

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

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

**[2024] NZEmpC 148
EMPC 168/2023**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN VICTORIA JEON (AKA JONG AI PARK)
AS TRUSTEE OF THE JESUS AROMA
CHURCH TRUST
Plaintiff

AND LABOUR INSPECTOR
Defendant

Hearing: 19 April 2024
(Heard at Christchurch via Audio Visual Link and further
submissions on 26 June 2024 and 3 July 2024)

Appearances: Plaintiff in person on 19 April 2024, and otherwise by counsel,
Seungmin Kang
G La Hood, counsel for defendant

Judgment: 9 August 2024

JUDGMENT ON A PRELIMINARY ISSUE OF JUDGE K G SMITH

[1] In April 2023, the Employment Relations Authority dealt with a claim by a Labour Inspector against the trustees of Jesus Aroma Church Trust.¹

[2] The Authority investigated the Inspector's claims that the trust employed two instructors in a Dunedin taekwondo academy. The claims included alleged breaches

¹ *A Labour Inspector v Victoria Jeon (aka Jong Ai Park), Joseph Jeon and Misun Leem, as trustees of Jesus Aroma Church Trust* [2023] NZERA 175 (Member Cheyne).

of the Minimum Wage Act 1983, the Holidays Act 2003 and the Wages Protection Act 1983.

[3] The Authority identified a difficulty with the Inspector's claim, because it began against the Jesus Aroma Church Trust.² The name of the respondent was then amended to "Victoria Jeon (aka Jeon Ai Park), Joseph Jeon and Misun Leem, as trustees of Jesus Aroma Church Trust".³

[4] The Inspector's claims were successful. Orders were made requiring the trustees to pay wage arrears, holiday pay and interest.⁴ Both instructors were found to have paid a premium to be employed and the Authority ordered the trustees to refund those payments plus interest.⁵ The trustees were ordered to pay penalties.⁶

The preliminary issue

[5] Victoria Jeon challenged the Authority's determination and sought a full rehearing. The other respondents named in the determination as trustees, Mr Jeon and Ms Leem, did not challenge it. One of the grounds of relief pleaded in Ms Jeon's amended statement of claim has given rise to a preliminary issue, namely whether she can seek an order that Mr Jeon and Ms Leem be "removed from the Authority Determination(s) and as parties to this proceeding". Mr Jeon and Ms Leem are Ms Jeon's adult children.

[6] The nature of the preliminary issue was described in a joint memorandum of counsel as being:

Whether Misun Leem and Joseph Jeon as Trustees of the Jesus Aroma Church Trust should be removed as parties to these proceedings.

[7] Despite the description of the preliminary issue in the memorandum, it transpired that what Ms Jeon wants to achieve is to relieve herself and her children of

² At [3].

³ At [4].

⁴ At [200] and [201].

⁵ At [200] and [204].

⁶ At [206].

liability but on slightly different grounds. She seeks to establish that there was no employment relationship between herself and the instructors and, consequently, that the financial awards ought not to have been made. Her challenge as it purports to affect Mr Jeon and Ms Leem, is that they were not trustees. If that is correct it follows they would not be liable as claimed by the Inspector.

[8] The preliminary issue was heard using evidence by affidavit and submissions. Ms Jeon swore an affidavit dated 20 September 2023, explaining that Mr Jeon and Ms Leem did not sign the trust deed or any other trust documents. She went so far as to say that they were never shown trust documents and that their informed consent to completing the deed was not sought. She also deposed to her children being unaware of, and not involved in, the trust's affairs. In other words, Mr Jeon and Ms Leem were completely in the dark about the trust and could not be liable for the trust's debts because they were not trustees.

[9] However, Ms Jeon acknowledged that her September 2023 affidavit was a clarification or correction of the one she swore on 2 June 2023 in which she deposed to asking her daughter to be a trustee.

[10] Ms Leem also swore an affidavit. Largely she supported Ms Jeon's September 2023 affidavit, stating that she did not sign the trust deed. Ms Leem further stated her preparedness to be added to the proceeding as a party if that might assist in resolving the preliminary issue but no formal application was made to join her to it. She did not purport to ratify the challenge or in some other way express her approval for it. Rather, Ms Leem's preparedness to be involved was to support her mother's revised position about the identity of the trustees. Mr Jeon did not provide any evidence.

[11] The Labour Inspector responded by relying on the trust deed dated 12 June 2015 purportedly signed by Ms Jeon and Ms Leem, with the signatures being witnessed by a Deputy Registrar of the District Court at Dunedin. For completeness, the trust deed did not provide for Mr Jeon's signature, but he was shown in the

Charities Register maintained by the Department of Internal Affairs as a trustee having been appointed on 7 October 2015.⁷

[12] Before considering the submissions it is necessary to briefly describe changes in representation that occurred while the preliminary issue was being considered. When the challenge was filed Ms Jeon was represented by Mr Kang. After Mr Kang filed submissions Ms Jeon elected to act for herself which she did at the 19 April 2024 hearing. During the hearing she reconsidered the decision to act for herself and sought an adjournment so she could be represented by counsel. That request was granted. Ms Jeon then appointed another lawyer who acted for her at a subsequent directions conference before Mr Kang was reappointed. The plaintiff's submissions, discussed below, were prepared by Mr Kang and filed in anticipation of the 19 April 2024 hearing.

Plaintiff's submissions

[13] The submissions for Ms Jeon can be summarised as follows:

- (a) Under s 179(1) of the Employment Relations Act 2000 (the Act), a party dissatisfied with a written determination may elect to have the matter heard by the Court.
- (b) The plain meaning of s 179(1), and the equity and good conscience jurisdiction in s 189 of the Act, create a low threshold to establish standing.
- (c) There is no other section of the Act limiting her standing or what might be advanced in a challenge seeking a full rehearing.
- (d) Her interest in the preliminary issue is sufficient to have standing because:

⁷ Jesus Aroma Church Trust was deregistered as a charity on 23 September 2022 pursuant to s 32(1)(b) of the Charities Act 2005: "Charities Register" Charities Services | Ngā Ratonga Kaupapa Atawhai <www.register.charities.govt.nz>.

- (i) identifying the employer was one of the matters before the Authority so the subject can be addressed again in this challenge; and
 - (ii) she was a party to the matter before the Authority and is entitled to raise this subject in the challenge.
- (e) There was no proper basis for the Authority's conclusion that Mr Jeon and Ms Leem were involved in the alleged employment of the instructors that prompted the Inspector's claims.
 - (f) The purported appointment of Mr Jeon and Ms Leem as trustees was invalid.
 - (g) Granting the claimed relief will not unfairly prejudice the instructors on whose behalf the Inspector acted.
 - (h) The matter is part of an employment relationship problem where the Court has exclusive jurisdiction under s 187(1) of the Act.

[14] There is some overlap in these submissions, but the general thrust of them was that the Court could revisit the determination's conclusions including any dispute about the identity of the trustees.

Defendant's submissions

[15] Mr La Hood's submissions in summary were:

- (a) The trustees are personally jointly and severally liable.
- (b) Ms Jeon does not have standing to bring claims on behalf of the other trustees, who must challenge the determination if they dispute liability.
- (c) The Court has no jurisdiction to address any issues about the validity of the trust which are matters for the High Court.

- (d) The equity and good conscience jurisdiction does not assist.
- (e) The Authority found that the trustees were employers and those findings were made by applying orthodox legal principles. It is irrelevant that some trustees may have been passive in administering the trust.

[16] While Mr La Hood mentioned the inconsistency between Ms Jeon's two affidavits, he did not seek to rely on that in support of the Inspector's position on this preliminary issue.

[17] As a result of considering these submissions the Court raised a further issue with the parties. It was whether the Trusts Act 2019 required the trustees to act unanimously and, if it did, the consequences.

[18] In Mr La Hood's further submissions he argued that s 38 of the Trusts Act required unanimity where there is more than one trustee. That unanimity was absent in this case. He pointed out that the trust deed did not derogate from or alter that statutory duty in any way; there is no provision in the deed allowing one trustee to take action on behalf of all of them. That meant, he submitted, Ms Jeon could not purport to act as she had. Reliance was placed on *Synergy Enterprises Ltd v Memelink*.⁸

[19] Mr Kang's response was that unanimity was not relevant for two reasons. The first reason was a little elusive, expressed as only being relevant when a trustee's decision affects the trust generally as distinct from the individual liability of a trustee. The second reason was that unanimity only becomes an issue if other trustees raise the subject. His point was that there was no suggestion that Mr Jeon and Ms Leem opposed the challenge. The *Synergy* case was about costs. Mr Kang's reply about that case was that, despite questioning the alleged trustee's authority to act, the Court still made a costs decision. Presumably this submission gives rise to a proposition that the case created no impediment to the relief claimed by Ms Jeon.

⁸ *Synergy Enterprises Ltd v Memelink* [2020] NZHC 1615.

[20] Those submissions were part of Mr Kang's broader argument that the Court's equity and good conscience jurisdiction should assist. It was also said that there was a good reason for Ms Jeon to begin the proceeding on her own, such a step avoided Mr Jeon and Ms Leem being seen to have acquiesced to the argument that they were trustees.

Analysis

[21] What began as a discrete point about one aspect of the relief claimed by the plaintiff has evolved into a wider issue about the sustainability of the challenge.

[22] The parties agree that a trust existed but disagree about who the trustees are and the nature and extent of any liability they may have.

[23] The relevant issues are:

- (a) Who are the trustees?
- (b) If there is more than one trustee have they acted unanimously?
- (c) If the answer to (b) is no, does the trust deed allow a trustee to act independently of any other trustees?
- (d) If the answers to (b) and (c) are no, is a majority decision able to be made by the trustees?

Who are the trustees?

[24] The preliminary issue turns on the identity of the trustees. The Labour Inspector says they are identifiable through the trust deed and information available to the Authority. Conversely, Ms Jeon and Ms Leem deny that the respondents identified by the Authority are the trustees.

[25] Before considering how to deal with this disagreement it is instructive to review the determination and the pleadings.

[26] In the Authority, the Inspector set out to establish that employment relationships existed and that there were, in relation to them, certain breaches. Implicit in the Inspector's claims must have been proving who the employer was (or employers were) which necessarily involves identifying the trustee or trustees. That information appears to have been provided to the Authority by counsel for (at least) Ms Jeon because the determination records the respondent's name being amended following confirmation from counsel, Mr Kang.⁹

[27] As mentioned earlier, Ms Jeon elected to challenge the whole of the determination. The amended statement of claim provides particulars of the claim in four introductory paragraphs placing in issue how the trust was created and the identity of the trustees. Ms Jeon pleaded that she signed the trust deed on her daughter's behalf without authority or informed consent and that she added her son as a trustee without his consent. The pleading continues on to say that, when the name of the trust was changed from the one used when it was established, she signed the required authorisation on behalf of her daughter and son again without their authority or informed consent.

[28] This part of the pleadings is, therefore, a claim that Ms Jeon was the sole trustee. If that contention is accepted the Court is invited to find that her children could not have employed the instructors.

[29] It is open on the pleadings to conclude that Ms Jeon does not accept what appears to have been a concession in the Authority and is, effectively, requiring the Inspector to prove the identity of the employer (or employers). There is, of course, a complication in taking that stance given how the trustees were identified to the Authority, but that is likely to be a matter going to proof and is not dispositive of this preliminary issue.

[30] The Inspector's response assumes the correct legal position is clear from the trust deed and determination so that the claimed remedy is unavailable. The difficulty with that response, however, is that the deed is being called into question and the

⁹ *A Labour Inspector*, above n 1, at [4].

conclusions in the determination are disputed. That means to succeed against the three people the Inspector considers to be trustees, and therefore employers, the evidence now given by Ms Jeon and Ms Leem will have to be overcome. That cannot be achieved without being able to test it.

[31] That analysis means I cannot accept Mr La Hood's submission that the issue is a dispute between trustees, or is over the constitution or administration of the trust which matters must be dealt with in the High Court. The election to challenge the whole determination means this case is an example of the Inspector needing to prove the claim again and, in doing so, to identify the employer (or employers).

[32] It follows that the only way the preliminary issue can be resolved is in a hearing.

The remaining issues

[33] For completeness, and because detailed submissions were made, a brief comment is necessary about the remaining issues. They can be dealt with together. There is no doubt that in the absence of a power to the contrary in a trust deed, trustees must act unanimously. Section 38 of the Trusts Act provides:

Duty to act unanimously

If there is more than 1 trustee, the trustees must act unanimously.

[34] One leading commentary describes the duty to act unanimously as extending to issuing proceedings.¹⁰ In *Nichols v Racey Constructions Pty Ltd*, Brown J referred to decisions of trustees needing to be unanimous, in the context of a dispute between trustees over whether the litigation ought to have been started.¹¹ In that case, the Court examined the trust deed and ascertained that it required decisions of the trustees to be unanimous. The Court held that, in the absence of evidence that both trustees

¹⁰ Greg Kelly and Chris Kelly "Chapter 20 Trustees' Duties and Obligations under the Trusts Act 2019" in *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) 497 at 539.

¹¹ *Nichols v Racey Constructions Pty Ltd* [2014] NZHC 2995 at [10]. While decided prior to the Trusts Act 2019, the unanimity rule which appears in s 38 is a statutory statement of existing principle under common law.

consented, the proceeding was flawed. Similar comments were made in *Synergy* where the issue was whether the person purporting to act as a trustee and claiming costs had the capacity to act.¹²

[35] Exceptions to the duty to act unanimously arises in two situations. The first is where the trust deed authorises such an action, which does not appear to be the case with this deed. The second is in relation to trusts which have a charitable purpose which may also have no bearing in this case. However, those subjects do not need to be taken any further at this stage but may need to be reconsidered later.

How to resolve the preliminary issue?

[36] There appear to be only a limited number of options. The first option is that there may now be agreement about the identity of the trustee or trustees, but that seems unlikely. The second option is that Mr Jeon and Ms Leem ratify in some way the decision taken to challenge the determination, but that seems equally unlikely.

[37] The third option is that the preliminary issue is set down for a hearing. That gives rise to a supplementary consideration about the possible participation of Mr Jeon and Ms Leem, who must be entitled to be heard if their rights and interests might be affected by the outcome.¹³

[38] To consider a constructive way to proceed, and to take into account any other option the parties want to put forward, a telephone conference is to be arranged with counsel.

[39] The preliminary issue is adjourned.

K G Smith
Judge

Judgment signed at 2.20 pm on 9 August 2024

¹² *Synergy*, above n 8, at [45].

¹³ See Employment Relations Act 2000, sch 3 cl 2(2).