

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

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

**[2021] NZEmpC 86  
EMPC 471/2019**

IN THE MATTER OF proceedings removed from the  
Employment Relations Authority

AND IN THE MATTER OF an application for adjournment of a  
hearing

BETWEEN PETER HUMPHREYS  
Plaintiff

AND SIAN JIMENEZ HUMPHREYS  
First Defendant

AND CHIEF EXECUTIVE OF THE  
MINISTRY OF HEALTH  
Second Defendant

Hearing: 16 June 2021  
(by telephone)

Appearances: P Cranney, counsel for plaintiff  
L Meys, as litigation guardian for first defendant  
S McKechnie and T Bremner, counsel for second defendant

Judgment: 16 June 2021

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**INTERLOCUTORY JUDGMENT (NO 2) OF  
CHIEF JUDGE CHRISTINA INGLIS  
(Application for adjournment of a hearing)**

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[1] These proceedings are set down for hearing in Auckland next week. On 14 June 2021 the second defendant filed an application for an adjournment on the basis that an application for leave to appeal would be filed against this Court's recent

judgment in *Fleming*.<sup>1</sup> An adjournment was said to be in the interests of justice because there is a material overlap in the issues in both proceedings. It was submitted that:

- The speedy, fair, just and inexpensive determination of these proceedings will be secured best by adjourning pending the outcome in the *Fleming* appeal, rather than going ahead with the hearing as scheduled, as the outcome of the *Fleming* appeal will be determinative of these proceedings in any event;
- For a hearing to proceed in the meantime would amount to an inappropriate use of the Court and parties' resources and be contrary to the interests of justice.

[2] The application for an adjournment was staunchly opposed by the plaintiff and the first defendant.

[3] Given the proximity to the hearing an urgent telephone hearing was convened this morning to hear argument on the opposed application. After hearing from counsel, I declined the application on the basis that I was not satisfied that it was in the overall interests of justice to grant an adjournment. I indicated that my reasons would follow. These are my reasons.

[4] Mr Humphreys is the father of Sian Humphreys. Sian is severely disabled and is cared for at home by her father. Mr Humphreys filed an application for the Employment Relations Authority to investigate a health and safety concern almost two years ago to the day (namely on 28 June 2019). The health and safety issue related to bathroom modifications that will, it is said, need to be made in the Humphreys' family home in order to avoid risks of falls and hot water burns for Mr Humphreys and his daughter. Mr Humphreys' work in caring for his daughter was at that time funded under the Ministry of Health's Family Funded Care (FFC) policy. Under that policy Sian was deemed to be her father's employer. Mr Humphreys' claim is that it is the Ministry of Health, not his severely disabled daughter, who is the real employer. The

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<sup>1</sup> *Fleming v Attorney-General* [2021] NZEmpC 77.

Ministry of Health filed a statement in reply denying any such relationship. Changes have subsequently been made to legislation and policy.<sup>2</sup>

[5] On 16 December 2019 the Authority directed that the matter be removed to the Court under s 178 of the Employment Relations Act 2000 (the Act). In directing removal the Authority noted that Mr Humphreys' case had already been significantly delayed by an earlier adjournment in the Authority, while two other cases were progressed in the Court (the two cases referred to were ultimately resolved by agreement rather than decision of the Court).

[6] Mr Humphreys' proceedings have now been before the Court since December 2019; were set down for a provisional fixture in the week of 21 September 2020; and were then allocated later dates at the request of both parties. The *Fleming* judgment was delivered last month, on 26 May 2021. The Crown has advised that it intends to file an application for leave to appeal within the statutory timeframe for doing so, that it is likely that leave will be granted given the nature of the issues involved, and that any decision of the Court of Appeal will almost certainly be determinative of the key issue in this case. It is further said that, if the present hearing proceeds, and results in a declaration that the Ministry of Health is the employer, it will seek a stay pending the outcome of the *Fleming* appellate process.

[7] I accept that the outcome of an appeal/s against the judgment in *Fleming* will likely impact on the key issue in this case. I also accept that proceeding with the hearing next week will inevitably come at a cost, both in terms of expense and inconvenience. That cost may, depending on the ultimate outcome, prove to be unnecessary.

[8] It is, however, necessary to weigh other factors into the mix. In particular, I have regard to Mr Humphreys' interests and Sian's interests, communicated through her litigation guardian. They wish to proceed and have the litigation, which has now been on-foot for a number of years and has been deferred because of other related proceedings, brought on for hearing. They are prepared to wear any prejudice to themselves, having regard to the potential outcome of any appeal. The Crown will

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<sup>2</sup> See New Zealand Public Health and Disability Amendment Act 2020.

suffer a degree of prejudice but, given the anticipated length of the hearing (1-2 days), that prejudice is minimal. And, because of the timing of the application, much of the cost involved in trial preparation has already been incurred. Nor do I discount the possibility that the appellate process in *Fleming* may be assisted by this Court's judgment in this case, which raises essentially the same identity of the employer issue but appears to arise within a much more straightforward factual context.

[9] Balancing all matters before me, I concluded that it was in the interests of justice for the hearing to proceed to be heard and declined the application accordingly, reserving costs.

Christina Inglis  
Chief Judge

Judgment signed at 4.40 pm on 16 June 2021