IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 101
EMPC 196/2018

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND THE MATTER	of an application for leave to appear and be heard as an intervener
BETWEEN	OVATION NEW ZEALAND LIMITED First Plaintiff
AND	TE KUITI MEAT PROCESSORS LIMITED Second Plaintiff
AND	THE NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Defendant

Hearing: (on papers dated 27 August – 3 September 2018)

Appearances: J Smith QC, R Brown and M Bialostocki, counsel for the plaintiffs
P Cranney and S Meikle, counsel for the defendant
P Skelton QC, M Wisker and J Upson, counsel for applicant

Judgment: 6 September 2018

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B A CORKILL: APPLICATION FOR LEAVE TO APPEAR AND BE HEARD AS AN INTERVENER

Introduction

[1] The Meat Industry Association of New Zealand Incorporated (MIA) has applied for leave to appear and be heard as an intervener for the purposes of the hearing of this proceeding. That application is supported by the plaintiffs and opposed by the defendant.

[2] As explained in previous judgments, the proceeding involves a question as to whether piece-rate workers at certain meat processing sites operated by the plaintiffs were and are paid for their rest breaks. Issues between the parties include whether such payments were or are incorporated in agreed piece-work rates, whether s 69ZD of the Employment Relations Act 2000 (the Act) was and is being complied with, and whether the plaintiffs have required, and now require, work to be performed by piece-rate workers during breaks in the form of "doffing and stowing and sterilising equipment and gear and donning such equipment and gear for use".[1]

[3] The grounds relied on by MIA in support of its application in summary are:

a) It is a voluntary trade association representing the majority of New Zealand meat processors, exporters and marketers. MIA represents 16 owners of meat processing plants: the companies it represents are responsible for 99 per cent of New Zealand's sheep and beef processing and exports.

b) Approximately 70 per cent of persons employed by MIA's members are meat production workers who are paid piece-rates under collective agreements with the defendant. Those collective agreements contain comparable provisions to those in issue before the Court.

c) The donning and doffing procedures at issue in this case reflect general industry practice.

d) The issues in this proceeding are relevant to the meat industry generally. In particular, findings that piece-rates do not incorporate payment for rest breaks or incorporate inadequate payment for rest breaks, or that time spent donning and doffing is required to be accounted for separately in employees' pay, would have significant economic consequences for MIA members.

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[1] *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 82, *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 92, *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 98.

e) The Court has already recognised that resolution of the questions identified by the parties may well have a broad impact.

f) MIA seeks leave only to make submissions.

[4] The plaintiffs support the application; they submit:

a) The primary parties' cases will be focused on the particular circumstances which apply to them.

b) Wider industry concerns may be extraneous to the immediate issues which are before the Court. The MIA's presence would assist in ensuring that broader industry issues are not overlooked, and that unforeseen difficulties do not arise.

c) Reliance is also placed on the statement by Chief Judge Inglis in the judgment which granted special leave to remove the proceedings to the Court, that resolution of the issues before the Court "may well have broader impact, including on a number of workers in the meat industry and more generally".[2]

d) MIA does not propose to lead evidence or cross-examine the parties' witnesses; accordingly, if leave were to be granted, the intervention would not have a significant impact on hearing time.

[5] The application, as framed, is opposed by the defendant. In summary, it is submitted:

a) Whether donning and doffing is work within the meaning of the Minimum Wage Act 1983 (the MWA) is primarily a question of fact, not law. Such an intense factual assessment could not be assisted by submissions made on behalf of other employers seeking to influence the Court with a view to future litigation advantage.

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2 *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 73 at [7].

b) Issue was taken with evidence contained in the applicant's supporting affidavit, in which it was stated that some collective agreements of MIA members contain rest breaks clauses similar to one of those which is before the Court for present purposes. But it was submitted that more fundamentally, the proper interpretation of clauses in agreements with other parties would not be before the Court for the purposes of this proceeding.

d) Submissions advanced by MIA would not enhance the Court's appreciation of the issues since these will be canvassed by the parties to the proceeding; it is also likely the submissions of the MIA will be consistent with those of the plaintiffs.

e) Concern as to the economic impact of the Court's conclusions amongst MIA members could not be a reason to grant the application.

f) If, contrary to the foregoing, leave were to be granted it should be "limited to the provision of general legal points only (without comment on their application to the facts)".

Principles

[6] As was noted by former Chief Judge Colgan in *Matsuoka v LSG Sky Chefs New Zealand Ltd*, such applications are to be resolved under cl 2(2) of sch 3 of the Act.[3] The test is whether, in the opinion of the Court, the applicant "is justly entitled to be heard". It is a very broad test, to be determined on the particular circumstances of the case.

[7] The starting point must be that an intervener should establish a sound basis for the Court to depart from the traditional privity of litigation, especially where such an application is opposed by a party.[4]

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3 *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 24.
4 *Seales v Attorney-General* [2015] NZHC 828 at [43].

[8] As was observed by White J in *C v Accident Compensation Corporation,* the principles for exercising the Court's discretion are well established, and include these factors:[5]

a) The power is broad in nature, but should be exercised with restraint to avoid the risk of expanding issues, elongation of hearings and increasing the cost of litigation.[6]

b) In a case involving issues of general and wide importance, the Court may grant leave when satisfied that it would be assisted by submissions from the intervener.[7]

c) The power may be exercised more liberally in cases involving the Court's special jurisdiction under legislation such as the Employment Relations Act 2000.[8]

[9] These principles are of assistance in resolving the present application.

Discussion

[10] The starting point relates to the factual assessments which the Court will need to make. Included in these will be a consideration of the disputed allegation as to whether as a matter of construction of relevant collective employment agreements (CEAs), or implication of terms (including in reliance of custom and practice), the effect of applicable clauses is that payments for rest breaks are included within agreed piece-work rates.

[11] This issue will require detailed consideration of the CEAs which will be placed before this Court, and the background evidence which the parties will call.

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5 *C v Accident Compensation Corporation* [2013] NZCA 34.
6 *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at [11].
7 *Wellington City Council v Woolworths NZ Ltd* [1996] 2 NZLR 436 (CA), *Drew v Attorney-General*, above n 6 at [17] and *Chamberlains v Lai* [2005] NZSC 32 at [5].
8 *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 591 (CA) at 592.

[12] As is appropriate, MIA if granted leave does not propose to lead evidence or cross-examine witnesses; it could not and would not contribute evidence as to this factual issue.

[13] It is also the case that the applicable legal propositions are well settled and not controversial.[9]

[14] It is apparent that the case will be well argued on both sides. Although it is obvious that the outcome of the present proceeding may have implications for other employers in the industry, I am not persuaded that in the circumstances of this proceeding the presence of an intervener on an issue pertaining to the interpretation of the CEAs which will be before the Court will materially assist it.

[15] However, there is also a statutory interpretation issue of some importance. The defendant has raised an assertion that the plaintiffs were in breach of s 69ZD of the Act before it was amended in 2015[10] by not providing paid rest breaks to their piece workers; and that from the date of amendment, they have been in breach of s 69ZD by not providing paid rest breaks to their piece workers. It appears that there will accordingly be an issue as to whether an employer and an employee can agree that payment for rest breaks under s 69ZD of the Act, in either of its manifestations, may be incorporated within piece work rates.

[16] As was observed by Chief Judge Inglis in the decision to remove the proceedings to this Court, the Court of Appeal's recent judgment in *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* did not address this issue;[11] and the Employment Court judgment touched on it but did not decide the point.[12] It remains for resolution, and could be significant to members of the meat industry generally.

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9 For example, *New Zealand Air Line Pilot's Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948; *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

10 Employment Relations Amendment Act 2014, s 50.

11 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495, [2017] 2 NZLR 234.

12 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2015] NZEmpC 176, [2015] ERNZ 986.

[17] I am persuaded that the construction of the statute is a matter on which the Court should be assisted by submissions given by an intervener representing other employers in the meat industry. I also note that such a step will not elongate the hearing unduly, since the intervener's submissions would be confined to a particular issue.

[18] The other matter which is said to be of potential significance for the industry relates to the Court's consideration of the donning and doffing issue. MIA submits that the donning and doffing procedures followed by the parties in this case reflect similar procedures throughout the industry, and that the Court's findings could have direct implications for many other employers.

[19] It is well established that cases which consider the nature of work for the purposes of s 6 of the MWA turn on a factual enquiry, which may well be extensive.[13]

[20] The Court will need to carefully evaluate the evidence which is placed before it by the parties, in light of the relevant authorities relating to the assessment of work under s 6 of the MWA. The circumstances which the Court will be considering relate to the work of piece workers who are members of the defendant, working in certain processing plants operated by the plaintiffs. It is apparent from the matters considered by the Court in previous interlocutory judgments that the issues will be the subject of detailed evidence. The assessment will be fact-specific. Furthermore, as already observed, I anticipate the case will be well argued on both sides.

[21] I am not persuaded that the Court will be materially assisted by additional submissions from an intervener on this particular issue.

Disposition

[22] On 31 August 2018, I issued a minute to the parties foreshadowing my conclusions on the application. Since any leave granted would be on a more limited basis than had been sought, I requested confirmation from MIA as to whether it wished

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[13] *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC) at [63], *A Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd* [2018] NZEmpC 43 at [31]-[32]

to participate in the proceeding at all. By memorandum of 3 September 2018, counsel confirmed MIA would wish to intervene with regard to the statutory interpretation issue discussed above.[14]

[23] Accordingly, I grant the application to intervene, subject to the following conditions:

a) MIA is to be served by the plaintiffs with all pleadings and documents filed in this proceeding, and a copy of any agreed bundle of documents prepared for the substantive hearing.

b) It is granted leave to file written submissions as to the interpretation of s 69ZD of the Act in its pre and post 2015 form; such submissions must be filed and served by 17 September 2018.

c) MIA is granted leave for its counsel to appear at the substantive hearing; but not to call evidence or cross-examine any witness.

d) I will decide at the hearing whether any supplementary submissions may be made by MIA in light of the oral evidence called by the parties, with regard to the topic identified at para [23](b).

e) MIA may not seek costs against any party.

B A Corkill
Judge

Judgment signed at 2.20 pm on 6 September 2018

[14] At [12] and [13].