

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2024] NZEmpC 49
EMPC 234/2023**

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 ATTAPORN CHANTAMA
Plaintiff

AND MCKERCHAR LAMB LIMITED
Defendant

Hearing: On the papers

Appearances: P J Brown, counsel for plaintiff
D McKerchar, agent for the defendant

Judgment: 22 March 2024

**INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Application to join a party)**

Background

[1] In May 2018, Attaporn Chantama commenced employment with McKerchar Lamb Ltd (MLL) as a chef. There was a dispute over the term of the employment relationship, whether Mr Chantama resigned or was constructively dismissed, whether Mr Chantama is entitled to wage arrears and holiday pay, and whether penalties should be awarded.

[2] On 6 April 2023, the Employment Relations Authority issued a determination awarding Mr Chantama \$3,790.60 (gross) in wage arrears.¹ The remainder of Mr Chantama's claims against MLL were not successful.²

[3] Mr Chantama has challenged the Authority's determination on a non-de novo basis. He is challenging the Authority's calculation of the wages he is owed, including whether inappropriate deductions were made. He is also challenging the Authority's finding that there was no basis for his unjustifiable dismissal claim.³

[4] MLL has informed Mr Chantama that it is unable to pay the amounts awarded by the Authority in its determination.

[5] On 17 October 2023, Mr Chantama applied to join David McKerchar, the sole director of the MLL, in his personal capacity as a defendant to these proceedings. The purpose of joining Mr McKerchar is to pursue him for a claim under ss 142W and 142Y of the Employment Relations Act 2000 (the Act) in relation to the elements of Mr Chantama's claim that relate to unpaid wages. Mr Chantama claims that Mr McKerchar is a person directly involved in the breach of employment standards by MLL pursuant to s 142W, and he should be liable for any default in the payment of amounts awarded to him by the Authority pursuant to s 142Y. The ss 142W and 142Y claims were not put before the Authority for determination.

[6] In summary, the key grounds for Mr McKerchar's opposition to the application for joinder, include that:

- (a) the Authority has already considered the matter and made a determination regarding Mr Chantama's claims against MLL, including as to liability;
- (b) Mr McKerchar has incurred significant losses personally due to Mr Chantama's conduct; and

¹ *Chantama v McKerchar Lamb Ltd* [2023] NZERA 169 (Member van Keulen) at [33] and [44].

² While the Authority found that MLL failed to keep wage and time records as required by s 130 of the Employment Relations Act 2000, Mr Chantama's claim for a penalty against MLL failed because it was not commenced in time.

³ *Chantama*, above n 1, at [34] and [45].

- (c) Mr McKerchar did not believe it was possible for him to be pursued in his personal capacity by Mr Chantama.

[7] While I acknowledge that Mr McKerchar strongly opposes the application for joinder, I do not consider his arguments are relevant to the application before the Court.

Legal principles

[8] The parties agreed that the application could be dealt with on the papers. Against that background, I now turn to the application before the Court.

[9] Section 221 of the Act gives the Court power to join a party to proceedings in order to enable the Court to more effectually dispose of any matter before it according to the substantial merits and equities of the case.⁴ The Court has a wide discretion to join a party pursuant to s 221 and the power may be exercised at any stage of the proceeding.

[10] 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.⁵ Rule 4.56 deals with joinder of defendants.

[11] While the two provisions contain different criteria, the authorities relating to r 4.56 and the general principles developed in the High Court may provide useful guidance to inform the exercise of the discretion under s 221.⁶

[12] The Court of Appeal has observed that the approach to applications for joinder under r 4.56 is liberal and that it imposes a fairly low threshold.⁷ As has been noted

⁴ Employment Relations Act 2000, s 221(a).

⁵ *McCook v Chief Executive of the Inland Revenue Department (No 1)* [2019] NZEmpC 189 at [10] citing *Lorigan v Infinity Automotive Ltd (No 3)* [2018] NZEmpC 88; *Zara's Turkish Ltd v Kocatürk* [2019] NZEmpC 139; and *Sfizio Ltd v Freeborn* [2019] NZEmpC 143.

⁶ See *Carrigan v Attorney-General* [2020] NZEmpC 147 at [4]–[9]; and *E Tū Inc v Raiser Operations BV* [2021] NZEmpC 219 at [6]–[9]. Compare *McCook*, above n 5; and *Zara's Turkish Ltd*, above n 5, at [14]: where the Court said the cases decided under the High Court Rules 2016 “will be relevant in informing the exercise of the discretion under s 221” [emphasis added].

⁷ *Newhaven Waldorf Management Ltd v Allen* [2015] NZCA 204, [2015] NZAR 1173 at [44] and [46]; and *Beattie v Premier Events Group Ltd* [2012] NZCA 257 at [24].

by this Court, the threshold imposed by s 221 is lower than the r 4.56 threshold.⁸ The general rule is that it is for the plaintiff to decide who they will sue and for any person named as a defendant to take strike-out proceedings if they consider there is no arguable cause of action.⁹ Plaintiffs seeking joinder of additional defendants are in the most favoured position. Once jurisdiction is established, joinder is usual.¹⁰

Analysis

[13] The question in this case is whether Mr McKerchar's presence may enable the Court to more effectually dispose of the matter before it according to the substantial merits and equities of the case.

[14] Mr Chantama filed an affidavit in support of his application. In his affidavit, Mr Chantama says that he and Mr McKerchar worked closely together during his employment; setting up and running MLL's restaurant business in which he was to work as a chef, that Mr McKerchar had the final say on all decisions and that Mr McKerchar paid MLL's bills.

[15] The notice of opposition and submissions from Mr McKerchar contain a number of assertions about Mr Chantama, which are unsupported and irrelevant to the application before the Court. None of these assertions appear to contradict Mr Chantama's evidence noted above. Mr McKerchar also confirms that MLL is unable to pay the amounts awarded to Mr Chantama in the Authority and he repeatedly refers to himself as the defendant in the proceedings. In his submissions and evidence he refers to his personal actions and knowledge as being indistinguishable from that of MLL.¹¹

[16] At this early stage, the untested evidence before the Court establishes that Mr McKerchar holds information relating to Mr Chantama's employment and

⁸ *Carrigan*, above n 6, at [8]: "What the Rules, however, do is make clear that a higher threshold applies, namely that parties to a proceeding must be limited, as far as practicable, to persons whose presence before the Court is 'necessary' to justly determine the issues arising, and persons who ought to be bound by any judgment given".

⁹ *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 (CA) at 138.

¹⁰ *NZI Insurance Ltd v Hinton Hill & Coles Ltd* [Joinder] (1996) 9 PRNZ 615 (HC) at 619.

¹¹ There were multiple comments to this effect in his affidavit filed in support of his notice of opposition to join a party to the proceedings, sworn 15 November 2023.

termination, the wages that were paid to him and any deductions made. Further, Mr McKerchar has first-hand information over his level of involvement (if any) in the alleged breach of employment standards. Importantly, Mr McKerchar will be directly affected by any order that may be made in the proceedings that relate to the ss 142W and 142Y claims.¹²

[17] In *Zara's Turkish Ltd v Kocatürk*, the Court considered the failure to have a dispute determined by the Authority was a significant hurdle to the plaintiff's application of joinder.¹³ This case can be distinguished. While ss 142W and 142Y were not raised in the Authority, it did hear and determine Mr Chantama's claim that there was an alleged default in the payment of wages or other monies, in breach of employment standards. The liability arising from the Authority's findings on this matter is the basis for the ss 142W and 142Y claims against Mr McKerchar. Specifically, if there is a default in the payment of wages or other monies awarded against MLL, ss 142W and 142Y can be used to determine whether Mr McKerchar is a person involved in the breach and liable for any default in the payment of wages or other money by MLL. Allowing Mr Chantama to raise such claims is consistent with the object of pt 9A of the Act which is to promote the more effective enforcement of employment standards¹⁴ and consistent with the broad and untechnical language of s 221 of the Act. If an order for liability against Mr McKerchar is deemed appropriate, it is within the jurisdiction of the Court to join him as a party for the purpose of making such an order.¹⁵

[18] In these circumstances, I am satisfied that Mr McKerchar's presence as a party would assist the Court to more effectually dispose of the matters before it, including to enable Mr Chantama's claim for wage arrears to be heard and resolved. I accordingly order that Mr McKerchar be joined as the second defendant to these proceedings.

¹² See *Auckland Regional Services Trust*, above n 9, at 138: "the general test is whether the proposed party will be directly affected by any order which may be made in the proceedings".

¹³ *Zara's Turkish Ltd*, above n 5, at [21]–[30].

¹⁴ Employment Relations Act 2000, s 142A.

¹⁵ See *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452 at [12].

Result

[19] I grant the application to join Mr McKerchar as a defendant, the criteria of s 221 of the Act being made out.

[20] I have considered the issue of whether Mr Chantama's claim needs to be repleaded. As previously mentioned, Mr Chantama's claims under ss 142W and 142Y were not put before the Authority for determination. If the challenge were to continue on a non-de novo basis the Court would not have jurisdiction to determine those matters.¹⁶ Adding them to the matters now before the Court for hearing effectively turns this non-de novo challenge into a challenge by hearing de novo;¹⁷ and the Court has the power to make directions to this effect.¹⁸ If Mr Chantama wishes to proceed with those claims, he is granted leave to amend his statement of claim accordingly and the Court will permit the challenge to proceed on a de novo basis.

[21] Mr Chantama will have until 4 pm on 5 April 2024 to file and serve any amended statement of claim. Any statement of defence to an amended statement of claim in response is to be filed and served by the defendants by 4 pm on 6 May 2024.

[22] Costs are reserved.

M S King
Judge

Judgment signed at 10 am on 22 March 2024

¹⁶ *Bourne v Real Journeys Ltd* [2011] NZEmpC 120, [2011] ERNZ 375 at [15] citing *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC).

¹⁷ See *Kidd v Beaumont* [2016] NZEmpC 158, [2016] ERNZ 257 at [11]–[16].

¹⁸ Employment Relations Act 2000, ss 182(3)(b), 189(1) and 221(d) as discussed in *Kidd v Beaumont*, above n 18, at [11]–[12]; and *Medina Trading Ltd v Hunter* [2023] NZEmpC 224 at [41].