Employment Court of New Zealand

Sfizio Limited v Freeborn [2019] NZEmpC 143 (11 October 2019)

Last Updated: 21 October 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[2019] NZEmpC 143
EMPC 7/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for joinder
BETWEEN	SFIZIO LIMITED Plaintiff
AND	KATIE FREEBORN Defendant

Hearing:	On the papers, and by oral submissions received on 4 October 2019
Appearances:	C Gregorash, representative for plaintiff F Lear and S Radcliffe, counsel for defendant
Judgment:	11 October 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for joinder)

Introduction

[1] This judgment resolves a question as to whether third parties should be joined for the purposes of a challenge brought by Sfizio Ltd (Sfizio) to a determination of the Employment Relations Authority against Katie Freeborn.1

[2] In the Authority, Ms Freeborn asserted she had been unjustifiably dismissed. Initially, her statement of problem cited two respondents, Curtis Gregorash and Kathy

1 *Freeborn v Sfizio Ltd* [2018] NZERA Wellington 112.

Parfitt. According to the determination, the statement in reply identified the employer as Wadestown Kitchen, while the individual employment agreement identified the employer party as Regulatory and Compliance Solutions Ltd trading as Wadestown Kitchen. The Authority considered that Mr Gregorash and Ms Parfitt were the sole directors and shareholders of that company, now known as Sfizio Ltd. The Authority then substituted the names of the employing party to Sfizio, stating that this was by agreement. Ms Freeborn was at this stage unrepresented.2

[3] The Authority proceeded to consider Ms Freeborn's personal grievance, concluding that the dismissal was unjustified and that the company should pay her

$2,000 as compensation for humiliation, loss of dignity and injury to feelings, $640 gross as recompense for wages lost as a result of the dismissal, $112 gross being wages payable for working on a particular day, and a filing fee reimbursement of $71.56.3

[4] The company, as noted, then brought a challenge. Ms Freeborn, via lawyers whom she has now engaged, subsequently applied for an order to join Mr Gregorash and Ms Parfitt. In supporting submissions, counsel for Ms Freeborn, Ms Lear, submits that they should be joined as third parties so that all potential parties are before the Court in determining who Ms Freeborn's employer was at the material time.

[5] Sfizio opposes the application, essentially on the grounds that the company was obviously the employer, that joinder of Mr Gregorash and Ms Parfitt would amount to joining shareholders of an employing entity and would breach company law principles that the corporate veil may not be pierced; and that in any event, Ms Freeborn's employment agreement was validly terminated under a 90-day trial provision.

[6] Careful submissions have been filed addressing the joinder issue; essentially, each submission develops the grounds of application on the one hand, and the grounds of opposition on the other. Oral submissions have also been presented.

2 At [5].

3 At [43].

Analysis

[7] The case of *Neill v Schmidt* involved circumstances somewhat similar to those which apply here that is insofar as both involve the substitution of a party by the Authority.4

[8] In that instance, two persons were named originally as parties in the statement of problem which the employee had filed in the Authority. The Authority changed the intitulment to the proceedings to delete any reference to those individuals and unilaterally substituted a company as respondent to the statement of problem in the course of the investigation.

[9] For the purposes of a subsequent challenge, the Court found that the Authority should not have deleted the named individuals from the intitulment to the proceedings. The consequence of doing so was to deny the employee a right to bring a challenge to the Authority's apparent decision that the employer was not the two persons whom she had originally asserted were, but a corporate entity.

[10] It followed that the respondents as originally cited should have remained as such and should have been named as defendants in the subsequent proceeding. It was accordingly unnecessary to deal with the matter as an issue of joinder.5

[11] The approach adopted in *Neill* is supported by the fact that a de novo challenge, when brought, is to "a full hearing of the entire matter".6 It is well established that the phrase "the entire matter" as referred to in s 179(3)(b) is the entirety of the "matter' referred to in s 179(1), namely the employment relationship problem as originally raised.7

[12] As noted, in *Neill* the employee was the challenger, and the issue was resolved by the Court correcting the naming of the defendants to the challenge so that her claim could be maintained against whichever defendant was found to be the employer. Here,

4 *Neill v Schmidt* [2010] NZEmpC 96.

5 At [5]-[6].

6 Employment Relations Act 2000, s 179(3)(b).

7 *Sibly v Christchurch City Council* [2002] NZEmpC 76; [2002] 1 ERNZ 476, at [47].

the position is different because Sfizio has brought the challenge, and Ms Freeborn is the defendant, wanting to assert that Mr Gregorash and Ms Parfitt were the employers.

[13] Consequently, the present case is not one where the procedural issue could be resolved simply by correcting the intitulment of the present challenge to add those persons as defendants.

[14] Ms Freeborn does not seek a joinder of Mr Gregorash and Ms Parfitt as plaintiffs, a step which would, in any event, require their consent and perhaps an acceptance by them that they were the employers.8

[15] Ms Freeborn could have instituted her own challenge against Mr Gregorash and Ms Parfitt, asserting that they are the liable parties. That step has not, to this point, been taken; nor was it argued for the plaintiff that it should have been.

[16] Rather, in order to address the problem which has arisen, Ms Freeborn seeks to join the individuals as third parties,

and to do so via her amended statement of defence in which remedies are apparently sought against the proposed third parties, although the claims are not spelt out with any particularity.

[17] Section 221 of the Employment Relations Act 2000 (the Act) allows for joinder. It states:

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

(a) direct parties to be joined or struck out; and
(b) amend or waive any error or defect in the proceedings; and
(c) subject to section 114(4), extend the time within which anything is to or may be done; and
(d) generally give such directions as are necessary or expedient in the circumstances.

8 High Court Rules 2016, r 4.56(3); Employment Court Regulations 2000, reg 6(2)(a)(ii).

[18] The difficulty with Ms Freeborn's application is that neither s 221 nor the Employment Court Regulations (the Regulations) provide expressly for the possibility of a defendant bringing a claim against a third party, as is the case, for instance, under the High Court Rules where there are provisions which address the issuing of a third party notice by a defendant, and for the filing of a statement of claim between a defendant and a third party.

[19] In oral submissions, Ms Lear submitted that the effect of s 221 is to bestow a broad jurisdiction to join parties, including third parties; and that it is a necessary consequence of that power that a defendant proposing to do so can plead a claim in his or her statement of defence as Ms Freeborn has done. She also alluded to reg 74 of the Regulations, which states that nothing in those particular regulations – such as the references to a statement of claim and a statement of defence as between a plaintiff and a defendant – limit the powers of the Court under s 221 of the Act. As a backup submission, Ms Lear accepted that the relevant provisions of the High Court Rules could be utilised.

[20] Mr Gregorash, in his oral submissions submitted that the Court could indeed in a situation such as the present have recourse to the High Court Rules in a situation such as the present, but that the criteria for joinder as described in those rules was not met.

[21] In *Prasad v LSG Sky Chefs New Zealand Ltd,* the Court joined third parties under s 221, utilising the relevant High Court Rules.9 However, the circumstances in that case were different for several reasons. The application for joinder of third parties was not opposed, unlike in the present case. A draft statement of claim was submitted to the Court for its consideration when the application for joinder was made, unlike in the present case. Furthermore, the proceeding in *Prasad* did not involve a challenge to a determination of the Authority.

[22] The last of these factors could be significant in a case where a defendant has a right to bring his or her own challenge. Such an election must be made within 28 days

9 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150.

after the date of the determination;10 or a later date if leave to extend time to file a challenge is granted.11 A factor which could arise for consideration in a case such as the present is whether the joinder of a third party against whom a challenge could have been brought, is being sought to circumvent the time limitation periods of s 179(2) of the Act. This factor may tell against the Court sanctioning the use of the third party procedure under the High Court Rules if that is a relevant issue.

[23] That point was not taken in the present case. Moreover, I am satisfied that it was not the defendant's intention to attempt to circumvent a time limitation period. Initially, Ms Freeborn was not represented for the purposes of the challenge. She says there was a brief discussion regarding a name change during the investigation, the significance of which was not clear to her; she felt pressured to go along with it. The present application was raised by her lawyers soon after they were instructed. The third party procedure has been resorted to because of the unusual procedural circumstances which have arisen.

[24] In the end, there was a consensus between the parties that the Court should utilise the third party provisions in the High Court Rules, via reg 6; I proceed accordingly.

[25] There was some discussion as to whether the case would or would not fall within the criteria for joinder, as stipulated in HCR 4.4(1)(c) which states:

4.4 Third parties

(1) A defendant may issue a third party notice if the defendant claims any or all of the following:

...

...

(c) that a question or issue in the proceeding ought to be determined not only between the plaintiff and the defendant but also between—

(i) the plaintiff, the defendant, and the third party; or
(ii) the defendant and the third party; or
(iii) the plaintiff and the third party:

10 Employment Relations Act 2000, s 179(2).

11. Employment Relations Act 2000, s 221. For example, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12, [2017] ERNZ 51; *Vasona Networks Inc v Sunder* [2016] NZEmpC 128.

[26] The threshold for joinder under s 221 is similar to the threshold under HCR 4.4.

[27] I am satisfied that the issue of identity of parties does meet the thresholds of either s 221 or HCR 4.4(1)(c). The intended third parties were originally alleged by Ms Freeborn to be her employer. She wishes to assert that her relevant dealings were only with Mr Gregorash and Ms Parfitt, and she did not understand that a company called Regulatory Compliance Solutions Ltd was an entity engaged in running the café at which she worked. She asserts now that the proposed third parties, rather than the plaintiff, are potentially liable for her disadvantage and dismissal grievances, rather than the plaintiff. Joinder will enable the Court to dispose of the matter according to the substantial merits and equities of the case; furthermore, the issue of employer identity should be considered not only between Ms Freeborn and Sfizio, but also between her and Mr Gregorash and Ms Parfitt.

[28] This is not necessarily an issue of piercing the corporate veil in order to attach liability to shareholders. It is conceivable that persons who happen to be shareholders are, in a given case, employers, if an analysis of the real nature of the relationship shows that the individuals created and maintained the relationship of employer.

[29] But it is not, of course, appropriate to reach any conclusions at present on the issue of who in fact may have been the employer. All the Court is concerned with at present is the issue of joinder.

[30] Next, I refer to other High Court Rules governing the third party procedure. It is clear from these rules that a defendant joining a third party must serve a statement of claim against those third parties; also described is a procedure for the filing of a statement of defence by a third party.12

[31] I am not satisfied that the "claim" against third parties, as contained in the defendant's present amended statement of defence, provides sufficient particulars of the matters which potentially require resolution as between the defendant and each third party.

12 High Court Rules, r 4.10, r 4.12 and r 4.14.

[32] In the circumstances in this particular case, I am satisfied that the way forward is to direct the filing of a third party notice and statement of claim on Mr Gregorash and Ms Parfitt. Those documents will overtake paras 11 to 18 of the amended statement of defence.

Disposition

[33] I find that the criteria justifying joinder of third parties are met, and I direct:

(a) The defendant must file and serve an amended statement of defence which does not contain paragraphs in the same or similar form to those at paras 11 – 18 of the first amended statement of defence; this document is to be filed and served within 14 days of the date of this judgment.
(b) The defendant must within 25 working days of the date of this judgment, serve Mr Gregorash and Ms Parfitt as third parties:

i. a third party notice; that notice is to be based on G14 of sch 1 of the High Court Rules, modified as may be necessary;

ii. a copy of the defendant's statement of claim against those parties;

iii. a copy of the plaintiff's statement of claim;

iv. a copy of the amended statement of defence served under para [33](a); and

v. a copy of this judgment.

(c) The defendant must, within 25 working days after the date of this judgment, serve Sfizio with:

i. a copy of the third party notice; and

ii. a copy of the defendant's statement of defence against each third party.

(d) A statement of defence by each third party must be filed and served within 25 working days after the date of service of the third party notice. That statement of defence is to be served on both the plaintiff and the defendant.

[34] I reserve costs.

B A Corkill Judge

Judgment signed at 9.20 am on 11 October 2019
