

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING
PARTICULARS OF THE PLAINTIFF**

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

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

**[2022] NZEmpC 71
EMPC 317/2021**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to join a party
BETWEEN	GF Plaintiff
AND	COMPTROLLER OF THE NEW ZEALAND CUSTOMS SERVICE Defendant

Hearing: On the papers

Appearances: M Dew QC, S Kopu and J Hansen, counsel for plaintiff
H Kynaston and H Khan, counsel for defendant

Judgment: 2 May 2022

**INTERLOCUTORY JUDGMENT (NO 5)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application to join a party)**

[1] The issue now before the Court is an application to join the Official Assignee as second defendant to the plaintiff's challenge. While the Official Assignee and the defendant do not oppose the application, and abide the decision of the Court, a number of issues have been raised as to the scope of the Court's power to order joinder. Before turning to those issues, it is necessary to understand the background to the application.

[2] The plaintiff is pursuing a challenge to a determination of the Employment Relations Authority. The plaintiff's claim centres on two causes of action - unjustified disadvantage and dismissal. The prayer for relief includes a claim for lost wages and compensation for non-pecuniary losses.

[3] The plaintiff was adjudicated bankrupt by the High Court on 22 February 2019. Section 101 of the Insolvency Act 2006 deals with the status of a bankrupt's property on adjudication. It provides that all property belonging to the bankrupt vests in the Official Assignee; the powers that the bankrupt could have exercised in, over, or in respect of any property for the bankrupt's own benefit also vest in the Official Assignee. Section 3 defines property as including: "property of every kind, whether tangible or intangible, real or personal" and includes "rights, interests, and claims of every kind in relation to property however they arise."

[4] It is well established that the definition of "property" is wide and includes the right to bring or continue a cause of action in respect of property - so it is up to the Official Assignee (not the bankrupt) to decide to continue, or not continue, with a cause of action. A common law exception has been developed relating to rights of action which are personal to a bankrupt.¹ Such actions do not vest; they remain with the bankrupt. Difficulties can arise in circumstances where the claim carries both features – property that vests in the Official Assignee and property that is personal to the bankrupt. Such cases are known as "hybrid" claims. The plaintiff says that their claim falls within this category.

[5] The Official Assignee does not wish to pursue the claim for lost wages but has said it would consent to the conditional assignment of it to the plaintiff. One of the proposed conditions has not been met and it is not in the plaintiff's power to meet the condition. It is against this backdrop that the plaintiff has applied to join the Official Assignee as a defendant, to enable the claim to be pursued on the challenge.

[6] The Court may join parties to proceedings under s 221 of the Employment Relations Act 2000 (the Act), which states:

¹ *Heath v Tang* [1993] 1 WLR 1421, [1993] 4 All ER 694 (CA); *Official Assignee v Dowling* [1964] NZLR 578 (SC).

221 Joinder, waiver, and extension of time

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; and
- (b) amend or waive any error or defect in the proceedings; and
- (c) subject to section 114(4), extend the time within which anything is to or may be done; and
- (d) generally give such directions as are necessary or expedient in the circumstances.

[7] The Court has previously held that when considering the language of s 221, assistance may be obtained from those provisions of the High Court Rules 2016 which relate to joinder.² Rule 4.56 deals with joinder of defendants and relevantly states that a Judge may, at any stage of a proceeding, order that the name of a person be added as a plaintiff or defendant because:

- (i) the person ought to have been joined; or
- (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding. ...

[8] The hybrid claim issue came before the High Court in *Robinson v Whangarei Heads Enterprises Ltd*.³ Associate Judge Bell considered it open to a bankrupt plaintiff, who does not have the co-operation of the Official Assignee, to sue on such a claim if the Official Assignee is unwilling to do so, joining the Official Assignee as co-defendant.⁴ In this regard he held that:

... Given that the Official Assignee would pursue any claims in part as constructive trustee for Mr Robinson, it seems open to follow the usual procedure where a person claiming an equitable interest does not have the co-operation of the person with legal title. That is, to allow the beneficiary to join the legal owner as one of the defendants.

² *McCook v Chief Executive of the Inland Revenue Department* [2019] NZEmpC 189 at [10] citing *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 88; *Zara's Turkish Ltd v Kocatürk* [2019] NZEmpC 139 and *Sfizio Ltd v Freeborn* [2019] NZEmpC 143.

³ *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 2945.

⁴ At [26].

[9] Joinder of the Official Assignee as a defendant rather than an additional plaintiff was explained on the following basis:⁵

... Mr Robinson may sue on hybrid causes of action by naming as a party to the proceeding the legal owner of the causes of action, the Official Assignee. As the Official Assignee is unwilling to sue, he should be joined as a defendant.

[10] Mr Kynaston, counsel for the defendant, submits that the present case is not on all fours with *Robinson* as it did not arise from an employment agreement and involved an alleged breach of a shareholders' agreement. He also submits that hybrid claims raise a number of complexities, the law is not clear cut and *Robinson* was dealt with on the papers and has been distinguished in subsequent cases.⁶ Reference is also made to the approach adopted by the English Court of Appeal in *Ord v Upton*,⁷ where Aldous LJ expressed concerns about whether a cause of action could be split and whether it would be acceptable to require compulsory joinder, which could lead to difficulties when a claim for loss of earnings was small compared with the potential costs of the litigation.⁸

[11] The power of joinder contained within s 221(a) of the Act is broad. And it is clear from authorities relating to r 4.56 that the threshold is not high and that the criteria are to be construed liberally.⁹ In the circumstances, and having regard to the position adopted by the Official Assignee and the plaintiff, I accept that the Official Assignee's presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding, including to enable the plaintiff's claim for lost wages to be heard and resolved. More generally, joinder is likely to enable the Court to more effectually dispose of the plaintiff's claim according to the substantial merits and equities of the case.

⁵ At [31].

⁶ Citing *Ravelich v Official Assignee* [2017] NZHC 332 and *Prescott v New Zealand Police* [2017] NZHC 2701. It is notable that *Ravelich* concerned a claim alleging loss without explicating any personal elements to the harm said to have been suffered (at [19]); *Prescott* (also a decision of Associate Judge Bell) references *Robinson* in a footnote, in association with a finding that the plaintiff's causes of action would not vest in the Official Assignee (at [37]).

⁷ *Ord v Upton* [2000] Ch 352, [2000] 2 WLR 755, [2000] 1 All ER 193.

⁸ *Ord v Upton* [2000] Ch 352 at 369-371.

⁹ *Brooker v AIG New Zealand Ltd* [2019] NZHC 1225 at [23] and [28].

[12] While the effect of joinder (including whether the claim for lost wages can be pursued in the absence of a cross-claim by the Official Assignee against the defendant) is not beyond doubt,¹⁰ resolution is likely to be assisted by a full understanding of the facts and can conveniently be dealt with at the hearing.

[13] I direct that the Official Assignee is to be joined as second defendant. The plaintiff is to file and serve an amended statement of claim within five working days of the date of this judgment.

[14] Costs are reserved. I record that counsel for the plaintiff has indicated that costs on this application will be sought against Customs.

Christina Inglis
Chief Judge

Judgment signed at 2 pm on 2 May 2022

¹⁰ Customs reserves its position in relation to these issues.