IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2021] NZEmpC 219
EMPC 230/2021

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for strike-out
BETWEEN	E TŪ INCORPORATED First Plaintiff
AND	FIRST UNION INCORPORATED Second Plaintiff
AND	RASIER OPERATIONS BV First Defendant
AND	UBER PORTIER BV Second Defendant
AND	UBER BV Third Defendant
AND	PORTIER NEW ZEALAND LIMITED Fourth Defendant
AND	RASIER NEW ZEALAND LIMITED Fifth Defendant

Hearing: 25 November 2021
(by telephone)

Appearances: P Cranney, G Liu and E Griffin, counsel for plaintiffs
G Service and S Howard-Brown, counsel for defendants

Judgment: 9 December 2021

INTERLOCUTORY JUDGMENT OF
CHIEF JUDGE CHRISTINA INGLIS
(Application for strike-out)

Introduction

[1] The plaintiffs have filed a claim on behalf of 12 named individuals. The claim is brought under s 6(5) of the Employment Relations Act 2000 (the Act). That provision confers exclusive jurisdiction on the Employment Court to make a declaration that an individual is an employee, and if so of whom.

[2] The defendants are five companies, characterised by the plaintiffs as part of the Uber entity. The defendants take issue with this descriptor as suggesting that the five defendants are interconnected. They say that they comprise two distinct operational groups, namely what are described as the Uber "ride-share" defendants (the first, third and fifth defendants) and the Uber "meal-delivery" defendants (the second and fourth defendants). The plaintiffs take issue with this descriptor as suggesting that the two groups of defendants are entirely separate.

[3] The interconnectedness or otherwise of the five defendants has some relevance for present purposes, as will become apparent. It is not, however, the key issue for the purposes of disposing of the application now before the Court. I refer to the five defendants globally as the Uber group. I refer to each of the defendants by their party status.

[4] The second and fourth defendants have applied to strike out the claim against them. They say that the claim is essentially against the first, third and fifth defendants, and only very loosely against the second and fourth defendants. If they remain as defendants it will, it is said, significantly impact on the scope of the evidence that is required (because of differences in the applicable business models) and, accordingly, the scale of the hearing. Striking out the claim against them will enable the Court to more effectually deal with the primary dispute. In oral submissions counsel for the defendants, Ms Service, described the application as being designed to assist the Court in the efficient and effective disposal of the matter and its hearing. In other words, the application is firmly rooted in pragmatism.

[5] The plaintiffs oppose the application. They say that the documentation between the parties does not reflect the real nature of the relationship and the Court

will be obliged to look well beyond it in order to determine whether the 12 named individuals are employees. The complexity of the corporate structure within the Uber group reinforces the need for each defendant to be before the Court to enable the s 6 issue to be fairly and justly resolved. The plaintiffs say that what the second and fourth defendants are really seeking to do is obtain summary judgment in their favour, which is unsuitable from a practical perspective and, in any event, jurisdictionally unavailable.[1]

Framework for analysis

[6] Section 221(a) of the Act enables the Court to join and strike out parties. It provides:[2]

> 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…

[7] Section 221(a) provides the lynchpin for analysis, rather than the parallel strike out provisions in the High Court Rules.[3] That is not to say that some of the general principles which have been developed within that framework will not provide useful guidance;[4] it is to say that s 221(a) sets out the key consideration for the Court in exercising its power to strike out a party.

[8] The key consideration is whether the Court is satisfied, in the exercise of its broad discretionary powers, that striking out the party will enable it to more effectually dispose of the matter. There is no suggestion that the claim against the second and fourth defendants is hopeless and ought to be struck out on that basis. In this regard Ms Service emphasised that the second and fourth defendants were not seeking to avoid the claim, as the named individuals could pursue a separate claim against them

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1 See Employment Relations Act 2000, s 187(2).
2 Section 221(a) (emphasis added).
3 See Employment Court Regulations 2000, reg 6. Compare r 4.56(1)(a) of the High Court Rules 2016 which provides for a party to be struck out where they have been "improperly or mistakenly joined."
4 *Carrigan v Attorney-General* [2020] NZEmpC 147 at [4]-[9].

in due course. Rather the central concern is one of efficiency - allowing the claim to proceed would be cumbersome, unnecessarily complex and inefficient.

[9] The first point is that the operative word in s 221(a) is "effectual", not efficient. "Effectual" is defined as "capable of producing the required result or effect; answering its purpose".[5] The focus on effectual disposition reflects other provisions of the Act designed to support the Court's ability to get to the heart of a matter. The Court's power to call for evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not,[6] and the statutory directive to determine matters and make directions and orders as in equity and good conscience the Court thinks fit,[7] are but two examples. More generally, the breadth of the discretion conferred by s 221 reflects the specialist nature of the Employment Court's jurisdiction.[8]

Analysis

[10] I do not disagree that a focus on the operations of three rather than five defendants would likely take less time and, in that sense, be more efficient. I agree too that the claim as pleaded is predominantly focussed on the first, third and fifth defendants. But efficiency is not, as I have already observed, the applicable yardstick under s 221(a).

[11] It may seem counterintuitive to allow a claim to continue against named defendants as putative employers where there is accepted uncertainty as to which of them are said to have that role (together with the associated obligations and liabilities that go with such status). What is apparent in this case is that there is a degree of complexity in the organisational set up and uncertainty from the perspective of the named individuals as to which company or companies within the Uber group may be the employer. As Mr Cranney pointed out, the High Court Rules provide for the joinder of parties where there is uncertainty as to who is the proper defendant.[9] And

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5 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford) University Press, Melbourne, 2005) at 343.
6 Section 189(2).
7 Section 189(1).
8 See, for example, *Winstone Clay Products Ltd v Inspector of Awards* [1984] 2 NZLR 209 (CA).
9 High Court Rules 2016, r 4.3(4).

the position is essentially reflected in s 6(5), which provides that the Court must not make a declaration of employment status under s 6(5) unless the person alleged to be the employer of the named person is a party to the application or has the opportunity to be heard on it.

[12] The reality is that in the context of s 6 applications it is not uncommon for the Court to be confronted with cases where a worker is unclear as to who their employer is, particularly in cases involving an overlay of complex company arrangements. And it is notable that the Court has left open the possibility that an employee may have joint, or multiple, employers.[10]

[13] The second point is that in order to decide whether striking out the second and fourth defendants will enable the Court to more effectually dispose of the matter, it is necessary to understand the nature of the matter the Court is being asked to determine.

[14] The claim is for declarations of employment status under s 6. In deciding whether a person is employed by another person under a contract of service, the Court must determine the real nature of the relationship between them. That requires the Court to consider all relevant matters, including any matters that indicate the intention of the parties. It is not to treat as determinative any statement by the persons that describes the nature of their relationship. It follows that contractual documentation that labels the parties will be relevant but is simply one piece of a much larger puzzle which the Court is required, under s 6, to put together. Documentation which, for example, has been crafted by a dominant party and imposed on a take-it-or-leave-it basis, may well require a closer look in terms of its placement in terms of prominence in the overall picture.

[15] While the defendants emphasise the degree of separation between companies within the Uber group, the facts as pleaded and the affidavit evidence filed in support of the application suggest a degree of interconnectedness between the five defendants - and also a degree of uncertainty as to where the boundaries might lie. For example,

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[10] See for example *Labour Inspector v Jeet Holdings Ltd* [2021] NZEmpC 84, [2021] ERNZ 336; *Orakei Group (2007) Ltd (formerly PRP Auckland Ltd) v Doherty (No 1)* [2008] ERNZ 345 at [48]-[55]; and *Hutton v Provencocadmus Ltd (in Rec)* [2012] ERNZ 566 at [79].

it is accepted that workers could simultaneously operate as ride-share "Drivers" for the first, third and fifth defendants; and as "Delivery Partners" for the second and fourth defendants. Both Drivers and Delivery Partners accessed work through the same mobile application, the Driver App.

[16] In structurally complex cases it is generally necessary to understand how the corporate structure works, who does what and why and how the worker, and the work they perform, fits in. All of this is necessary if the Court is to have a full and informed appreciation of the reality of the situation, to enable it to answer the worker's key question: "am I an employee?" and "if so, of whom?"

[17] The situation would likely be different where, for example, a worker sought a declaration of employment status against a freezing works company (where they work Monday to Wednesday each week) and a beauty salon (where they work Saturdays each week). In such circumstances striking out one of the defendants might well be appropriate.

[18] While leaving the second and fourth defendants in as parties will add to the complexity and length of the hearing, I see that as a necessary by-product of getting to the nub of the matter before the Court. In other words, in the circumstances of the present case I see the presence of the second and fourth defendants before the Court as a help, rather than a hindrance, to effectually disposing of the matter.

[19] Ms Service submits that the plaintiffs' pleading lacks clarity as to who each of the named individuals claim to have been employed by. I have already touched on this objection. Mr Cranney made the point that it was difficult to pinpoint the putative employers of each of the named individuals because of the complexity of the corporate structure. He noted that the plaintiffs would be better placed to provide further particulars of their claim following disclosure (which has not yet been completed). There is a need for realism in terms of the degree to which the claim can be particularised at this stage.

[20] I note for completeness that counsel for the defendants submitted that in no other Uber case had the Court allowed a claim to proceed against different arms of the

Uber entity within the context of the same proceeding. That may be so, although I was not referred to the analysis as to what may have informed any such decisions. The point is that the strike out application in this case must be dealt with applying s 221(a) of New Zealand's Employment Relations Act; the substantive claim in this case must be dealt with applying s 6 of New Zealand's Employment Relations Act and the developed caselaw under it.

Outcome

[21] It will be apparent from the foregoing that I am not satisfied that striking out the second and fourth defendants as parties would enable the Court to more effectually dispose of the question it is being asked to answer, namely are each of the identified individuals employees and if so of whom? I consider that the presence of the second and fourth defendants as parties would likely assist, rather than undermine, the Court's ability to effectually dispose of the plaintiffs' application for declarations of employment status.

[22] The second and fourth defendants' application to strike out the plaintiffs' claim against them is accordingly dismissed.

[23] Any statement of defence must be filed and served by the second and fourth defendants within 15 working days of the date of this judgment.

[24] The question of whether further particulars ought to be provided may be brought back before the Court once disclosure has been completed, which should be attended to without delay.

[25] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 4.45 pm on 9 December 2021