

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

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

**[2024] NZEmpC 88
EMPC 379/2021**

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

AND IN THE MATTER OF an application to join a third party

AND IN THE MATTER OF an application for costs

BETWEEN HENDERSON TRAVELS LIMITED (IN
LIQUIDATION)
Plaintiff

AND RAJWINDER KAUR
Defendant

Hearing: On the papers

Appearances: No appearance for plaintiff
J M Douglas, counsel for defendant
No appearance for Flight Experts NZ Ltd

Judgment: 24 May 2024

**INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE K G SMITH
(Application to join Flight Experts NZ Ltd to the proceeding for the purposes
of costs)**

[1] On 26 October 2023 Henderson Travels Ltd's challenge to a determination of the Employment Relations Authority was dismissed.¹

[2] The Authority had ordered Henderson Travels to pay Rajwinder Kaur unpaid wages, for working on a public holiday, holiday pay, and to refund a premium she paid

¹ *Henderson Travels Ltd v Kaur* [2023] NZEmpC 181.

in contravention of the Wages Protection Act 1983.² It also awarded her compensation under ss 123(1)(c)(i) and 123(1)(b) of the Employment Relations Act 2000 (the Act) and imposed a penalty on the company of \$12,000. Of that penalty \$9,000 was directed to be paid to Ms Kaur.³ Henderson Travels' unsuccessful challenge resulted in an uplift in some of the compensation the Authority had ordered it to pay.⁴

[3] Having been successful Ms Kaur was entitled to an award of costs and she is now seeking to have them fixed and made payable by Flight Experts NZ Ltd.

Henderson Travels is placed in liquidation

[4] Henderson Travels was placed in liquidation by special resolution of shareholders on 8 November 2023.⁵ The liquidators' first report advised that the company ceased trading as at 30 June 2023.

[5] A statement of the company's assets and liabilities made by the liquidators showed it has no property, vehicles or equipment, debtors to collect or cash in the bank. Its creditors were listed as the Inland Revenue Department, a bank and Ms Kaur. Its liabilities were described as unknown even though the judgment establishing the company's indebtedness to Ms Kaur was issued several days before the shareholders' resolution was passed.

[6] In the balance of the liquidators' report they commented on the circumstances of their appointment noting an inquiry by Vyom Sikri on 31 October 2023, followed by consultation on 6 November 2023 and the documents of appointment being signed on 8 November 2023.

² *Kaur v Henderson Travels Ltd* [2021] NZERA 418 (Member van Keulen).

³ At [85]–[89].

⁴ *Henderson Travels Ltd v Kaur*, above n 1, at [104].

⁵ Companies Act 1993, s 241(2)(a).

The application to join Flight Experts

[7] Against that background Ms Kaur has applied to join to this proceeding Flight Experts NZ Ltd for the purposes of making it liable for costs. The grounds of the application can be summarised as:

- (a) Ms Kaur was successful and entitled to costs.
- (b) In an interlocutory judgment, dated 15 July 2022, an indication was given that Henderson Travels' potential exposure to costs might be dealt with by joining Flight Experts to the proceeding.⁶
- (c) Flight Experts is the "sister" company of Henderson Travels and has funded this litigation.
- (d) Flight Experts continues to trade and operates the business that was previously run by Henderson Travels.
- (e) Henderson Travels is unlikely to be able to satisfy the judgment or pay any costs.
- (f) It is just in all the circumstances that Flight Experts be joined.

[8] Ms Kaur provided a supporting affidavit. She referred to the Authority's cost award in her favour remaining unpaid, as is the balance of the Court's judgment sum despite a demand for payment having been made.⁷ She said that Flight Experts continues to operate the business that was formerly run by Henderson Travels and social media posts are being made for Flight Experts by an employee who was previously employed by Henderson Travels.

⁶ *Henderson Travels Ltd v Kaur (No 2)* [2022] NZEmpC 126 at [33].

⁷ The sum held because of the previously ordered stay was disbursed to Ms Kaur in accordance with *Henderson Travels Ltd v Kaur*, above n 1, at [106].

[9] The application was served on the liquidators of Henderson Travels and on Flight Experts. No steps were taken by either of them in response.

[10] Ms Douglas' submissions began with s 221 of the Act providing a broad discretion enabling the Court to join parties to a proceeding to dispose of any matter more effectually before it. *Nisha v LSG Sky Chefs New Zealand Ltd (No 22)* was relied on as encapsulating the principles to apply.⁸ In turn, *Nisha* applied *Kidd v Equity Realty (1995) Ltd*, and considered *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* and *Goodwood Recoveries Ltd v Breen*.⁹

[11] Ms Douglas accepted that, to succeed in this application, Ms Kaur had to show something more than that Flight Experts funded the litigation. She submitted that the overall justice of the case supported the application because of the relationship between the two companies, the actions of representatives of Flight Experts, and the indication that Flight Experts might be joined to the proceeding given in the interlocutory judgment of 15 July 2022.¹⁰

[12] To satisfy the test in *Kidd*, Ms Douglas:

- (a) referred to the adverse findings about Mr and Mrs Sikri in the judgment;
- (b) pointed to obfuscation over which legal entity was continuing the business; and
- (c) commented that this challenge was brought by Henderson Travels with the knowledge that it was not in a position to meet the judgment debt but, if it was unsuccessful, liability for costs could be avoided by placing the company into liquidation.

⁸ *Nisha v LSG Sky Chefs New Zealand Ltd (No 22)* [2016] NZEmpC 166, [2016] ERNZ 663; leave to appeal this judgment was declined in *Hay v LSG Sky Chefs New Zealand Ltd* [2017] NZCA 153.

⁹ *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145; and *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414, [2006] 1 WLR 2723.

¹⁰ *Henderson Travels Ltd v Kaur (No 2)*, above n 6.

The legal principles

[13] The starting point is s 221(a) of the Act, which confers a broad discretion to join parties at any stage of the proceedings.

[14] The relevant principles were stated by the Privy Council in *Dymocks*, in the subsequent decision by the English Court of Appeal in *Goodwood Recoveries* and by the Court of Appeal in *Kidd*.

[15] In *Dymocks*, the Privy Council held that making costs orders against non-parties is exceptional, but in this context that means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.¹¹ The ultimate question is whether in all the circumstances it is just to make the orders sought.

[16] *Kidd* was an appeal from this Court. In this Court, a defendant was joined to the proceeding under s 221 of the Act for the purpose of considering a costs order being made against him. By the time costs came to be fixed the defendant company was insolvent. The defendant was joined because he was the guiding mind of the company and was responsible for the litigation strategy it pursued.¹²

[17] The Court of Appeal held that the broad and untechnical language of s 221 provides jurisdiction to join a non-party for the purpose of awarding costs.¹³ It held that factors relied on to join the defendant were routine and did not, in themselves, warrant an award of costs being made against him personally.¹⁴ The Court went on to hold that:¹⁵

...Something more is required. In the present context, the requirement for “something more” might be satisfied if:

- (a) there was any relevant impropriety on the part of Mr Kidd; or
if

¹¹ *Dymocks*, above n 9, at [25].

¹² *Orakei Group (2007) Ltd v Kapadia* EMC Auckland AC 37/08, 23 September 2008. See too *Kidd*, above n 9, at [23].

¹³ *Kidd*, above n 9, at [12]-[13].

¹⁴ At [15].

¹⁵ At [16] footnotes omitted.

- (b) Mr Kidd was relevantly acting not in the interests of [the company] but rather his own interests and was thus the real party.

[18] As an example of “something more” constituting impropriety, the Court of Appeal referred to *Goodwood Recoveries*. Exceptional circumstances existed in that case because the individual behind the company caused it to issue proceedings to recover money under a guarantee that he knew was not owed, and because of the improper or dishonest way in which he acted throughout the litigation. It became apparent that the litigation was for his own benefit.¹⁶

[19] Two other examples were given by the Court of Appeal about what might fall into the “something more” part of this test. The first of them was an observation that a Court might be easily persuaded to join directors to the litigation where a company litigant was insolvent at the time of the litigation. In that situation, the Court might be satisfied the litigation was for the director’s own purposes rather than in the company’s interests. The other example referred to as falling within the “something more” approach was where the Court was satisfied that the litigation was promoted to take advantage of a company’s insolvency by adopting, either expressly or by implication, a “heads I win, tails you lose” approach. In such circumstances, where the claim was speculative and/or devoid of merit, the Court may well conclude that such an approach was taken by the directors concerned.¹⁷

Analysis

[20] Ms Douglas was correct to observe that significant findings of credibility adverse to Mr Sikri and his wife, Preeti Sikri, were made in the judgment. Mr Sikri and Mrs Sikri demanded Ms Kaur pay back some of the wages she earned as a manager in one of Henderson Travels’ offices. Mrs Sikri told Ms Kaur how much she was to pay from her income to Henderson Travels and Mr Sikri attempted to extract payment. Those findings were relevant to the failure of the company’s challenge but do not, by themselves, take this application very far.

¹⁶ *Goodwood Recoveries*, above n 9, at [70] and [72].

¹⁷ *Kidd*, above n 9, at [20].

[21] Ms Douglas' submissions extended, however, to what was said and done on behalf of Henderson Travels in two interlocutory applications in which Mr Sikri took a prominent role. He was the managing director of Henderson Travels at the time Ms Kaur was employed and, in the lead up to the Authority's investigation, his appointment to that post lasted from 2017 until November 2021.

[22] The first interlocutory application was by Henderson Travels for a stay of execution of the Authority's determination. The application included a statement that the company was not in a financial position to pay the whole amount of the determination and that, if Ms Kaur started enforcement action, the challenge would become "infructuous"; meaning unproductive or fruitless. The company proposed that, if a stay was granted, half the Authority's determination could be paid into the Court to be held on trust. At that time the Authority had ordered the company to pay Ms Kaur just over \$64,000.

[23] Mr Sikri swore an affidavit supporting the application. He deposed to Henderson Travels' lack of capacity to pay and the consequences if enforcement action was taken. To support that evidence he outlined the company's financial situation but only in broad and general terms, describing the travel industry being badly affected because of COVID-19-related travel restrictions. He acknowledged, candidly, that the company was struggling to do business in New Zealand because of the travel ban saying it was suffering "huge losses" as most of its New Zealand-based employees had left.

[24] Mr Sikri went on to say that he was a director in two other companies, Flight Experts NZ Ltd and Flight n Trips NZ Ltd, and that both of them carried on business. His evidence was that the income from those companies could pay off Henderson Travels' liability "in case of any contingency". He did not explain the contingency contemplated by that statement but, in the context of the application, he could only have been referring to Henderson Travels being unsuccessful in its challenge.

[25] Mr Sikri bolstered his reliance on the financial resources of Flight Experts by exhibiting to his affidavit bank statements from that company showing positive cashflow and credit balances.

[26] Mrs Sikri, who was Henderson Travels' only director at the time of the hearing, also swore an affidavit to support the application for a stay. She made almost exactly the same statements on behalf of the company as Mr Sikri did, confirming it was not able to pay the whole amount of the determination and expressing concern about the future of the challenge if enforcement action was taken. She went on to say that the company had been operating in New Zealand for almost eight years and had a plan to revive the business after the border closure caused by the pandemic was lifted.

[27] Henderson Travels' application for a stay was granted, but the proposal to pay only half the amount ordered by the Authority was not accepted. Instead, the stay was conditional on the whole amount being paid to the Registrar of this Court but in stages.¹⁸ The condition was satisfied and the stay became effective.

[28] Henderson Travels' financial position featured in a second interlocutory judgment when both parties sought security for costs.¹⁹ Not surprisingly, Ms Kaur's application was made because of Mr and Mrs Sikri's financial disclosures. She acknowledged what was said by them, about the company's financial difficulties and that it was supported by other businesses. However, she was concerned about Henderson Travels becoming insolvent and being forced to participate in litigation that would be expensive for her and that she considered lacked merit.

[29] Both applications were unsuccessful.²⁰

[30] Mr Sikri's affidavit in response to Ms Kaur's application for security for costs is relevant to this application. In it he rejected Ms Kaur's concerns about the financial viability of Henderson Travels. In doing so he continued to refer to Flight Experts, which he described as "a sister concern" of Henderson Travels but did not explain

¹⁸ *Henderson Travels Ltd v Kaur* [2022] NZEmpC 34 at [36].

¹⁹ *Henderson Travels Ltd v Kaur (No 2)*, above n 6.

²⁰ At [34].

what was meant by that comment. Despite the lack of an explanation for that description of the relationship between the companies, it was obviously meant to underscore Henderson Travels' ability to call on financial assistance from Flight Experts if the need arose; otherwise, there was no need to draw attention to any link or connection that might have existed between them.

[31] In the context of saying Henderson Travels was in a position to pay a future costs award, Mr Sikri's affidavit repeated the essence of the statement he made in the application for a stay. That is, the availability of ongoing financial support. In describing the viability of that company's business, he referred to leasing a commercial property in Manukau, Auckland, with an intention to "resume the full time travel business" given the then recent announcement that travel restrictions were ending. He also made a comment that vacancies for the office were listed on social media and that it planned to introduce a social media campaign.

[32] While Mr Sikri's comments may have been intended to convey confidence in Henderson Travels' future, there was a blurring of distinctions between that company and Flight Experts in what he said and produced to support the statements that were made. Three exhibits to the affidavit, a copy of an agreement to lease, a tax invoice for signage, and advertised vacancies were all in the name of Flight Experts, although none of them use the company's full name. It is not clear whether they referred to a trading name to be used by Henderson Travels or were, instead, about the other company in which Mr Sikri had an interest.

[33] In rounding out opposition to Ms Kaur's application, Mr Sikri referred to the amount deposited with the Registrar to comply with the judgment granting a stay, adding that there "are sufficient funds available to pay costs in case there is any order for costs by the Employment Court against us".

[34] Given what had been said about Henderson Travels' finances shortly beforehand, and the absence of any evidence about a dramatic upturn in that company's business, Mr Sikri's reference could have only been to funds available through Flight Experts.

[35] The mere fact that Flight Experts is likely to have provided some or all of the money deposited with the Registrar to satisfy the conditions of the stay, and presumably otherwise funded the litigation, is not sufficient to warrant joining it to the proceeding for the purposes of fixing costs.²¹

[36] However, there are two reasons to accept Ms Douglas's submission that the test in *Kidd* has been satisfied. The first reason is that Mr Sikri, as a director of Flight Experts, went beyond being a mere funder when clear commitments were made on its behalf about that company meeting future costs orders. The purpose of those comments was to provide assurances to the Court and Ms Kaur that potential future costs orders were adequately addressed. Those assurances were intended to enable Henderson Travels to continue with the litigation it could not otherwise support.

[37] The second reason is connected to the first one, and it is that the financial commitment of Flight Experts assisted Henderson Travels in avoiding an order for security for costs. It is highly likely that an order for security for costs would have stymied Henderson Travels' challenge well before preparation was required for the substantive hearing and Ms Kaur incurred the cost she is now bearing. In turn, that meant Henderson Travels obtained a significant advantage it would not have otherwise enjoyed by being able to continue the litigation to test the Authority's adverse findings. Mr Sikri's commitment meant that Henderson Travels enjoyed what the Court of Appeal referred to as a "heads I win, tails you lose" approach by seeking to overturn the Authority's decision with little, or no real, downside if the decision was adverse to it.

[38] I am satisfied that Flight Experts should be joined to the proceeding. Henderson Travels, Mr Sikri, Mrs Sikri and Flight Experts cannot be surprised at this outcome. At the conclusion of the judgment on security for costs an observation was made that if Henderson Travels' challenge failed then any costs issues might be dealt with by joining Flight Experts to the proceeding.²²

²¹ *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* [1997] 1 WLR 1613 (CA) at 1620 per Millett LJ; as cited in *Kidd*, above n 9, at [16].

²² *Henderson Travels Ltd v Kaur (No 2)*, above n 6, at [33].

Outcome

[39] The application is granted. Flight Experts is joined to the litigation for the purposes of fixing costs.

[40] At this stage, I do not intend to determine costs. While Flight Experts has not participated in considering this application it may still wish to make submissions on the costs that have been claimed. To enable that to happen a copy of this judgment is to be served on that company. It may file submissions on costs within **21 days of being served with this judgment.**

K G Smith
Judge

Judgment signed at 12.30 pm on 24 May 2024