IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 92
EMPC 442/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application as to admissibility of evidence
BETWEEN	GLENFIELD COLLEGE BOARD OF TRUSTEES First Plaintiff
AND	NZEI TE RIU ROA Second Plaintiff
AND	SECRETARY FOR EDUCATION Third Plaintiff
AND	FIONA ANDERSON Defendant

Hearing: On the papers

Appearances: P Pa'u, advocate for first plaintiff
P Cranney, counsel for second plaintiff
C R Cartwright, counsel for third plaintiff
G Pollak, counsel for defendant

Judgment: 31 May 2024

INTERLOCUTORY JUDGMENT (NO 3) OF
CHIEF JUDGE CHRISTINA INGLIS
(Application as to admissibility of evidence)

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[1] These proceedings are set down for hearing in Auckland commencing on 15 July 2024. The proceedings involve a de novo challenge to a determination of the

Employment Relations Authority,[1] and centres on the interpretation and application of a clause within Ms Anderson's employment agreement. Timetabling directions were made by the Court, including in respect of the exchange of briefs of evidence and the preparation and filing of a bundle of documents.

[2] A key witness for the first plaintiff passed away on 25 February 2024. The parties by consent request that the Court admits the deceased's brief of evidence, filed in the Employment Relations Authority, as evidence in the current proceedings.

[3] Issues were raised as to the basis on which the parties were proposing that the brief of evidence was to be admitted. I drew these issues to the representatives' attention and they have since clarified matters. In the intervening period two further parties were joined as plaintiffs, namely NZEI Te Riu Roa and the Secretary for Education.[2] They were invited to express a view on the application and both have confirmed that they are prepared to abide by the decision of the Court.

[4] Section 189(2) of the Employment Relations Act 2000 (the Act) provides that the Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. As will be apparent, the scope of s 189(2) is broad, and extends beyond the admission of evidence; the reference to acceptance and calling for information makes this plain.

[5] While the Court's powers under s 189(2) are broad they must be exercised in a principled manner.

[6] In exercising its powers in respect of evidential matters it is not uncommon for the Court to draw assistance from the sort of approach adopted in the High Court, via provisions of the Evidence Act 2006. But the twin principles of equity and good conscience, and the legislative intent that this Court have available to it a wider tranche of material to assist in particular cases, must always be the ultimate touchstone.[3]

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1 *Anderson v Glenfield College Board of Trustees* [2023] NZERA 654 (Member Urlich).
2 *Glenfield College Board of Trustees v Anderson (No 2)* [2024] NZEmpC 80.
3 *Lyttelton Port Co Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [52]-[53]; *Cronin-Lampe v Board of Trustees, Melville High School* [2023] NZEmpC 18, [2023] ERNZ 44 at [27].

[7] The brief of evidence is a hearsay statement. Section 18 of the Evidence Act provides for the general admissibility of a hearsay statement if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and the maker of the statement is unavailable as a witness or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[8] Both limbs are satisfied. Mr McKinley is unavailable and I am satisfied that there is a reasonable assurance of reliability. While the brief of evidence is unsigned it is common ground (between the first plaintiff and the defendant) that it was filed in the Authority. It is also common ground that Mr McKinley gave evidence consistent with his brief of evidence in that forum.

[9] The Court will not have the advantage of direct evidence from Mr McKinley, on matters that are of relevance to the issues on the first plaintiff's challenge. I have no difficulty concluding that it is consistent with equity and good conscience that the brief of evidence be admitted in these proceedings, and make orders accordingly.

[10] I do not understand any issue of costs to arise.

Christina Inglis
Chief Judge

Judgment signed at 1.45 pm on 31 May 2024