IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 49
EMPC 491/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of applications to strike out a party and join a party
BETWEEN	MARITIME UNION OF NEW ZEALAND INCORPORATED First Plaintiff
AND	GERALD SEYMOUR Second Plaintiff
AND	ISO LIMITED Defendant

Hearing:	13 March 2020 and submissions on 27 March 2020 and 6 April 2020 (Heard at Christchurch via Audio Visual Link)
Appearances:	S Mitchell and J Lynch, counsel for plaintiffs K Ashcroft and C Gray, counsel for defendant
Judgment:	22 April 2020

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Applications to strike out the first plaintiff and join a second plaintiff)

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[1] There are two interlocutory applications to be addressed in this decision. The first was by the defendant, ISO Ltd, seeking to strike out of the proceeding the first plaintiff, Maritime Union of New Zealand Inc (MUNZ).

[2] The second application was by the plaintiffs seeking to join George Lye to the proceeding as an additional plaintiff.

The determinations

[3] Two determinations of the Employment Relations Authority explain this proceeding and these applications. The first determination was issued on 23 November 2018 and the second one just over a year later, on 12 December 2019.[1] The following description of the employment relationship problem that gave rise to this litigation is taken from the Authority's determinations.

[4] At all relevant times Mr Seymour was employed by ISO. In 2018 Mr Seymour, and nine of his fellow employees, lodged a proceeding in the Authority. All of the applicants are members of MUNZ and worked for ISO as either stevedores or forklift operators at the port of Tauranga.[2] They sought to establish that the hours of work provisions in their individual employment agreements with ISO did not satisfy ss 67D and 67G of the Employment Relations Act 2000 (the Act). MUNZ was an applicant in the proceeding.

[5] Sections 67D and 67G were inserted in the Act with effect from 1 April 2016.[3] They prohibit the practice known as zero-hour contracts; referring to those employment agreements containing no guaranteed hours of work but requiring the employees to be available should work be offered to them by their employer.

[6] In the 2018 determination, the Authority concluded that all ten of the individual employment agreements failed to comply with the Act, because they did not specify any guaranteed hours.[4] In reaching this conclusion the Authority recognised differences between the employment agreement Mr Seymour had with ISO and the agreements his nine colleagues had with the company. Those differences were held to

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1 *Maritime Union of New Zealand Inc v ISO Ltd* [2018] NZERA 368 (Member Campbell) (2018 determination); *Maritime Union of New Zealand Inc v ISO Ltd* [2019] NZERA 704 (Member Campbell) (2019 determination).
2 2018 determination, above n 1, at [1].
3 Employment Relations Amendment Act 2016, ss 2 and 9.
4 At [37].

be immaterial.[5] No orders were made despite the Authority concluding the agreements were non-complying, because none had been applied for.

[7] Just over a year later the Authority issued its second determination about the same employment relationship problem. Between the two determinations there was a change in the parties. By December 2019, Mr Seymour and MUNZ were the only applicants. This time they sought compliance orders alleging breaches of s 67C–67F of the Act.[6]

[8] There had been no change to the employment agreements between the first and second determinations, so the Authority's conclusion was no different from the year before, Mr Seymour's agreement was non-complying.[7] However, that finding did not result in a compliance order. The Authority accepted ISO's evidence that, since the first determination, it had not applied those terms and conditions of the agreement that infringed the Act.[8] The application for a compliance order was declined for that reason. Mr Seymour and MUNZ challenged the 2019 determination.

[9] Before discussing the challenge one more observation needs to be made. In both proceedings before the Authority ISO objected to MUNZ being a party and unsuccessfully sought to have it struck out. In the second determination the Authority accepted MUNZ had no standing, but concluded the union's participation as a party would be just.[9]

The challenge

[10] MUNZ and Mr Seymour's challenge to the 2019 determination elected to have the whole matter heard again.[10]

[11] While most of the statement of claim contained pleadings about the agreement between Mr Seymour and ISO, there is one paragraph dedicated to the relationship

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5 At [25].
6 2019 determination, above n 1, at [6].
7 At [41].
8 At [42].
9 At [18].
10 Employment Relations Act 2000, s 179(1), commonly called a de novo challenge.

between MUNZ and ISO. The pleading is that the union is affected by ISO's alleged non-compliance with the Act for three reasons:

(a) Because of difficulties over bargaining for a collective agreement.

(b) MUNZ is operating in the workplace with another union that obtains benefits through collective bargaining by accepting hours of work that are not compliant with the Act.

(c) ISO is being advantaged in comparison to other stevedoring companies offering compliant agreements and who employ MUNZ members.

[12] The relief claimed by Mr Seymour and MUNZ is essentially the same. The prayer for relief relevantly sought:

> 16. The making of a Compliance Order requiring the Defendant to comply with the availability provisions of the Employment Relations Act 2000 contained in Sections 67D, 67E and 67F by:
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> 16.1. Entering into an employment agreement for the Second Plaintiff, and other members of the First Plaintiff, that either does not contain an availability provision, or that complies with the Act by:
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> 16.2. Containing some agreed hours of work at specific times and specific days, that the Second Plaintiff will work each week and providing for availability beyond these hours;
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> 16.3. The provision of reasonable compensation to the Second Plaintiff for making himself available for work outside such agreed times.
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> …

[13] The relief claimed differentiates between Mr Seymour and the union only in paragraph 16.3, seeking compensation for Mr Seymour for making himself available for work.

[14] The only other part of the pleading to note, at this stage at least, is that paragraph 16.1 seeks a broad-based order extending beyond the parties to any other MUNZ member. The balance of the statement of claim does not explain how such an order could be granted.

[15] ISO's statement of defence disputed the claim that its employment agreement with Mr Seymour fails to comply with the Act. On its face, that pleading is inconsistent with both determinations.

The strike out application

[16] The power to strike out parties to a proceeding is in s 221 of the Act:

> **221 Joinder, waiver, and extension of time**
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> 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,—
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> (a) direct parties to be joined or struck out; and
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> (b) amend or waive any error or defect in the proceedings; and
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> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
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> (d) generally give such directions as are necessary or expedient in the circumstances.

[17] ISO has applied to strike out MUNZ as a plaintiff, renewing the applications it made to the Authority. The union is said to have no standing to seek remedies against the company because:

(a) the dispute is about Mr Seymour's employment agreement;

(b) there is no collective agreement between the union and ISO; and

(c) the Act does not provide for a union to issue proceedings in its own name about individual terms and conditions of employment and/or to seek a compliance order in respect of determination in which "no findings were made for it".

[18] ISO relied on a combination of ss 18, 129, 137 and 236 of the Act, reg 6 of the Employment Court Regulations 2000 and r 7.24 of the High Court Rules 2016. The application relied on several cases said to illustrate the union's lack of standing.[11]

[19] MUNZ opposed the application but Mr Seymour did not. The grounds of that opposition relied on s 137(4) of the Act; the union says it is affected by non-observance or non-compliance with the Act because of the bargaining-related problems it is encountering with ISO.

[20] In summary Ms Ashcroft, counsel for ISO, submitted MUNZ should be struck out as a plaintiff because:

(a) It was not a party to Mr Seymour's employment agreement.

(b) While ss 18 and 236 of the Act provide for an employee to be represented by a union they do not authorise a proceeding in the union's name for the person being represented. She relied on *Service and Food Workers Union Ng Ringa Tota Inc v Spotless Services (NZ) Ltd*.[12] The example in that case was of a union not having standing to bring a wage claim in its own name on behalf of its members.

(c) To satisfy s 137(4) of the Act the person seeking a compliance order must be affected by the alleged non-observance or non-compliance. Accepting that the threshold for establishing standing is low, she argued that the union was not affected.[13] That was because the bargaining between ISO and the union was an irrelevant consideration.

[21] Ms Ashcroft's last submission was an invitation to consider *Maritime Union of New Zealand Inc v Ports of Auckland Ltd*.[14] In that case, the union had standing

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11 2018 determination, above n 1; *Maritime Union of New Zealand Inc v Ports of Auckland Ltd* [2010] NZEmpC 32, (2010) 7 NZELR 257 (*Maritime Union* (EmpC)); *Ports of Auckland Ltd v Maritime Union of New Zealand* [2010] NZCA 229, (2010) 7 NZELR 409; and *Service and Food Workers Union Ng Ringa Tota Inc v Spotless Services (NZ) Ltd* EmpC Auckland AC 50/07, 23 August 2007.

12 *Service and Food Workers Union*, above n 11.

13 Relying on *Maritime Union* (EmpC), above n 11.

14 *Maritime Union* (EmpC), above n 11.

because of an alleged inconsistency between a fixed term employment agreement and a current collective agreement. The union had standing because it was entitled to attempt to protect the integrity of that agreement. The obvious point of difference is that MUNZ and ISO are not parties to a collective agreement.

[22] In summary Mr Mitchell, counsel for MUNZ, submitted that the union was affected within the meaning of s 137(4)(a) because:

(a) The section gives the Court a broad power to hear parties and does not require the person claiming to be affected to be a party to the agreement about which compliance is sought.

(b) The effect on the union was real, because it is bargaining with ISO for a collective agreement where availability provisions and compliance have been sticking points for some time. This proceeding may resolve the bargaining impasse.

(c) The issue raised by the proceeding is one of collective interests, consistent with the objects of Part 4 of the Act, relating to the operation of unions. A union must be able to promote its members' interests by bringing a compliance order application in a situation such as the one presented by Mr Seymour's case.

(d) The union has been seriously affected by delays in bargaining because of membership attrition. Membership has declined from 23 members to 5 members by February 2020. Membership retention and recruitment are difficult when bargaining is unresolved.

(e) It was appropriate for the union to be able to place the meaning and application of availability provisions before the Court, rather than to expect the individuals concerned to do so.

[23] Mr Mitchell's supplementary submissions informed the Court that Mr Seymour recently resigned from ISO because of a change in his personal

circumstances. MUNZ is now concerned about the future of this litigation because it anticipates facing a further submission from ISO that, in Mr Seymour's absence, there is no longer a live issue.

[24] Most of these further submissions urged the Court to apply its equity and good conscience jurisdiction to allow MUNZ to remain a party.[15] In addition it was submitted that the status quo should remain because any potential problem may only be temporary. That was because MUNZ intends to apply, or has applied, to the Authority for an order pursuant to s 33(1) of the Act that ISO has breached its duty to conclude a collective agreement. The union plans to seek removal of that new proceeding to the Court, presumably to be heard at the same time as this case.[16]

[25] In Ms Ashcroft's supplementary submissions, the union's proposal to issue further proceedings was criticised as not providing a reason for MUNZ to remain a party. She also resisted reliance on the equity and good conscience jurisdiction because the cases relied on by Mr Mitchell were said to be not comparable.

Analysis

[26] I do not accept Mr Mitchell's submissions. They boil down to allowing the union to remain as a party because, in reality, the litigation is and always was a tool to assist collective bargaining where the issues are broader than the individual employment agreement between Mr Seymour and ISO. Difficulties over bargaining are not enough to reach the reasonably low threshold applied to standing that requires the union to show it is affected.

[27] Section 137(4)(a) specifies who may apply to the Authority and reads:[17]

> (4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):

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15 Relying on several cases supporting the breadth of the Court's equity and good conscience jurisdiction including *Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd* (1982) ERNZ Sel Cas 10 (CA); *Rossiter v AFFCO New Zealand Ltd* [2017] NZEmpC 28; and *Emmerson v Northland District Health Board* [2019] NZEmpC 34.

16 See Employment Relations Act, ss 178(2)(a), (c) and (d).

17 Subsection (2) empowers the Authority to make orders requiring compliance or preventing non-compliance.

(a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1).

(b) [Repealed]

[28] Mr Seymour is able to claim he is affected by non-compliance within the meaning of s 137(2) and s 137(4)(a) because the effect he can point to is that the employment agreement does not provide remuneration for his availability.

[29] The union is plainly not in the same situation and is seeking to extend the application of s 137(4)(a) in a way that goes far further than the section intends. While Mr Seymour was a party to a non-complying agreement, at present there is only a bargaining relationship between the union and ISO that may or may not result in a collective agreement. The potential similarity in their problems does not mean the union can claim to be affected by what has happened between Mr Seymour and ISO. There is no consequence for the union, or effect on it, no matter what happens between Mr Seymour and ISO. Mr Mitchell's submissions conflate the union's present inability to conclude a collective agreement with Mr Seymour's separate concerns about his individual employment agreement.

[30] Had the Act intended to authorise a union to seek a compliance order in its own name, on behalf of one of its members who is party to an individual employment agreement, a reasonable inference is that s 137(4)(a) would have said so. It does not. The reality is that the union is affected by ISO's bargaining position and not because of problems Mr Seymour has with ISO arising from the employment agreement between them being non-complying.

[31] The difficulty in the union's argument is illustrated by the serious problem that would emerge about any compliance order made in its favour, and who might enforce such an order. If the union's interpretation of s 137(4)(a) is correct, it could have obtained a compliance order compelling ISO to bargain with Mr Seymour. That cannot have been intended.

[32] If there is a deadlock over bargaining the Act contains mechanisms to overcome it; enabling the union to seek a compliance order in the way MUNZ is attempting is not one of them.

[33] The situation is not saved by the union's intention to issue a further proceeding. If that happens there may be a reason for the proceedings to be heard at the same time but that is a different matter.

Joinder

[34] The joinder application can be disposed of succinctly. The plaintiffs sought to join Mr Lye as a type of insurance against the risk that MUNZ would be struck out as a plaintiff, or Mr Seymour's employment agreement might be seen as not representative. As it happens, Mr Seymour's changed personal circumstances have created a situation making this application all the more pertinent. Mr Lye has consented to be a plaintiff.

[35] Ms Ashcroft's submissions for ISO opposed to Mr Lye being joined can be summarised as:

(a) The Authority only dealt with Mr Seymour's circumstances in the challenged determination. Mr Lye's employment agreement is different and, it follows, r 4.2 of the High Court Rules 2016 has not been met because they have no right of relief in common.

(b) He was not a party in the 2019 Authority proceeding in which MUNZ and Mr Seymour unsuccessfully sought a compliance order, so he cannot satisfy s 179 of the Act.[18]

(c) The Authority has exclusive jurisdiction to determine compliance applications. If Mr Lye wants to seek a compliance order about his individual employment agreement a separate application will need to be lodged in the Authority in the first instance.

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[18] Section 179 authorises challenges to an Authority determination.

(d) Joining him would allow the circumvention of a necessary preliminary step of an Authority investigation and a challenge only if that is unsuccessful. The corollary to this argument is that he must lodge a fresh application in the Authority and wait for an adverse determination.

[36] I reject Ms Ashcroft's submissions. Section 221 confers on the Court power to join a party to enable the effectual disposal of any matter in accordance with the substantial merits and equities of the case. That power is not dependent on the party seeking to be joined first having passed through the filter of applying to the Authority. While the 2019 determination declined a compliance order it did so because of a finding that ISO was not enforcing the non-complying parts of the employment agreement with Mr Seymour, not because of his actions or the actions of the other stevedores. In those circumstances, if Mr Lye was to apply to the Authority, the outcome would probably be inevitable.

[37] Furthermore, any differences between the stevedore's employment agreements is irrelevant. The Authority has already found that the employment agreements of the ten stevedores who were parties to the 2018 determination were materially the same. All of them, including Mr Lye's agreement, were held not to comply with the Act. The 2018 determination has not been challenged and to accept ISO's submission would be to allow a collateral attack on it.

[38] Mr Seymour's subsequent application for a compliance order was patently in the nature of an action taken on behalf of all those previously successful applicants, including Mr Lye. They have a common interest in complying employment agreements and it would be artificial to expect Mr Lye to now apply to the Authority as some sort of necessary preliminary step.

[39] It would not be consistent with the Court's equity and good conscience jurisdiction to deny Mr Lye the ability to participate in this proceeding.

[40] I am conscious that the orders to be made may be seen as allowing this litigation to change in such a way that it is not the same challenge as originally filed.

Such an observation would be misplaced. The fundamental issue remains whether a compliance order should be made where the relevant employment agreements do not comply.

Outcome

[41] The following orders are made:

(a) MUNZ is struck out as a plaintiff.

(b) Mr Lye is joined as a plaintiff.

(c) Costs are reserved to be dealt with at the conclusion of the hearing. However, given that both parties have enjoyed success it is possible that costs will lie where they fall.

K G Smith
Judge

Judgment signed at 11.45 am on 22 April 2020