided to the Inland Revenue Department probably had the corporate entity as employer that form would not necessarily be complete when he signed it. The IR12 form was not produced in evidence.

[46] At the commencement of the proceedings before the Authority and the Court, the original statement of problem to the Authority did not nominate a corporate entity. It referred to the employer as being Vince Roberts Electrical. It is true that the statement of problem referred to the employer as "the company". However, these documents were prepared either by Mr Carroll or by his partner, both lay persons in these matters. The use of the words "the company" may have been simply use of a generic term to describe the employing entity or business, rather than evidence of knowledge of the technicalities between individual personal entities and corporate entities. I do not place too much store on the use of those words by Mr Carroll. Of course by the time that the proceedings came before the Court by way of the challenge, the Authority Member in her determination had changed the name of the employer to Vince Roberts Appliance Warehouse Limited. If that entity was ever the employer, it certainly did not continue in that role from about 2006. Even then there is evidence which would suggest that that company was never really a corporate entity employing Mr Carroll, if indeed the true employer was a company.

A further point is that if Mr Carroll in his initial documents to the Court described the employer as a corporate entity, it would simply have been because the party bringing the challenge at that point was Vince Roberts Appliance Warehouse Limited. In filing defence documents, Mr Carroll would have had no option but to refer to that corporate entity. The position soon changed once Mr Carroll became represented by legal advisers, and of course there was then a subsequent application to the Court not only to change the nominated plaintiff to Vince Roberts Electrical Limited, but also to join Mr Roberts personally in view of the assertions made by Mr Carroll that he was the true employer.

[47] In weighing up the respective factors relied upon by each of the parties, I have reached the conclusion that Mr Roberts was the employer of Mr Carroll. That can be the only conclusion from an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties at that point. It is corroborated by the business practices adopted by Mr Roberts at the time and during the employment as it continued. Mr Carroll would have known of the existence of the plaintiff company by virtue of the cheques issued to him from time to time and the credit card. However, I do not consider this fact as sufficient to displace the other significant factors indicating Mr Roberts' assumption of the role of the employer.

[48] Regardless of the issue as to who was Mr Carroll's true employer, during the course of the employment Mr Carroll took very few holidays and accrued a substantial amount of annual leave entitlement and an entitlement to be fully reimbursed for working on public holidays and without receiving days off in lieu.

[49] In November 2011, Mr Roberts and his company were in serious financial difficulties. Prior to this there had been attempts to ameliorate the financial difficulties by altering the terms and conditions of employment and in particular those of Mr Carroll. He was unilaterally informed that his total hours would be reduced. He lost the use of the business credit card, which he said he was to use for fuel expenses in travelling to and from work. It appears that there was disparity in treatment of Mr Carroll compared with the treatment of other employees. Matters finally came to a head when Mr Carroll arrived at work on a Saturday morning to be

informed that he was being made redundant. Even then Mr Roberts' treatment of Mr Carroll, in notifying him of the redundancy, was different from the practice he had adopted in respect of other employees who were given more adequate notice.

[50] At that time, a promise was made to reimburse Mr Carroll for his untaken annual holidays and public holiday leave. This promise was not kept and indeed Mr and Mrs Roberts would have had difficulty in calculating the amount Mr Carroll was owed because of their totally inadequate employee records.

[51] It is obvious that Mr and Mrs Roberts's treatment of Mr Carroll, both in respect of his holiday pay and termination of his employment and the earlier reduction in his hours, was not appropriate. It was not carried out in a way that could be described as what a fair and reasonable employer would or could have done in all the circumstances at the time when the dismissal and the other actions occurred. The reason given for not paying him his proper reimbursement for holidays was that the company simply couldn't afford it.

[52] The problem that Mr Carroll faces in respect of the reduction in hours and the dismissal, which have been raised in the proceedings as personal grievances, is that, as the Authority found, they were not notified as grievances within the time specified in s 114 of the Act. Mr Carroll took no steps to rectify the position by seeking leave to bring the grievances out of time in the face of the employer's failure to consent.

[53] An attempt has been made by Mr Carroll in his evidence to elevate statements that he made to Mr and Mrs Roberts as being proper notification of personal grievances. It is clear that he was unhappy about the reduction in his hours but his evidence does not go far enough to show that he took reasonable steps to make Mr and Mrs Roberts aware that he was alleging a personal grievance that he wanted them to address. The statement in his evidence-in-chief, contained in his written brief of evidence, leads me to conclude that rather than notifying a grievance, he simply acquiesced in what was done and this would include the time when he was notified that his employment was terminated. He no longer seeks any remedy in respect of the cancelled credit card. His evidence on the other issues was first in relation to his hours being reduced. He said:

> I considered his actions to be a breach of our agreed working arrangements. Vince did not respond and we remained at an impasse. …

[54] Secondly, in relation to the unpaid wage arrears he said:

> At this stage I lost all confidence in the assurances provided me by Vince and Mary Roberts and requested copies of my wage and time records so I could work out my entitlement myself. However, the wage and time records were never sent to me and it was not revealed until later that none were kept. I made it clear to Vince that I considered he had acted in breach of his promise to pay all sums to which I was entitled.

[55] Under cross-examination from Mr Collecut, counsel for Mr Roberts, Mr Carroll indicated that he raised an objection to the reduction in his hours, but that the matter was left hanging because Mr Roberts was going to discuss with Mrs Roberts whether there might be some increase in the daily rate Mr Carroll was to receive. Mr Carroll confirmed that his objection was left up in the air even though he wasn't satisfied. That would be insufficient for there to have been a personal grievance notified. Similar evidence as to Mr Carroll's actions at the time of the termination of his employment was also given.

[56] As indicated in the Authority's determination, Mr Carroll made no application to the Authority for leave to raise a personal grievance out of time once he became aware that the employer did not consent to any extension of time.[21] That would have been open to Mr Carroll and indeed he could have made a similar application to the Court once the challenge was filed, but chose not to do so, instead relying upon his assertion that personal grievances were properly notified in a timely fashion.

Conclusions

[57] The fact that Mr Carroll was not aware that the plaintiff may have been his employer is not conclusive. There have been many instances where an entity has been held to be an employer, even where the employee was not aware of the employer's true identity. What needs to be determined in the present case is what the real nature of the relationships was. In the present case it is more probable than not

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[21] Employment Relations Act 2000, s 114(3).

that Mr Roberts personally, rather than the corporate entities, was the true employer of Mr Carroll. The evidence points to the fact that Mr Roberts assumed that role throughout. He chose to act in that way towards Mr Carroll and other employees and did nothing to disavow them of that belief on their part.

[58] Ms Lewis, as an alternative argument, relied upon the principle of agency to argue that Mr Roberts acted throughout as agent of an undisclosed principal and is liable on that account. There is no need to determine that argument in view of the findings. However, it was not pleaded and only raised in closing submissions. It would have been unfair to allow that argument to be raised and prevail in any event. If it had been properly pleaded, Mr Carroll would have had the opportunity to deal with it in his evidence. He would be severely prejudiced by not now having had that opportunity but nevertheless being called upon to answer that submission. On that ground, had the success of Mr Carroll's case relied solely upon the agency argument it would not have been appropriate to consider it.

[59] The issues needing resolution in this case are, on the basis of the previous findings, decided as follows:

a) Upon all the evidence and the principles applying in such cases, Mr Roberts personally was Mr Carroll's employer from the outset. The plaintiff was never, at any time, Mr Carroll's employer. This is not a case of there being more than one employer.

b) Mr Carroll did not raise personal grievances within the 90-day period, if at all. His indications to Mr Roberts in response to the actions taken to his disadvantage and his dismissal could not be categorised as the raising of grievances in accordance with the legal requirements. He may have been able to argue that the filing of the statement of problem to the Authority remedied the position, but that was filed outside the 90-day period and no application for leave to do so was then made.

c) As he did not raise his grievance in a timely manner, Mr Carroll is not entitled to any remedies for the grievances, even though the actions of the employer in this case were not in compliance with the standards required by s 103A of the Act.

d) The action for a penalty is not properly based and is dismissed.

Remedies

[60] There is a declaration that Mr Roberts was the employer of Mr Carroll. He is ordered to pay Mr Carroll the sum of $31,314.07, being the balance of the annual leave and statutory holiday pay owing at the termination of Mr Carroll's employment. This is in accordance with the agreed quantum set out in Ms Lewis' closing submissions. It covers the entire period from commencement of employment in 2002 to 28 November 2011.

[61] There will be interest on this sum at the rate prescribed in cl 14 of sch 3 to the Act from 28 November 2011 until payment.

[62] While the plaintiff was stayed from bringing its challenge and debarred from defending the cross-challenge, common sense dictates that there needs to be a final resolution of all aspects of this matter in view of the findings now made. The challenge of the plaintiff has to be allowed in view of those findings. The Authority determination is accordingly set aside. Nevertheless, because of the manner in which the plaintiff pursued the challenge and the obstructive behaviour of its officers, no costs will be awarded to it.

[63] Costs are reserved in respect of the cross-challenge. Mr Carroll has 21 days in which to file his memorandum containing submissions as to costs. Mr Roberts will then have 21 days to file his memorandum in answer. Mr Carroll may have a further 7 days to reply if he requires it. These time limits are to be strictly adhered to. The parties may agree between themselves to truncate the time periods, but not

extend them, should they wish. Once all the submissions on costs are received the Court will issue a further judgment as to costs.

M E Perkins
Judge

Judgment signed at 11 am on 14 July 2015