

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 155
EMPC 292/2020**

IN THE MATTER OF	an application for a declaration pursuant to s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER	of an application for joinder
BETWEEN	KEANU HEAD Plaintiff
AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT Defendant

Hearing: (on the papers)

Appearances: P Cranney, counsel for plaintiff
S Hornsby-Geluk and P Gillespie, counsel for defendant
G Service, counsel for Madison Recruitment Ltd

Judgment: 30 September 2020

JUDGMENT OF JUDGE B A CORKILL

[1] In *McCook v Chief Executive of the Inland Revenue Department* (EMPC 254/2019), nine plaintiffs seek declarations under s 6 of the Employment Relations Act 2000 (the Act). However, the second plaintiff has recently filed a notice of discontinuance on the basis of ill-health.

[2] That development resulted in Mr Keanu Head applying, in that proceeding, for an order of joinder so that he would become the replacement second plaintiff. In his supporting affidavit, he said he had been employed at the Inland Revenue Department (IR) in Palmerston North in the same intake as Ms Hailey Malu, whose claim had been

discontinued; since she could no longer be involved in the proceeding, he wished to do so instead.

[3] This application was opposed by the first defendant in that proceeding, the Chief Executive of IR. The second defendant, Madison Recruitment Ltd (Madison) abided.

[4] The first ground of opposition raised for IR was that Mr Head's application for joinder had been raised under s 221 of the Act; it was contended that he lacked any legal standing to bring that application under that provision since he was not an existing party in the *McCook* proceeding. The section makes it clear that an application for joinder must be made by a party; the Court may also act on its own motion.

[5] Prejudice was also raised. It was submitted that since the substantive hearing in the *McCook* proceeding is scheduled to commence on 9 November 2020 and IR's evidence is to be filed on 22 October 2020, unacceptable prejudice would arise by having to deal at this late stage with an additional plaintiff.

[6] On 21 September 2020, I received oral submissions and discussed these issues with counsel.

[7] I indicated that I agreed with the IR submission that any application under s 221 of the Act by Mr Head in the context of the *McCook* proceeding was inappropriate, because he was not a party. Moreover, his presence as a plaintiff would not necessarily be required to more effectively dispose of the matter before the Court according to its substantial merits and equities. I also indicated I was not in those circumstances prepared to act on the Court's own motion.

[8] I then said that the correct procedure was that utilised recently in another proceeding, where fresh claims under s 6 of the Act were instituted by five plaintiffs who then applied to be joined as plaintiffs in the *McCook* proceeding.¹ Once that step

¹ *Langford v Chief Executive of Inland Revenue Department* [2020] NZEmpC 123.

was taken, the plaintiffs in that proceeding were joined as plaintiffs in the *McCook* proceeding, by consent. The order was made on 14 August 2020.

[9] Mr Cranney, counsel for Mr Head, indicated a fresh proceeding would immediately be issued in Mr Head's name to facilitate that course.

[10] Ms Hornsby-Geluk, counsel for IR, had also submitted that the Court previously directed in the *McCook* proceeding that the cut-off date for interlocutory applications would be 18 September 2020. A fresh proceeding and application for joinder would, she said, fall foul of that time limit. However, Mr Head commenced his process that day, albeit in an incorrect form; thus I was not persuaded that this was an impediment. The parties had been appraised of his intentions by the due date.

[11] Disclosure was discussed. Ms Service, counsel for Madison, said documents relating to Mr Head could be obtained and provided to the parties in the week of 21 September 2020.

[12] In light of this discussion, I made directions for the filing of a fresh proceeding by Mr Head, notice of opposition by IR, and submissions. I said the matter would be finalised on the papers.

[13] On 22 September 2020, Mr Head's fresh proceeding was issued: EMPC 292/2020. The statement of claim raises the same allegations as are contained in the fifth statement of claim in the *McCook* proceeding. An application for joinder in that proceeding was also filed on behalf of Mr Head. It is signed by Mr Cranney as his counsel; I infer the application is supported by the plaintiffs in *McCook* for whom Mr Cranney also acts, there being no indication to the contrary. IR filed a notice of opposition repeating the grounds of opposition filed originally, including the point that joinder would not be consistent with the provisions of s 221 of the Act.

[14] Mr Cranney relies on both s 189 and s 221 of the Act. I agree with Ms Hornsby-Geluk that s 221 is not the appropriate provision since Mr Head is not a party.

[15] However, the Court can act under its equity and good conscience jurisdiction under s 189, since the Act provides no express provision for a non-party to apply for joinder. It is appropriate to utilise that jurisdiction in the somewhat unusual circumstances which arise here, where the Court is required to consider joining a replacement plaintiff, and where there has already been a joinder of several plaintiffs by consent.

[16] The real issue relates to the question of potential prejudice by joining a plaintiff at this late.

[17] I agree there will be a confined period within which IR, and for that matter, Madison, would have to prepare their defences in respect of a further claim if an order of joinder were to be made. These parties may well have to brief evidence pertaining to Mr Head's circumstances in a relatively short period of time.

[18] However, Mr Cranney has also submitted that even if Mr Head were not to be joined he would nonetheless be called as a witness, the implication being that the necessary preparatory work would still have to be undertaken by the defendants.

[19] I have decided that whilst the late addition of a party is unfortunate, it is an issue which can, if appropriate, be addressed at the costs stage of the proceeding.

[20] Accordingly, I order that Mr Head, as plaintiff in EMPC 292/2020 be joined as a plaintiff in EMPC 254/2019, the *McCook* proceeding.²

[21] I assume Mr Head will now file and serve a notice of discontinuance of this proceeding, subject to costs which I reserve.

B A Corkill
Judge

Judgment signed at 2.45 pm on 30 September 2020

² So that the parties would know where they stood as soon as possible, I indicated I would make such an order in a minute issued on 25 September 2020.