IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2023] NZEmpC 94
EMPC 197/2022

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for security for costs
AND IN THE MATTER OF	applications for leave to intervene
BETWEEN	LYN SOAPI First Plaintiff
AND	DANNY LAU Second Plaintiff
AND	MARY LAU Third Plaintiff
AND	PICK HAWKE'S BAY INCORPORATED Defendant

Hearing:	20 March 2023 (Heard at Christchurch via Audio Visual Link)
Appearances:	T Oldfield, counsel for plaintiffs J Bates, L Brown and M Inwood, counsel for defendant J Hancock, counsel for Human Rights Commission P Cranney and G Iddamalgoda, counsel for New Zealand Council of Trade Unions
Judgment:	21 June 2023

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Applications for security for costs and leave to intervene)

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[1] There are three interlocutory applications to resolve. The defendant has applied for an order for security for costs against the plaintiffs. The Human Rights Commission and the New Zealand Council of Trade Unions (NZCTU) have sought leave to intervene.

[2] The plaintiffs oppose the application for security for costs and support the applications seeking to intervene. The defendant opposes the applications to intervene.

Background

[3] The plaintiffs are citizens of the Solomon Islands. They do not live in New Zealand but worked in this country for the defendant as participants in the Recognised Seasonal Employer (RSE) scheme. The scheme allows approved New Zealand employers to recruit citizens of certain Pacific nations to work seasonally in New Zealand in the horticulture and viticulture industries. Special visas are issued to RSE employees entitling them to work in New Zealand for the duration of the season for which they are employed following the completion of which they return home.

[4] The first plaintiff, Lyn Soapi, worked in the 2018/2019 and 2019/2020 seasons. The second plaintiff, Danny Lau, worked for the 2017/2018 season and again in 2018/2019. The third plaintiff, Mary Lau, began working for the defendant in the 2015/2016 season and she worked each season until 2019/2020.

[5] Each time the plaintiffs worked for the defendant they were employed on individual employment agreements for a fixed term expiring at the end of the season.

[6] The defendant is an incorporated society and its function is to supply seasonal labour to its members. It is a not-for-profit organisation. Its primary objectives under its rules include maintaining its status as a Recognised Seasonal Employer, promoting best practice in the horticulture and viticulture industries to promote economic growth and productivity, and ensuring that employees are adequately paid and able to benefit financially from their employment.

[7] To participate in the RSE scheme the defendant must be accredited by Immigration New Zealand (INZ). The accreditation process is undertaken every three years but approval to recruit employees from overseas, known as an Agreement to Recruit (ATR), is granted annually. For some time, INZ has granted the defendant ATR status. As part of the ATR approval process the defendant provides to INZ for vetting a draft of the employment agreement to be offered to seasonal employees employed under this scheme.

The plaintiffs' claims

[8] The plaintiffs claim that the defendant made deductions from their wages that were unlawful because they breached the Wages Protection Act 1983 or Minimum Wage Act 1983.

[9] The first claim is that the defendant unlawfully deducted certain expenses from the plaintiffs' wages in breach of the Wages Protection Act. The deductions were itemised in a schedule to the pleading and include costs such as for transport, food, clothing and storage. The plaintiffs say that these deductions were not authorised by INZ.

[10] There is also a claim that the deductions breached the individual employment agreements that required them to be submitted to INZ for approval. The claim is that these deductions were therefore unreasonable within the meaning of s 5A of the Wages Protection Act and breached ss 4 and 5 of that Act.

[11] Part of this claim is that the defendant made deductions from the plaintiffs' wages for work gear and wet weather gear. The pleading is that this equipment comprised personal protective equipment within the meaning of that term in s 16 of the Health and Safety at Work Act 2015.

[12] The plaintiffs claim that the defendant was required to provide to them personal protection equipment under the Health and Safety at Work Act and, under regs 15–20 of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, was not entitled to charge them for providing it. The pleading was

that deducting a charge for this equipment was a breach of s 27 of the Health and Safety at Work Act.

[13] The plaintiffs allege the defendant breached ss 6 and 7 of the Minimum Wage Act by making deductions for accommodation and other expenses. The claim was that the plaintiffs did not receive at least the minimum wage for their work at the beginning of each of the seasons because of those deductions. This claim is that the deductions were not permissible under s 7 of the Minimum Wage Act.

[14] The first and third plaintiffs allege a breach of s 11B of the Minimum Wage Act, because the employment agreements did not contain a maximum number of hours of work per week for the 2019/2020 season.

[15] All the plaintiffs seek arrears of wages and interest. Additionally, the first and third plaintiffs seek penalties for alleged breaches of the Minimum Wage Act and Wages Protection Act and for those penalties to be paid to them under s 136(2) of the Employment Relations Act 2000 (the Act).

[16] The plaintiffs are represented pro bono and while they seek to recover disbursements they do not claim costs.

[17] The defendant denies it has breached either statute or the employment agreements.

Security for costs

[18] The defendant has applied for security for costs because:

(a) the plaintiffs are outside New Zealand;

(b) the plaintiffs will be unable to meet an adverse costs award if their claims do not succeed; and

(c) the merits of the case, so far as they can be assessed at this stage of the proceeding, favour it.

[19] The amount sought for security was $2,000 from each plaintiff. The defendant seeks a stay until the security is provided. The application was supported by an extensive affidavit from the defendant's president, John Evans.

The test

[20] The Act does not provide for security for costs. However, the Court may consider an application and in so doing applies the High Court Rules 2016.[1]

[21] Under r 5.45(2), a Judge may order security for costs if that is just in all the circumstances. The required threshold is in r 5.45(1), which relevantly to this application allows an order to be made where:

(a) the plaintiff is resident out of New Zealand; or

(b) there is reason to believe the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceeding.

[22] An order is discretionary. The discretion is a broad one to be exercised in the interests of justice. In making a decision the interests of both parties need to be carefully weighed up. That exercise must contemplate that an order for a substantial sum may prevent the plaintiff from pursuing a claim. Such an order should be made only after careful consideration and in a case where the claim has little chance of success. That is because access to the Court for a genuine plaintiff is not likely to be denied. Conversely, the assessment involves weighing the interests of the defendant who must be protected against being drawn into unjustified litigation.[2]

The issues

[23] Four issues arise in this application:

(a) Issue 1: is there reason to believe that the plaintiffs will be unable to meet an award of costs against them?

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1 Employment Court Regulations 2000, reg 6(2)(a)(ii).
2 See *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

(b) Issue 2: is it appropriate for an order for security for costs to be made?

(c) Issue 3: how much security is appropriate?

(d) Issue 4: should a stay be ordered?

Issue 1: Is there reason to believe the plaintiffs will be unable to meet a costs award against them?

[24] It is common ground that r 5.45 is satisfied. The plaintiffs are citizens of the Solomon Islands where they live and their financial means are extremely limited.

[25] The threshold to consider making an order for security for costs has been crossed by the defendant. The answer to Issue 1 is yes.

Issue 2: Is it appropriate for an order to be made?

[26] Mr Bates characterised this evaluation as weighing up the plaintiffs' rights to access to justice against their effective immunity from a costs award if the claims fail. The assessment was said to favour the defendant because the plaintiffs' claims, even at this early stage, have been shown by Mr Evans' evidence to lack merit. Mr Bates commented that there had been ample time for the plaintiffs to respond to Mr Evans' affidavit if they disagreed with him but they had not.

[27] The thrust of Mr Evans' evidence was that almost all the plaintiffs' claims are answered in one way or another through:

(a) the approvals granted by INZ; or

(b) because the deductions were consented to by the plaintiffs; or

(c) the amounts involved were very small and capable of resolution without litigation.

[28] Mr Bates submitted that the plaintiffs' claims fall into four categories:

(a) Category 1: deductions from wages allegedly made in breach of ss 4, 5 and 5A of the Wages Protection Act due to a lack of consent.

(b) Category 2: deductions from wages for work gear and wet weather gear alleged to be made in breach of ss 4, 5 and 5A of the Wages Protection Act.

(c) Category 3: alleged breaches of ss 6 and 7 of the Minimum Wage Act by making the deductions referred to in Category 2 and other deductions for accommodation-related expenses.

(d) Category 4: an alleged breach of s 11B of the Minimum Wage Act by failing to set maximum hours for the first and third plaintiffs in the 2019/2020 season in relation to which penalties under the Act were sought.

[29] Mr Bates described Category 1 as fact-intensive involving modest sums of money that was substantially unmeritorious. The claimed deductions totalled just over $7,200. He referred to Mr Evans' evidence which was that the deductions were submitted to and approved by INZ.

[30] In Mr Evans' assessment the defendant had substantially complied with the ATR and each individual employment agreement. He considered that the proposed deduction arrangements were approved by INZ and the amount of the deductions was transparent which prevented price gouging.

[31] Drawing on Mr Evans' analysis, Mr Bates submitted that one of the claims made by the plaintiffs, set out in schedule A to the second amended statement of claim, was about a weekly allowance which amounted to $2,900. The analysis was said to show that the amount was not actually a deduction because the sum was received by the plaintiffs into their bank accounts as demonstrated by a reconciliation of payments. That meant the balance of the claim was small.

[32] Mr Bates submitted that Mr Evans' evidence about that balance showed substantial compliance by the defendant. The defendant accepted, however, that there was no written consent form for some deductions totalling $949.55. That sum included food costs of $609.92 not approved under the ATR process, but which expense was incurred during the first COVID-19 lockdown. The defendant intends to argue that verbal consent to the deductions was obtained.

[33] Mr Bates' point was that if this evidence is accepted then a significant portion of this claim is unsustainable. He accepted that there were some deductions for which no written consent was obtained but submitted those expenses amounted to $339.63 for three plaintiffs over five years excluding food costs. That amount was described as miniscule.

[34] Category 2, about deductions for work gear and wet weather gear, was said to amount to just over $800. The defendant's response was that the amount was modest and the claim weak. Where the claim relates to duties under the Health and Safety at Work Act 2015, it was criticised as being beyond the jurisdiction of this Court.

[35] Category 3, where the claim amounts to $35,392.32 and penalties for alleged breaches was characterised by Mr Bates as misconceived, because the deductions were made for lawful purposes as explained in *Terranova Homes and Care Ltd v Faitala*.[3] The proposition was that an employer may make lawful deductions from wages, even if what is received by the employee falls below the minimum wage, where that is done to meet the employee's statutory or other legal obligations. In this case that requirement was to satisfy a contractual commitment to pay towards the costs of accommodation.

[36] As to Category 4, Mr Bates acknowledged that the defendant breached s 11B of the Minimum Wage Act. The employment agreements did not state, as required, maximum hours of work. However, the claim for penalties arising from that omission was described as opportunistic. The omission was said to be unintentional, the template employment agreements that did not comply were approved by INZ, and the first and third plaintiffs suffered no loss because they were paid for all hours worked.

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3 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347.

[37] Brief mention needs to be made of two other submissions for the defendant intended to assist in considering making an order. The first was that the plaintiffs declined to be involved in mediation or alternative dispute resolution. The second was that the plaintiffs are represented pro bono and ought to have an incentive (described as "some skin in the game") to guard against the proceeding being unduly protracted, complicated and expensive. Presumably making an order would provide that incentive.

[38] Mr Bates argued that the weakness of some of the claims, the modest value of others, and the strength of the defendant's defences through relying on approval being provided by the ATR process, shifted the analysis firmly in favour of the defendant.

[39] Mr Oldfield accepted that the issues require balancing the plaintiffs' rights to access justice and the defendant's right to be protected from unnecessarily being drawn into litigation.

[40] Not surprisingly, Mr Oldfield concentrated on the weight that ought to be given to access to justice, emphasising that the plaintiffs' position is an invidious one. They wish to pursue claims against a New Zealand business, in New Zealand, arising from the work they performed for it. They have no alternative other than sue here. Their position was, he said, no different from any other worker engaged in this scheme and that gave rise to fundamental issues about whether the actions of the defendant were able to be tested in a meaningful way.

[41] Mr Oldfield pointed out that this proceeding in the Court is the first occasion on which the plaintiffs will have an opportunity to pursue their claims. The employment relationship problem was not investigated by the Authority because it was removed to the Court, a decision the defendant acquiesced in. It appears, from his submissions, that there was mediation at an earlier stage, and the claims now made represent those issues that were not able to be resolved through that process.

[42] As to the merits of the claim, Mr Oldfield accepted that some of the sums involved are modest but submitted, with considerable force, that they are significant to the plaintiffs. He was reluctant to examine the merits in detail at an interlocutory

stage but said that it would be wrong to see the plaintiffs' claim as lacking merit, or as sufficiently weak to justify ordering security for costs. He noted that Mr Evans appeared to accept the defendant made at least some deductions without written consent. That concession meant the defendant just disagreed as to the amount of those deductions and that it had acknowledged breaching s 11B of the Wages Protection Act.

[43] Mr Oldfield submitted that the merit of the plaintiffs' claim was perhaps best illustrated at this stage by reference to the deductions for work gear and wet weather gear, collectively described as personal protective equipment. Mr Evans' evidence was that the defendant did not make any deductions from the plaintiffs' wages for that equipment.

[44] There were two prongs to the plaintiffs' response to Mr Evans' evidence. The first was that in applying for ATR approval the defendant represented to INZ that it would be responsible for providing all personal protective equipment. The approved individual employment agreements arising from the ATR process did not refer to any deductions that might encompass the plaintiffs paying for their personal protective equipment. Despite representations made to INZ, documents provided by Mr Evans indicated that the defendant did make deductions for at least some personal protective equipment in the form of boots and wet weather gear.

[45] The second prong to this response was that it is immaterial whether the plaintiffs consented to the deductions made for personal protective equipment. This argument turns on interpreting the Health and Safety at Work Act and regulations. The plaintiffs intend to argue that the legal requirement to provide that equipment falls on the employer and cannot be passed on to employees. The issue was to assess what an employer must pay for as a matter of law and does not give rise to the jurisdiction concern mentioned by Mr Bates. It was, Mr Oldfield said, a matter of construing the legislation which task is within this Court's jurisdiction.[4] The plaintiffs' case is that the defendant stepped outside the protection afforded by INZ's approval and the deductions were unlawful.

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[4] See Employment Relations Act 2000, sch 3 cl 1.

[46] As a further illustration of the merits of the plaintiffs' claim, Mr Oldfield explained that they wish to explore whether the accommodation-related deductions breached s 7 of the Minimum Wage Act. Under s 6 an employee must receive pay at not less than the minimum rate subject to deductions made under s 7. Those authorised deductions are for board, lodging or time lost because of a default by the employee.

[47] The plaintiffs' case is that the legislation creates a code which the defendant's deductions breached. The claimed breach arose because for several weeks after they began work the amounts deducted for accommodation (and other costs) reduced what the plaintiffs were actually paid, in some cases, to nothing. Those deductions continued until such time as their income wiped out the deficit created by the expenses they incurred.

[48] Mr Oldfield explained that the claim is about the relationship between ss 6 and 7, which is not assisted by *Faitala*. That is because the defendant's deductions were derived from the employment agreements rather than, for example, the plaintiffs meeting tax obligations. He acknowledged that the disagreement between the plaintiffs and defendant over the interpretation of ss 6 and 7 could go either way but submitted that the plaintiffs' position had substance.

[49] From Mr Bates' perspective, his review demonstrated the weakness of the plaintiffs' case and shored-up the defendant's assessment so that the Court's discretion about security for costs should come down firmly in its favour.

[50] From Mr Oldfield's perspective, the impecuniosity of the plaintiffs may not have been caused by the defendant but it has taken advantage of that situation. He submitted that an order would effectively end this litigation and it would be perverse to bar the plaintiffs from attempting to correct injustices arising from their employment when they were only able to enter into an employment relationship with the defendant because it had secured RSE status.

[51] I agree with Mr Bates that the defendant may find itself litigating with plaintiffs who are effectively immune from a costs order. However, it is important to bear in mind the access to justice principles referred to in *McLachlan Ltd v MEL Network Ltd*.

They were also discussed in *Highgate on Broadway Ltd v Devine*, which Mr Bates referred to in addressing this issue.[5]

[52] In *Highgate*, Kós J commented that access to justice is an essential human right.[6] He concluded that the cost of exercising that right is the payment of costs in the event of failure, but that the right of a successful defendant to costs is arguably subordinate to the plaintiffs right to be heard. He went on to comment that strong social policy considerations favour the use of Courts as an accessible forum for the resolution of disputes and grievances of almost all kinds. Only where a clear impression can be formed that the plaintiffs' claims are altogether without merit, so that in the alternative it would be amenable to being struck out, would it be right for security to be ordered where to do so would bring the plaintiffs' claim to a "dead halt".[7]

[53] In weighing up the submissions, I have concluded that the plaintiffs' ability to have access to the Court outweighs the defendant's concerns about not being able to recover costs if the claims fail.

[54] If security was to be ordered the effect would be to halt this litigation. Such a step would preclude the plaintiffs from testing whether the rights they had as employees in New Zealand were compromised as a result of their employment under a scheme which may, if the plaintiffs are correct, have contributed to the circumstances in which they found themselves. It cannot be just to effectively deprive the plaintiffs of an opportunity to test whether their employer complied with New Zealand law.

[55] I do not accept that the defendant has been able to show that the plaintiffs' claims are so lacking in merit or that they are so modest in value that it would be just to order security to be provided. Plainly, the issues between them are arguable and the plaintiffs' claims would not be susceptible to being struck out as Kós J mentioned.

[56] The answer to Issue 2 is no, it is not appropriate for an order for security for costs to be made. It follows that Issues 3 and 4 do not need to be addressed.

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5 *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017.
6 At [23](b).
7 At [23](b).

[57] The application for security for costs is unsuccessful and it is dismissed.

Applications to intervene

[58] Two applications were made to intervene. The Human Rights Commission sought to intervene maintaining that human rights issues of general principle and importance arise in the proceeding. The issues identified were about the rights of migrant employees under the RSE scheme arising from alleged breaches of the Wages Protection Act and Minimum Wage Act.

[59] Mr Hancock drew attention to the direct impact of New Zealand's obligations under International Labour Organisation standards. It was said that those issues are likely to apply to other workers under the RSE scheme and perhaps to the workforce more widely.

[60] The Commission relied on its statutory functions under ss 5(2)(a) and (j) of the Human Rights Act.[8] It seeks to address the human rights issues set out in international human rights standards:

(a) International Covenant on Economic, Social and Cultural Rights.

(b) International Covenant for Civil and Political Rights including the right to equality and freedom from discrimination.

(c) United Nations Guiding Principles on Business and Human Rights.

(d) United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which has not been ratified by New Zealand but which principles are said to be relevant.

(e) New Zealand's participation in International Labour Organisation (ILO) standards.

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8 *Seales v Attorney-General* [2015] NZHC 828; *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780; *Attorney-General v Taylor* [2017] NZSC 131; and *Fitzgerald v R* [2021] NZSC 119.

(f) The ILO Multilateral Framework on Labour Migration.

(g) Other ILO Guidelines, Conventions and Recommendations about fair recruitment, protection of wages and protection of migrant workers.

[61] The Commission accepted that if leave was granted its submissions would be filed in advance of the hearing.

[62] NZCTU sought leave to intervene because the litigation involved issues relating to minimum entitlements of importance to unions and employers.

[63] The defendant opposed both applications to intervene. The defendant took the position that claims for breaches of the Wages Protection Act, or impacts of deductions under the Minimum Wage Act, involve settled law. Mr Bates submitted that the Court would not therefore benefit from submissions by either the Human Rights Commission or NZCTU. The case simply involved ascertaining what was and what was not approved by INZ. He submitted that there are no wider human rights issues and the proceedings are not an occasion to put the RSE scheme itself under scrutiny.

Analysis

[64] Applications to intervene are dealt with under cl 2(2) of sch 3 to the Act. The test to apply is whether, in the opinion of the Court, the applicant is "justly entitled to be heard". The test is a broad one to be determined on the particular circumstances of the case.[9]

[65] The starting point is that the intervener must establish a sound basis for the Court to depart from the privity of litigation especially where the application is opposed.[10] The principles to apply are well established:

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9 See *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 24; *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 101.

10 *Seales v Attorney General*, above n 8, at [43].

(a) The power is broad in nature but should be exercised with restraint to avoid the risk of expanding issues, elongating hearings and increasing the costs of litigation.[11]

(b) In a case involving issues of general and wide importance the Court may grant leave when satisfied that it will be assisted by submissions by the intervener.[12]

(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.[13]

[66] I will deal with the applications together. There is considerable force in Mr Bates' submission that interpreting and applying the Minimum Wage Act and Wages Protection Act may not require any further assistance beyond that provided by counsel for the parties. In a sense this proceeding is a mundane one where what is at stake is an assessment of whether breaches have occurred and, if so, whether the defendant is indebted to the plaintiffs or penalties should be imposed. On such an analysis it might be difficult to see why intervention from NZCTU or the Human Rights Commission could be justified.

[67] In this case, however, I accept the submissions by Mr Hancock and Mr Cranney that there are broader issues at play both about the RSE scheme and the interpretation and application of the Minimum Wage Act and Wages Protection Act that have potentially wider implications beyond the interests of the parties.

[68] I note, in particular, that at an early stage in this proceeding it was the defendant who contemplated that the issues raised may be sufficiently significant to warrant the prospect of inviting intervention.

[69] The applications to intervene are granted subject to the following conditions proposed by the interveners:

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11 *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at [11].
12 *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 436 (CA).
13 *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 591 (CA) at 592.

(a) The interveners may appear and make submissions at the hearing.

(b) They are not to produce evidence or to cross-examine.

[70] There is no order as to costs.

K G Smith
Judge

Judgment signed at 12 pm on 21 June 2023