

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 147
EMPC 340/2019**

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for orders
BETWEEN	JANE CARRIGAN First Plaintiff
AND	CHRISTINE FLEMING Second Plaintiff
AND	THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE CARMEL SEPULONI in her capacity as THE MINISTER OF SOCIAL DEVELOPMENT AND MINISTER FOR DISABILITY First Defendant
AND	THE ATTORNEY-GENERAL sued on behalf of THE HONOURABLE DAVID CLARK in his capacity as MINISTER OF HEALTH Second Defendant
AND	JUSTIN JAMES COOTE by his litigation guardian Luke Meys Third Defendant

Hearing: 10 September 2020
(Heard at Auckland)
And by written submissions filed on 14 and 15 September 2020

Appearances: P Dale QC, counsel for plaintiffs
S McKechnie and T Bremner, counsel for first and second
defendants
L Meys, counsel (litigation guardian) for third defendant

Judgment: 17 September 2020

INTERLOCUTORY JUDGMENT (NO 3)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for orders)

[1] The first and second defendants have applied for orders striking out various aspects of the plaintiffs' second amended statement of claim. The applications arise in the context of proceedings seeking declarations under s 6 of the Employment Relations Act 2000 (the Act) as to the identity of the employee and the employer within the framework of the model adopted for the provision of funding for disabled people who are cared for by family members. The model is known as Funded Family Care.

[2] Ms Fleming, the second plaintiff, is the mother of and full-time carer for Mr Coote (the third defendant). Mr Coote is 39 years of age. He is severely disabled and requires 24 hours per day, seven days per week, assistance. Under the Funded Family Care model, it is Mr Coote (the disabled person) who is deemed to be the employer; his mother (the family carer) is deemed to be his employee. In essence, the plaintiffs seek clarity as to employment status and, if there is an employment relationship, whether the real employer is the Crown.

[3] During the course of the hearing, various issues fell away from and into focus. I deal with each issue in turn.

Strike-out of the first plaintiff?

[4] There was no dispute as to the principles that apply to applications to strike out causes of action in this Court. In summary, pleaded facts, whether or not they are admitted, are assumed to be true (with the exception of pleaded allegations which are speculative and without foundation); the cause of action must be clearly untenable in fact and law and incapable of success; the strike-out jurisdiction should be used sparingly and carefully; just because pleadings or proceedings raise difficult questions of law requiring extensive argument does not mean that an unsound claim cannot be struck out; the Court should be slow to strike out a claim in a developing area of law.¹

¹ See for example *Kocatürk v Zara's Turkish Ltd* [2020] NZEmpC 32 at [10].

I consider that s 221(a) of the Act provides the framework for considering applications to strike out parties, for reasons I turn to next.

[5] The first and second defendants seek an order striking out Ms Carrigan as first plaintiff. In summary, it is said that she has insufficient connection with the relief sought or the matters at issue in the proceedings. Ms Carrigan wishes to remain as a party.

[6] Section 221(a) of the Act enables the Court to join and strike out parties. It provides:

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

[7] I was invited to approach the issue of whether Ms Carrigan should remain as a party having regard to the approach to such issues under r 4.56 of the High Court Rules 2016. It is true, as counsel for the Attorney-General pointed out, that reg 6 of the Employment Court Regulations 2000 (the Regulations) provides a link through to the High Court Rules. The link is not, however, an automatic route that must be followed when determining matters coming before the Court.

[8] As reg 6(2) makes clear, the High Court Rules only apply where no form of procedure has been provided for by the Act or the Regulations. And it is notable that r 4.56 is in comparable terms to s 221(a) in the sense that it contains no additional procedural overlay. What the Rules, however, do is make clear that a higher threshold applies, namely that parties to a proceeding must be limited, as far as practicable, to persons whose presence before the Court is “necessary” to justly determine the issues arising, and persons who ought to be bound by any judgment given.² The determining criteria set by s 221(a) differ, focussed not on whether the order sought is “necessary” but whether the making of it would enable the Court to more effectually dispose of a matter according to the substantial merits and equities.

² High Court Rules 2016, r 4.1.

[9] For these reasons I prefer to approach the current application squarely under the umbrella of s 221(a), while acknowledging that the analysis contained in cases decided under r 4.56 may be of some general assistance.

[10] Would the Court be able to more effectually dispose of these proceedings without Ms Carrigan's presence as plaintiff? I accept that Ms Carrigan has a strong personal interest in the proceedings, having been an advocate for many years and having provided advice and support to a number of families with their funding issues. She has been involved in Ms Fleming's case for some time. It also appears from her affidavit evidence that she currently acts as agent for another family, which has proceedings before the Employment Relations Authority (stayed pending the outcome in these proceedings). She wishes to be heard in these proceedings, advising during the course of argument that a key motivation for remaining as a party is because the Crown has a history of 'picking off' plaintiffs and settling with them. I understood her to be saying that she would not be easily picked off for settlement purposes.

[11] These proceedings relate to employment status. It is not suggested that Ms Carrigan is either an employer or an employee in this case. She says in her most recent affidavit that she is an agent for a severely disabled person in another case but the circumstances of that case, and the person she acts as agent for, are not before this Court in these proceedings. It is true that a s 6 declaration, if one were to be made, would be likely to have an effect on her, as it would a large number of other persons not named as parties in the litigation.³ Still, enabling her to remain as a party on the basis that she acts as agent in the context of proceedings before the Authority would likely unnecessarily complicate, rather than simplify, determination of the employment status claim that is currently before the Court.

[12] As Mr Dale pointed out, penalties are sought by the plaintiffs which may impact on Ms Carrigan.⁴ This is said to weigh in favour of Ms Carrigan remaining as a party. The strength of the submission must, however, be viewed in context. The plaintiffs seek an order that part payment of any penalty imposed on the first and second defendants be paid to Ms Carrigan. That is, as I understand it, on the basis of

³ See *Lowe v New Zealand Post Ltd* [2003] 2 ERNZ 172 (EmpC) at [16].

⁴ See *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 (CA) at 138.

the time and effort she has put into advancing matters for Ms Fleming. I do not see that the penalty action, and the possibility that part of any penalty (if imposed) might be ordered in favour of Ms Carrigan, alters the position. It is a matter that frequently arises in this Court and is not one which would otherwise persuade the Court that the potential recipient of the part payment might usefully be joined as a party. The position would likely be different if a penalty was being sought against Ms Carrigan.

[13] And, while I accept that Ms Carrigan is concerned about settlement, rather than disposition of the proceedings by public hearing and determination, I do not consider that to be a relevant factor for the exercise of my discretion under s 221(a).

[14] While I do not doubt that Ms Carrigan has an intense interest in the proceeding, and the outcome of it, it is not an interest that warrants party status. As discussed during the course of argument, Ms Carrigan can give evidence at the hearing, including by providing relevant background context and in respect of the interactions that have taken place in relation to securing funding for Ms Fleming. I did not understand the first and second defendants to have a difficulty with that proposal. There is also an option, under the provisions relating to representation, for her to appear as a representative in these proceedings.⁵

[15] In summary, I conclude that Ms Carrigan's presence as a party would likely undermine, rather than assist, the Court's ability to effectually dispose of the proceedings. She is accordingly struck out as first plaintiff.

Strike-out of the first defendant?

[16] Following discussion, it was accepted that the first defendant will remain a party. It appears that the Minister of Social Development and Disability Services (the first defendant) has at least some involvement in the formulation of the policy and framework that is the backdrop to these proceedings; the plaintiffs are advancing an argument that the Crown is the true employer; and I consider it would be helpful to have both Ministers remain as parties when dealing with this claim. The plaintiffs are,

⁵ Employment Relations Act 2000, s 236.

however, to more closely particularise the scope and nature of the claim as it is directed at the first defendant.

Strike-out of pleadings relating to matters and programmes which neither the plaintiffs nor the third defendant are involved with?

[17] Counsel for the first and second defendants took issue with the reference in the pleadings to various support programmes which do not have an application to Ms Fleming (second plaintiff) and her son (third defendant). I understood Mr Dale to say that reference had been made to such matters by way of background context. The objections can be dealt with by way of re-pleading to make it clear that this is so, and that no specific claim is made in relation to these matters.

Strike-out of pleadings insofar as they purport to challenge the Needs Assessment Service Coordination (NASC) assessment?

[18] I do not propose striking out the pleadings insofar as they are said to challenge the NASC assessment of the third defendant. The obligations or otherwise which flow from a finding (if one is made) of employment status will (depending on who, if anyone, is found to be in an employment relationship with whom) fall for consideration. As counsel for the first and second defendants observed, it is unclear whether (if the Court does have jurisdiction) it could then proceed to grant the remedy of 40 hours' funding allocation. It is arguable and is best left as a matter for trial.

[19] The reality is that the proceedings raise a number of issues which are novel. It is appropriate in these circumstances to avoid pruning back the pleadings' branches any more than is required. Having said that, I agree with Ms McKechnie that it is preferable to inject as much clarity as possible into the pleadings. That is particularly so in the context of a factual matrix that is plainly very complicated. It is also true that the defendants and the Court are entitled to be adequately informed as to the case that the plaintiffs are pursuing. The pleadings are a key component of meeting that objective. The statement of issues, which Ms McKechnie suggested and which Mr Dale readily agreed to as a helpful case management tool for this case, is another.

Conclusion

[20] The first plaintiff is struck out as party to these proceedings; the first defendant remains as party. The plaintiffs are required to re-plead aspects of their claim. Directions have been made timetabling the filing and service of an amended statement of claim and statement of defence to that amended statement of claim, together with a statement of issues. The pleadings relating to the NASC assessment will not be struck out.

[21] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 11 am on 17 September 2020