IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 43
EMPC 281/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	applications by the New Zealand Council of Trade Unions and the Human Rights Commission for leave to appear and be heard
BETWEEN	DIANE DELE MOODY Plaintiff
AND	SHANE CHAMBERLAIN by his litigation guardian, L Meys First Defendant
AND	HER MAJESTY'S ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF HEALTH Second Defendant

EMPC 368/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	applications by the New Zealand Council of Trade Unions and the Human Rights Commission for leave to appear and be heard
BETWEEN	CLIFF ROBINSON Plaintiff
AND	MARITA AND JOHN ROBINSON by their litigation guardian, L Meys First Defendants
AND	HER MAJESTY'S ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF HEALTH Second Defendant

Hearing:	On the papers
Appearances:	P Dale QC, counsel for plaintiffs S McKechnie, counsel for the Attorney-General P Cranney, counsel for the New Zealand Council of Trade Unions J Hancock and J Anderson-Bidois, counsel for the Human Rights Commission
Judgment:	9 April 2019

INTERLOCUTORY JUDGMENT (NO 3)
OF CHIEF JUDGE CHRISTINA INGLIS
(Applications for leave to appear and be heard)

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[1] The plaintiffs are the parents of three disabled adult children. Litigation guardians have been appointed to represent the interests of the adult children in these proceedings. I also directed, at an early stage, that a full Court be convened to hear the claim. That was because of the potential significance of the claim, and the matters at issue.

[2] An application for leave to appear and be heard by the New Zealand Council of Trade Unions and the Human Rights Commission has followed.[1] It is not unusual for such organisations to seek to be heard in full Court hearings in this Court. That simply reflects the nature of much of the Court's work, and its potential to impact more broadly than on the parties themselves. The Court has previously received much assistance from submissions advanced by interveners, such as the Council of Trade Unions, Business New Zealand, and the Human Rights Commission, and it is not uncommon for such applications to be dealt with on a consent basis.

[3] The present applications cannot be disposed of on a consent basis. The Attorney-General contends that the grounds for intervention have not been made out, and that there is a basis on which the applications could be declined. In the case of the Council of Trade Unions, the Attorney-General questions whether the "unique

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[1] Business New Zealand was given notice of the proceeding but advised that it did not wish to advance an application.

focus" of the Funded Family Care Operational Policy (FFC Policy) has any wider implication; whether Council members would be affected; and whether the Council would add any assistance to the Court's appreciation of the issues. Ms McKechnie, counsel for the Attorney-General, nevertheless advises that the Attorney-General is prepared to abide the decision of the Court.

[4] Litigation is generally between the parties themselves.[2] Anyone wanting to intervene in somebody else's case must satisfy the Court that it is appropriate to do so. The Court has a broad discretion to grant leave, and to grant leave subject to conditions. The instances in which the Court might grant leave are broad and cannot be exhaustively defined. That is because much will depend on the circumstances of each case. What can, however, be said is that the Court has granted leave in cases in which:

- issues of general principle and/or public importance are likely to be engaged;
- there is the potential to impact more broadly than on the parties themselves;
- the proposed intervener has a demonstrable interest in the proceeding; and
- the Court is likely to be assisted by the intervention.

[5] Ultimately, a balancing exercise is required – the likely benefits of granting an application as against the potential down-side, in terms of (for example) any additional hearing time; the risk of diffusing or expanding the issues the parties have identified for determination; and increasing the costs of the litigation. The discretion should be exercised with restraint.[3]

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2 Referred to as the principle of privity of litigation. See *Seales v Attorney-General* [2015] NZHC 828 at [43]-[48]; *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 101 at [6].

3 *Seales* at [45].

[6] To put the Attorney-General's concerns in context, it is necessary to understand what the case is about and what contribution the proposed interveners might be in a position to make.

[7] In the substantive proceedings the plaintiffs seek declarations as to the status of employer in the context of the FFC Policy. The policy was adopted under s 70D of the New Zealand Public Health and Disability Act 2000 and the Funded Family Care Notice 2013, issued under s 88 of that Act. A convenient summary of the position appears in a memorandum of counsel for the Attorney-General:[4]

> The FFC Policy is effected through a Gazette Notice (**Notice**), published pursuant to s 88 of the Act. In the Notice, funded family care is described as a five-way partnership among the disabled person, family carer, the Ministry, and the Ministry's agents (the Needs Assessment Service Coordinator (**NASC**) and the Host provider). The partnership requires the disabled person to employ a family carer. The Host assists with initial and on-going advice on the employment relationship. *The disabled person is responsible under the Notice for complying with employment requirements, including employing the family carer and complying with all laws as an employer.*
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> (emphasis added)

[8] The plaintiffs seek four declarations, including that there are no employment relationships between the disabled persons and their respective parent carers, and that if the FFC Policy (properly interpreted) requires an employment relationship, it is between the parent carers and the Ministry of Health. The Attorney-General has filed a statement of defence to these allegations.

[9] It follows from the pleadings that a number of core issues will arise in respect of the alleged employment relationship, including the capacity of a disabled person to be an employer and if the disabled person cannot, as a matter of law, be the employer, who the employer is. The FCC Policy may be unique, as Ms McKechnie says, but that does not mean that the case is unlikely to have a broader impact. That is because it will engage consideration of the core characteristics of an employment relationship. As Mr Cranney, counsel for the Council of Trade Unions, points out, this is the sort of issue which has the potential to have far-reaching consequences, including unintended consequences, in which the organisation he represents is vitally interested.

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[4] Memorandum of counsel for the Attorney-General dated 20 March 2019, at [9].

[10] I do not think that it is seriously arguable that the Council of Trade Unions and the Human Rights Commission do not have a proper interest in these matters; that determination of these key issues is unlikely to have a much broader impact; or that the Court is unlikely to be assisted by their respective submissions. On their face, the issues at the heart of these proceedings raise fundamental questions as to contractual capacity and liability, and engage human rights considerations, including (as counsel for the Human Rights Commission observes) the impact or otherwise of New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities. This, it is said, is a matter of wide public importance, given the implications this case may have for future funded-care arrangements in the health and disability sector.

[11] There is, as well, an obvious potential impact on others who are subject to the policy but who are not represented, and those who are eligible to access the policy. As counsel for the Human Rights Commission submits, the Commission will be in a position to provide the Court with impartial assistance on matters pertaining to human rights law arising from the proceeding.[5] I have no difficulty concluding that the full Court is likely to be assisted by hearing from both the Human Rights Commission and the Council of Trade Unions.

[12] For completeness I have considered whether there are any countervailing considerations which might tell against the grant of leave. I have been unable to identify any.

[13] The applications by the Council of Trade Unions and the Human Rights Commission for leave to appear and be heard at the hearing are accordingly granted. They may make written submissions, filed in advance of the hearing (which is set down for three days on 26, 27 and 28 August 2019) in compliance with the timetabling directions which will be issued in due course, and may make oral submissions at the hearing. The interveners will not be entitled to claim costs against any party. Counsel for the parties are to liaise with counsel for the interveners with a view to filing a joint

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5 The Commission functions independently of government policy and is established as an independent Crown entity: Human Rights Act 1993, s 4(2); Crown Entities Act 2004, ss 7 and 113, and sch 1, Part 3.

memorandum setting out agreed timetabling orders in relation to the filing of affidavits, submissions and any other documentation required for the hearing. The Registrar is directed to forward to counsel for the interveners copies of the most recent pleadings, and the interveners are to be included in all future communications with the Court.

Christina Inglis
Chief Judge

Judgment signed at 4.45 pm on 9 April 2019