IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

2023 NZEmpC 35
EMPC 242/2022

IN THE MATTER OF	proceedings removed in part from the Employment Relations Authority
AND IN THE MATTER OF	an application with regard to status of intervener
BETWEEN	NEW ZEALAND NURSES ORGANISATION INCORPORATED First Plaintiff
AND	PUBLIC SERVICE ASSOCIATION TE PŪKENGA HERE TIKANGA MAHI Second Plaintiff
AND	TRACEY BLACK and approximately 33,000 other healthcare worker members of the first plaintiff Third Plaintiffs
AND	JOY NEILSON and approximately 2,000 healthcare worker members of the second plaintiff Fourth Plaintiffs
AND	TE WHATU ORA – HEALTH NEW ZEALAND Defendant
AND	MIDWIFERY EMPLOYEE REPRESENTATION ADVISORY SERVICES Intervener

Hearing: On the papers

Appearances: R Harrison KC and P Cranney, counsel for plaintiffs
V Casey KC, S Hornsby-Geluk and M Vant, counsel for defendant
S Mitchell KC, counsel for intervener

Judgment: 8 March 2023

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B A CORKILL
(Application with regard to intervener status of the Midwifery Employee Representation Advisory Services)

Introduction

[1] This judgment is a sequel to my interlocutory judgment of 13 December 2022, in which I granted leave to the Midwifery Employment Representation and Advisory Service (MERAS) to be heard as an intervener on the conditions set out therein.[1]

[2] The pleaded background to the case is fully summarised in my judgment of 30 November 2022.[2] Briefly, the proceeding concerns certain backpay agreements that were entered into whilst pay equity claims were being bargained for. They were concluded after the Equal Pay Act 1972 (EP Act) was amended, and prior to a pay equity settlement being concluded under that Act.

[3] A range of complex legal issues arise as to the meaning and status of the various agreements, and as to the effect of some of the recently introduced provisions, for instance as to good faith in pay equity bargaining and as to choice of procedures. The issues are potentially novel and very significant for many employers and employees.

The defendant's position concerning the status of MERAS

[4] Following the issuing of the interlocutory judgment, the defendant indicated it wished to be heard further on the issue of MERAS's status.

[5] By way of background, in the interlocutory judgment I said:[3]

> [5] The plaintiffs do not oppose the application. The defendant says only that it reserves its position in relation to any disclosure issues which may arise in relation to the application. In response to this point, the plaintiffs say that

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1 *New Zealand Nurses Organisation Inc v Te Whatu Ora – Health New Zealand* [2022] NZEmpC 231.

2 *New Zealand Nurses Organisation v Te Whatu Ora Health New Zealand* [2022] NZEmpC 218 at [4] and [21].

3 *New Zealand Nurses Organisation Inc v Te Whatu Ora*, above n 1, at [5].

> status as an intervener, if granted, could not give rise to any disclosure issues so far as the intervener is concerned.

[6] I went on to grant leave to MERAS to participate as intervener on the following conditions:[4]

a. MERAS may file, serve, and lead evidence only with leave of the Court, to be sought before the timetabling for the filing of evidence by the parties commences.

b. MERAS may make written submissions which are to be filed and served no later than two weeks prior to the hearing, and to speak to those submissions at the hearing only with leave.

c. MERAS may not make an application for costs.

[7] Subsequently, Ms Casey KC, counsel for the defendant, advised the Court that confusion had arisen with regard to the reference to the intended intervener, in its memorandum of 7 December 2022, which was a disclosure memorandum. Ms Casey correctly observed that the Court understood that to be the extent of the defendant's intended response to the application that MERAS be granted intervener status. She acknowledged that it should have been made clear that the defendant was, in parallel, working on its response to the MERAS application, which was set out in memoranda filed after the judgment was issued.

[8] The defendant's position, when it was outlined, invited the Court to reconsider the order in light of its submissions. It was accepted that MERAS has an interest similar to that of the first and second plaintiffs, having entered into a Memorandum of Understanding (MOU) in terms similar to the MOUs that form a central part of the plaintiffs' claims. It was acknowledged that it would be sensible and efficient for MERAS to also participate in this proceeding, as it would avoid the prospect of separate litigation at a later date covering similar issues.

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4 At [7].

[9] However, counsel went on to submit that if MERAS was to be part of the present proceeding, it should be joined as a plaintiff pursuant to s 221(a) of the Employment Relations Act 2000. This was because the issues before the Court, including those that MERAS would seek to put forward, would essentially be factual.

[10] MERAS would face the same evidential burden as the plaintiffs if seeking to pursue a claim that its agreements have the same effect as the plaintiffs allege theirs have. To respond to the MERAS claim fairly, the defendant would need that claim to be properly pleaded, with disclosure provided and evidence presented.

[11] Counsel requested that the MERAS application be considered in light of these submissions.

Subsequent representations on these issues

[12] Mr Mitchell KC, counsel for MERAS, then filed a memorandum stating that as it was not seeking any order from the Court, there was no reason for MERAS to be a plaintiff. It sought opportunity only to comment on the legal issues arising.

[13] I indicated I would hear counsel further at a telephone directions conference. Prior to the conference, I issued a minute pointing out that the Court had directed that MERAS may file, serve, and lead evidence only with the leave of the Court. Thus, it had been granted restricted status only. Given the requirement for leave, the Court would not anticipate there would be evidential issues; the same would apply to disclosure. At that stage, I was not persuaded that there was a basis for reconsidering the order granting intervener status to MERAS.

[14] The matter was discussed at the telephone directions conference held on 7 February 2023 at which the concern was again expressed that the critical issues were whether MERAS would seek to engage at all in the matters of fact (and matters of mixed fact and law) that the Court would be determining as between the parties, and whether MERAS intended that this proceeding would determine any matters in relation to its own agreements with the defendant. If so, MERAS should be joined as a full party.

[15] Ms Casey stated that the defendant was also concerned that it be clearly understood from the outset that if MERAS was not joined as a full party, then no issue estoppel could arise between MERAS and the defendant in relation to matters in this proceeding, and no findings of the Court in this proceeding would be binding on either MERAS or the defendant in any future dealings or litigation between those parties.

[16] The defendant requested that if MERAS was to be an intervener, the terms of intervention should be varied to ensure clarity on these issues so as to avoid any misunderstanding or confusion. Ms Casey proposed the following conditions:

(a) MERAS may not participate in the evidential phase of the hearing and, in particular, may not adduce any evidence, cross-examine any witness, or challenge or otherwise make submissions on any matter of evidence.

(b) MERAS may make written submissions strictly limited to addressing legal issues in the abstract, noting that the interpretation of the provisions of the MOUs and other documents entered into between the plaintiffs and the defendant will involve mixed questions of fact and law and are not within the scope of MERAS's permitted submissions on the law. MERAS's submissions are not to engage in any matters of fact, including matters of fact relating to MERAS, and MERAS may not address or in any way challenge any evidence or submissions on the facts made by either party.

(c) MERAS's submissions are to be filed and served two weeks prior to the hearing. MERAS may speak to those submissions at the hearing only with leave and subject to the same constraints as above.

(d) MERAS may not seek costs against any party but may be liable for costs at the discretion of the Court.

(e) For the avoidance of doubt, no issue estoppel arises between MERAS and the defendant in relation to any matter in this proceeding, and no

findings of this Court in this proceeding are binding on either MERAS or the defendant in any future dealings or litigation between them.

[17] At the telephone directions conference, Mr Harrison KC, counsel for the plaintiffs, confirmed that they did not wish to be heard on these issues.

[18] I timetabled a written response by Mr Mitchell. In that response he submitted that he preferred the directions made by the Court as set out earlier.[5] He went on to elaborate.

[19] In respect of the directions proposed by Ms Casey, as recorded at [16](a) and (b) above, Mr Mitchell said that MERAS preferred the direction given by the Court. He confirmed that MERAS would not call any evidence in the proceeding.

[20] He said that it was unclear what was meant by the phrase in the condition at [16](a) where it was suggested MERAS would not make submissions "on any matter of evidence". He said that the subject agreements will be evidence in the proceeding and are matters of evidence. MERAS would seek to make submissions on the interpretation and application of those agreements. It was not possible to give entirely "abstract" submissions as was proposed by the defendant.

[21] With regard to the direction made at [16](c), the same comments applied in relation to the comments he had made about evidence.

[22] With regard to the direction at [16](d) relating to costs, Mr Mitchell submitted that interveners may not seek costs and there was no precedent for an intervener being held liable for costs. Given the limited intervention accepted by MERAS, it was not appropriate for exposure to costs to arise. He submitted that it was important that the Court be aware of a broader context to the dispute, which was the purpose of the application.

[23] Finally, with regard to the proposed direction at [16](e), Mr Mitchell submitted that the Court could not in this proceeding determine any estoppel issue between the

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5 Above at para [6].

defendant and MERAS arising as a result of the judgment. That would have to be considered in any relevant subsequent proceeding. Thus, the direction sought would be inappropriate.

[24] In response, Ms Casey said that while MERAS's position purported to provide assurance that it would not be pursuing a claim that the agreements it entered into with the defendant's predecessors have the same effect that the plaintiffs in this proceeding each allege their agreements have, the defendant remained concerned that the position was ambiguous. She said that the most recent response from MERAS had confirmed the defendant's concerns. MERAS was proposing to address the Court on the meaning and effect of the plaintiffs' agreements with the defendant on the basis that they are the same as or materially similar to MERAS and therefore that MERAS's agreements will have the same legal effect. MERAS had said that the outcomes of this case may give rise to an issue estoppel and/or binding findings as between itself and the defendant, despite it not participating as a full party, but suggests that does not need to be determined now.

[25] Ms Casey submitted this position is highly prejudicial to the defendant. If the Court were to make any findings about the contractual relationship between MERAS (or its members) and the defendant and/or any other findings that may be binding as between MERAS and the defendant, then MERAS needed to plead and establish its claims in the ordinary way, and the defendant would be entitled to fair process in defending those claims.

[26] It was suggested that the Court should accordingly decline MERAS leave to intervene on the basis that the terms on which it now sought to participate were not appropriate for an intervener. If MERAS wished to be joined as a plaintiff, then it could apply to do so.

[27] Finally, it was noted that there are precedents for an intervener to be liable for costs if, at the conclusion of the case, the Court considered that to be appropriate.[6] Ms Casey submitted that whether costs are in the end awarded against an intervener is

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[6] Reference was made to *Borrowdale v Director-General of Health* [2020] NZHC 1379, [2020] NZLR 927 at [45]; *Seales v Attorney-General* [2015] NZHC 828 at [72]–[73].

a matter for the Court, but it is not necessarily appropriate to give an intervener unconditional protection in advance of a hearing.

The procedural position as to variation of an interlocutory order

[28] Ms Casey submitted that the Court has jurisdiction to vary an interlocutory order in circumstances such as the present by analogy with r 7.49 of the High Court Rules 2016. That rule provides that a party affected by an interlocutory order may instead of appealing against the order or decision, apply for variation or recission if the party considers the order or decision is wrong.

[29] In *Complainant A v New Zealand Law Society*,[7] the Court of Appeal said the rule permits interlocutory matters to be dealt with expeditiously and less expensively. The Court said the rule is particularly appropriate where some additional point not raised before has emerged or there are facts, whether or not arising from a change of circumstances, which were not previously before the Court and should be considered.[8]

[30] Since no other counsel contested this approach, I agree that this is the appropriate means for considering the defendant's submissions on this occasion.

Intervention principles

[31] As was noted by former Chief Judge Colgan in *Matsuoka v LSG Sky Chefs New Zealand Ltd*, applications for intervention are to be resolved under cl 2(2) of sch 3 of the Employment Relations Act 2000.[9] The test is whether, in the opinion of the Court, the applicant "is justly entitled to be heard". It is a very broad test, to be determined on the particular circumstances of the case.[10]

[32] The starting point must be that an intervener should establish a sound basis for the Court to depart from the traditional privity of litigation, especially where such an application is opposed.[11]

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7 *Complainant A v New Zealand Law Society* [2017] NZCA 373 at [15].
8 At [15].
9 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 24.
10 At [6].
11 *Seales v Attorney-General* [2015] NZHC 828 at [43].

[33] As was observed by the Court of Appeal in *C v Accident Compensation Corporation*, the principles for exercising the Court's discretion are well established and include these factors:[12]

(a) the power is broad in nature, but should be exercised with restraint to avoid the risk of expanding issues, elongation of hearings and increasing the costs of litigation;[13]

(b) in a case involving issues of general and wide importance, the Court may grant leave when satisfied that it would be assisted by submissions from the intervener;[14] and

(c) the power may be exercised more liberally in cases involving the Court's special jurisdiction under legislation such as the Employment Relations Act 2000.[15]

[34] There are many examples where interveners have been appointed in this Court. One example, which is of interest in the present case, is *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Incorporated*.[16] There a voluntary trade association representing entities potentially affected by the issues involved were granted leave to intervene so as to present submissions on particular legal issues.[17]

Analysis

[35] MERAS's position, as confirmed by its counsel, is that it seeks no order from the Court, does not wish to take part in the evidential phase of the proceedings and wishes only to address the Court only on legal matters.

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12 *C v Accident Compensation Corporation* [2013] NZCA 34 at [12].
13 *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at [11].
14 *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 436 (CA); *Drew v Attorney-General*, above n 13, at [17], and *Chamberlains v Lai* [2005] NZSC 32 at [5].
15 *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 591 (CA) at 592.
16 *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Incorporated* [2018] NZEmpC 101.
17 At [23].

[36] In light of the content of the pleadings which the parties have filed, it is apparent there will be legal issues as to the proper interpretation of the agreements referred to earlier, but the Court will also be required to consider certain provisions of the EP Act. That statute has recently been overhauled; amongst other things, a detailed regime for pay equity bargaining has been introduced.[18] Potentially the issues may be of general and wide importance, not only to the parties, and to MERAS, but also to other parties who may engage in pay equity bargaining as well. The issues could affect a substantial number of employers and employees.

[37] Given the importance of the issues, I remain of the view that it is appropriate for MERAS to participate as an intervener on a restricted basis. It is justly entitled to be heard. I am not persuaded that the direction I made in the first judgment as to intervener status should be varied.

[38] The real issue lies with the conditions which should govern its participation.

[39] The conditions proposed for the defendant are more elaborate than those which I originally imposed. They relate first to the evidential phase of the proceeding and, secondly, to the submissions phase of the proceeding.

[40] Whereas I originally directed that MERAS could only file, serve and lead evidence with the leave of the Court to be sought before the timetabling of the filing of evidence, it is now suggested that MERAS should not participate in the evidential phase at all. As noted, Mr Mitchell has confirmed that MERAS wishes only to be heard on legal issues and not on issues of fact. Accordingly, I allow the formulation proposed by the defendant relating to the evidential phase.

[41] With regard to submissions, I indicated that MERAS could make written submissions which would be filed and served no later than two weeks prior to the hearing, and to speak to those submissions at the hearing only with leave. The defendant's formulation indicates that such submissions would be strictly limited to addressing legal issues "in the abstract", with the clarification that MERAS would not

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[18] Equal Pay Amendment Act 2020.

be permitted to make submissions on any matters of fact or any matters of fact and law.

[42] In my view, there should be a modification of the relevant condition so it is clear MERAS's submissions are to be directed to legal principles only, and that it may not address the merits of any factual issues which arise between the plaintiffs and the defendant.

[43] The direction made as to submissions at the hearing are uncontroversial and I allow the defendant's formulation.

[44] With regard to costs, I note the position with regard to claims for costs against interveners in *Borrowdale* and *Seales*; I accordingly allow the defendant's formulation, noting that MERAS will be able to take part fully in any debate concerning an application for costs made against it.

[45] With regard to the possibility of a statement concerning issue estoppel, I accept Mr Mitchell's submission that it is premature for this Court to address that topic. I therefore disallow the defendant's formulation in that regard. But I observe it is difficult to see how an issue estoppel could arise between the defendant and MERAS given the fact MERAS is not a party to the proceeding, and its participation will be confined.

Result

[46] Drawing these threads together, I vary the conditions upon which MERAS may be an intervener as set out in the judgment of 13 December 2022, and confirm that it is given leave to intervene on the following terms:

(a) MERAS may not participate in the evidential phase of the hearing and, in particular, may not adduce any evidence, cross-examine any witness, or challenge or otherwise make submissions on any matter of evidence.

(b) MERAS may make written submissions dealing with legal principles relating to the interpretation of the subject agreements and as to

interpretation of relevant provisions of the EP Act. MERAS may not deal with the merits of the parties' claims and defences.

(c) MERAS's submissions are to be filed and served two weeks prior to the hearing. MERAS may speak to those submissions at the hearing only with leave and subject to the same constraints as above.

(d) MERAS may not seek costs against any party but may be liable for costs at the discretion of the Court in the usual way.

[47] Neither of the parties, nor the intervener, advised the Court that there may be costs issues arising from the application for intervener status. My provisional view is that costs should lie where they fall, given the way the issue unfolded. However, in case it is necessary to consider that issue further at a later date, I reserve costs.

B A Corkill
Judge

Judgment signed at 4.10 pm on 8 March 2023