

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

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

**[2023] NZEmpC 54  
EMPC 25/2022**

IN THE MATTER OF      an application for a judicial review  
AND IN THE MATTER    of directions following a settlement  
BETWEEN                ALLAN GEOFFREY HALSE  
                                 Applicant  
AND                        EMPLOYMENT RELATIONS  
                                 AUTHORITY  
                                 First Respondent  
AND                        FIRST SECURITY GUARD SERVICES  
                                 LTD  
                                 Second Respondent  
AND                        SUSAN MARGARET KENNEDY  
                                 Third Respondent

Hearing:                On the papers

Appearances:         A Halse, in person  
                                 J B Watson, counsel for first respondent  
                                 M Lawlor, counsel for second respondent  
                                 No appearance for third respondent

Judgment:             5 April 2023

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**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL  
(Directions following a settlement)**

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**Introduction**

[1]      This judicial review proceeding relates to an investigation in the Employment Relations Authority where the third respondent, Ms Susan Kennedy, brought an

employment relationship problem involving her employer, the second respondent, First Security Guard Services Ltd (First Security).

[2] In an earlier interlocutory judgment I explained the background to the matter which I will not repeat in detail here.<sup>1</sup>

[3] Certain interim orders were made by the Authority in relation to Mr Allan Halse and his associated company, CultureSafe New Zealand Ltd.<sup>2</sup> The orders required them:<sup>3</sup>

- (a) not to make or threaten to make any public comment about First Security and its management or the Authority's investigation;
- (b) to take down any public postings made on their website and social media platforms touching on the employment relationship between the parties or the Authority's investigation; and
- (c) to cease and desist from contacting First Security and its management directly regarding Ms Kennedy, with communications regarding her to be sent only to its lawyers. Such communications were not to be copied to First Security or its management.

[4] The present judicial review proceedings relate to the legitimacy of these orders.

[5] In February 2023, memoranda were filed by Mr Halse and counsel for First Security, Mr Lawlor, stating that an agreement had been reached between them, to the effect that all issues between Mr Halse, his client Ms Kennedy, and First Security had been resolved. The Court was also informed that there was no issue as to costs between those parties.

[6] Mr Lawlor proposed that First Security be removed as a respondent from the proceeding, or alternatively, that it be excused from any further attendance in the

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<sup>1</sup> *Halse v Employment Relations Authority* [2022] NZEmpC 165.

<sup>2</sup> Now in liquidation.

<sup>3</sup> *Kennedy v First Security Guard Services Ltd* [2022] NZERA 26.

matter. Mr Halse proposed that Ms Kennedy be removed as a party from the proceeding.

[7] Subsequently, counsel for the Authority, Mr Watson, filed a memorandum outlining its position. He submitted that the Authority's interim orders could not persist beyond the final determination of the dispute. The fact that the substantive dispute had been resolved meant the Court might take the view that the issues raised in Mr Halse's judicial review application do not require determination. This was because the rights or interests of the only parties affected by the decision under challenge were no longer affected by it.

[8] Mr Watson, however, properly pointed out that by analogy to authorities concerning moot appeals, the Court likely retained its discretion to hear the present judicial review application if, for example, it concerned a matter of public importance. Mr Watson noted that Mr Halse had asserted there was indeed an ongoing public interest in the lawfulness of the interlocutory order made by the Authority, but he also acknowledged this issue would be addressed in several other proceedings to which Mr Halse had made reference.

[9] Mr Watson stated that consistent with convention, the Authority would continue to abide the decision of the Court both on the issue of whether the proceeding is now moot, and in the substantive proceeding were the Court to determine it should proceed; he said the Authority would not take an active role in this proceeding. He also noted that if there were outstanding issues for resolution, the Court may wish to invite the Solicitor-General to appoint counsel to assist the Court and to provide contrary argument on relevant points.

[10] In response to Mr Watson's submissions, Mr Halse argued that the proceeding could not be characterised as moot, because the judicial review claim brought against the Authority itself had not been resolved. Mr Halse did not accept Mr Watson's suggestion that this issue would be addressed in other proceedings Mr Halse is involved with, and even if so, it would take considerable time before those matters come before the Court.

[11] Mr Halse submitted it is necessary for the Authority to take an active position with regard to his claim.

[12] He also said he did not agree it would be appropriate for the Solicitor-General to appoint counsel to assist since she is, he said, already representing the Authority.

[13] In summary, he argued that the Authority should take an active stance and that the judicial review proceeding should continue.

### **The status of the three respondents**

[14] At an earlier point in the proceeding, Mr Watson submitted that the Judicial Review Procedure Act 2016 does not oblige a court or tribunal named as a respondent to file a statement of defence. He submitted that any purported obligation of that nature would cut across the settled principle that courts and tribunals should not “enter the fray” and become protagonists in the defence of their own decisions.<sup>4</sup> He also relied on the proposition that a court cannot compel a judicial body which is named as a respondent to file a statement of defence.<sup>5</sup>

[15] It is this issue which Mr Halse proposes to raise in proceedings to be brought in the Court of Appeal. However, as the Court understands it, such a proceeding has yet to be filed.

[16] At least at this stage, I am not persuaded that Mr Watson’s submission is incorrect. It follows that, if on advice the first respondent elects to abide and take no active position with regard to the judicial review proceeding which is before the Court, it may do so.

[17] I also consider that in the unusual circumstances it is preferable for the second and third respondents to abide, rather than be removed as parties to the proceeding. In the circumstances, therefore, I direct that each of the respondents be excused from further participation.

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<sup>4</sup> *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177 at [27].

<sup>5</sup> Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [JR 10.03].

## **Should counsel to assist be appointed?**

[18] Although the substantive issues between the employee and the employer have been resolved, Mr Halse argues that the issues raised by his judicial review application are of sufficient public importance as to warrant continuation of the proceeding.

[19] There is authority for the proposition that in circumstances where the underlying issues of a proceeding are no longer live, it may nonetheless proceed if, for example, the issues involved are of significant public importance.<sup>6</sup>

[20] Accordingly, I agree that the next step in the current proceeding must be to determine whether the Court should exercise its discretion to allow the proceeding to continue, or whether it should be declared moot.

[21] It is necessary to fix directions for the resolution of that issue.

[22] A contradictor needs to be appointed in light of the position taken for the three respondents who do not wish to be actively involved in this matter.

[23] I am not satisfied that directing the Solicitor-General to appoint independent counsel to assist the Court will necessarily give rise to a conflict of interest. Any such possibility of that kind is a matter for the Solicitor-General to manage in the usual way.

[24] It is well established that the appointment of counsel to assist is entirely a matter for the Court to resolve in its discretion. The purpose of such an appointment is to provide assistance to the Court on a matter in respect of which it would not otherwise receive assistance. It is worth repeating several factors that fall for consideration when considering whether counsel to assist should be appointed.

[25] Counsel assisting are typically appointed by the Court to help the Court itself.<sup>7</sup> Counsel assisting is not a party.<sup>8</sup> Counsel assisting do not act on instructions from a

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<sup>6</sup> *R v Gordon-Smith* [2008] NZSC 56; [2009] 1 NZLR at 721 at [24].

<sup>7</sup> *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [64]; and *Erwood v Holmes* [2017] NZHC 1278, [2017] NZAR 971 at [34].

<sup>8</sup> *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZCA 60, [2009] NZAR 523 at [21].

client or a party to the proceedings.<sup>9</sup> The correct approach is to view Counsel Assisting's involvement as emanating from the Court, not an instructing party.<sup>10</sup> The parties' consent to an appointment is not required.<sup>11</sup>

[26] In light of these principles, I am satisfied that it is appropriate for the Solicitor-General to appoint independent counsel to act as a contradictor with regard to both the mootness point and, subject to the outcome of that issue, with regard to the balance of the judicial review proceeding in this Court.

## **Result**

[27] I record that the three respondents abide the decision of the Court on the outstanding issues arising in this proceeding. Their attendances are accordingly excused.

[28] A copy of this judgment is to be forwarded to the Solicitor-General along with a copy of the Authority's determination dated 26 January 2022, and the application for judicial review dated 31 January 2022. She is asked to appoint Counsel Assisting for the purposes of acting as a contradictor in respect of the mootness point, and if necessary, for the balance of the proceeding.

[29] As soon as the Court is advised of that appointment, I will convene a telephone directions conference for the purposes of discussing the appropriate process for consideration of the issue as to whether the proceeding is now moot.

[30] In the circumstances, it is appropriate for each party to bear their own costs.

B A Corkill  
Judge

Judgment signed at 10.30 am on 5 April 2023

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<sup>9</sup> *Solicitor-General v Alice* [2007] 1 NZLR 655 (CA) at [20], citing *The Solicitor-General for New Zealand v Moodie* HC Wellington CIV 2005-485-1026, 25 July 2006 at [19]–[20] per Fogarty J.

<sup>10</sup> *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin*, above n 8, at [26].

<sup>11</sup> At [21].