

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 17
EMPC 324/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to intervene
BETWEEN	CANTERBURY WESTLAND FREE KINDERGARTEN ASSOCIATION INCORPORATED Plaintiff
AND	JANE ROSEMARY BARNES Defendant

EMPC 349/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to intervene
BETWEEN	JANE ROSEMARY BARNES Plaintiff
AND	CANTERBURY WESTLAND FREE KINDERGARTEN ASSOCIATION INCORPORATED Defendant

Hearing: 27 February 2020 (by telephone conference)

Appearances: M O’Flaherty, counsel for Canterbury Westland Free Kindergarten
Association Incorporated
A Halse, advocate for Ms Barnes
P Cranney, counsel for NZEI Te Riu Roa as intervener
AL Russell, counsel for Secretary for Education as intervener

Judgment: 27 February 2020

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for leave to intervene)

[1] These proceedings are set down for hearing in Christchurch on 1 May 2020. The challenge raises issues as to the interpretation of a clause in a collective agreement, in respect of the way in which sick leave is to be paid out.

[2] During the course of a telephone directions conference on 11 December 2019, I drew the representatives' attention to s 129 of the Employment Relations Act 2000 (the Act). The provision states that a party pursuing a dispute involving the interpretation, application or operation of a collective agreement must ensure that all union and employer parties to the agreement have notice of the existence of the dispute. Counsel for Canterbury Westland Free Kindergarten Assoc Inc (the Association) undertook to take the necessary steps to provide notice. Applications for leave to intervene were subsequently filed by NZEI Te Riu Roa and the Secretary for Education.

[3] While the Association consents to the applications, Ms Barnes does not. Mr Halse, advocate for Ms Barnes, wished to be heard further on the opposition and I heard from the representatives of the parties and the applicant interveners during a telephone hearing this afternoon. At the conclusion of the hearing I granted the applications, subject to conditions, and indicated that my reasons would follow. These are my reasons.

[4] The Court has jurisdiction to make an order granting leave to intervene in a proceeding under sch 3 cl 2(2) of the Act where it is satisfied that the applicant "is justly entitled to be heard". As Judge Corkill recently pointed out in *Leota v Parcel Express Ltd*,¹ the starting point must be that an intervener should establish some basis for the Court to depart from the traditional privity of litigation, especially where the application is opposed.² He went on to observe that the power should be exercised

¹ *Leota v Parcel Express Ltd* [2019] NZEmpC 152.

² At [7].

with restraint to avoid the risk of expanding issues, thereby increasing the costs associated with the hearing.³

[5] The applications for leave are advanced on a limited basis, namely in order to appear and be represented at the hearing and to make submissions. Neither applicant seeks leave to call evidence or cross-examine witnesses.

[6] I am satisfied that both applicants have a proper basis for advancing their applications. NZEI Te Riu Roa is the union party to the collective agreement which is central to the proceedings. The union clearly has an interest in the correct interpretation of the clause at issue as it applies, via the collective agreement, to a large number of other union members. I am also satisfied that the Secretary for Education has a proper interest in the interpretation issue. That is because the Secretary negotiates and is party to the collective agreement. As Mr O’Flaherty (counsel for the Association) pointed out, the Court’s judgment may well be important beyond the parties themselves. It seems to me that the Court is likely to be assisted by submissions from the union and the Secretary in the particular circumstances.

[7] I understood Ms Barnes’s opposition to involve two main points. First, that Ms Barnes was a member of NZEI Te Riu Roa, that the union did not do enough to support her at the time her complaints initially arose and it ought to have contacted her before advancing its application for leave to intervene; second, that the case has been ongoing since 2016 and there have been a number of matters relating to the collective agreement since that time in which the Secretary for Education has not involved herself. It is suggested that the Secretary for Education and the union are now wishing to involve themselves in the litigation “to prevent payment of [two years’] discretionary leave which [Ms Barnes] is claiming.”

[8] I am not satisfied that the applications for intervention are being advanced other than in good faith. As I have said, there is a demonstrable basis for the union and the Secretary’s interest in the interpretation issue. The Act requires that notice of disputes involving the interpretation and application of collective agreements be given for the very reason that it enables those with a proper interest to advance an application

³ At [8].

to be heard. That is what has occurred here. There is no suggestion that intervention will delay the hearing, and given the nature and extent of the intervention sought it is unlikely to cause undue anxiety to Ms Barnes (a concern foreshadowed by Mr Halse at today's telephone hearing).

[9] Standing back and balancing the interests of the parties, I was satisfied that the application ought to be granted and did so at the conclusion of the telephone hearing on the following basis:

- (a) NZEI Te Riu Roa and the Secretary for Education are to be served by the Association with all pleadings and documents filed in the proceeding, and a copy of any agreed bundle of documents prepared for the substantive hearing.
- (b) Both NZEI Te Riu Roa and the Secretary for Education are granted leave to file written submissions which must be filed and served by 17 April 2020.
- (c) NZEI Te Riu Roa and the Secretary for Education are granted leave for their counsel to appear at the substantive hearing, but not to call evidence or cross-examine any witness.
- (d) Neither NZEI Te Riu Roa nor the Secretary for Education is to address the Court on its submissions unless leave to do so is granted by the trial Judge.
- (e) Neither NZEI Te Riu Roa nor the Secretary for Education is to seek costs against any party.

[10] No issue of costs arises on these applications.

Christina Inglis
Chief Judge

Judgment signed at 4.15 pm on 27 February 2020