



Employment Court of New Zealand

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FVB v XEY [2020] NZEmpC 158 (1 October 2020)

Last Updated: 8 October 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 158](#)

EMPC 263/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for intervener to cross-examine witnesses
BETWEEN	FVB Plaintiff
AND	XEY Defendant
AND	EBD Intervener

Hearing: On the papers

Appearances: D Fleming, counsel for plaintiff
M O'Brien, counsel for defendant
T Oldfield, counsel for intervener

Judgment: 1 October 2020

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application for leave to cross-examine)

[1] The Court is shortly to hear a challenge to a determination of the Employment Relations Authority (the Authority) in which the Authority declined to make certain non-publication orders.¹

¹ *XEY v EBD* [\[2020\] NZERA 334](#).

FVB v XEY [\[2020\] NZEmpC 158](#) [1 October 2020]

[2] EBD is the employer of FVB and XEY and was granted intervener status for the proceeding.

[3] This judgment resolves the intervener's application for leave to cross-examine the defendant and the other witness called by the defendant in respect of matters raised in their briefs of evidence. The application is limited to the paragraphs in those briefs that refer to the intervener and especially to its management of, and statements on allegations of sexual harassment.

[4] The intervener seeks leave to cross-examine those witnesses because:

- (a) the evidence identified is inconsistent with the evidence-in-chief that the intervener has been given leave to adduce;
- (b) it would be equitable to allow the intervener to cross-examine the two witnesses about serious allegations they

have made against the intervener and its senior personnel;

(c) it is the intervener, rather than the plaintiff, that is the subject of the complaints made and it is the intervener that has the best knowledge of its policies and procedures, and of a review currently being undertaken;

(d) the scope of the intended cross-examination is limited and should not unduly lengthen the proceeding; and

(e) granting the intervener leave to cross-examine, would allow the Court to more effectually dispose of the matter according to its substantial merits and equities.

[5] Given the proximity of the hearing, the parties were invited to respond to the application by 4 pm on 30 September 2020.

[6] The plaintiff does not oppose the intervener's application for leave and considers it is in the interests of justice that leave be granted, essentially because the evidence in question relates more directly to the intervener than it does to the plaintiff.

[7] The defendant has not responded.

Leave to cross-examine granted

[8] [Section 221](#) of the [Employment Relations Act 2000](#) gives the Court power to give directions as the Court considers necessary or expedient to dispose of any matter before it according to the substantial merits and equities of the case.

[9] The intervener already has been granted leave to adduce evidence, confined to the processes in place for managing complaints of sexual harassment.

[10] The matters on which the intervener wishes to cross-examine are limited. The evidence in chief in issue is directed to the intervener, rather than to the plaintiff, and includes serious accusations.

[11] In the circumstances it is in the interests of justice that the intervener is able to cross-examine the defendant and the other witness called by the defendant in respect of the matters identified in the application for leave.

[12] Accordingly, leave is granted to the intervener to cross-examine the defendant and the witness called by the defendant on the matters raised in the following parts of their briefs of evidence:

(a) paragraphs [9]–[17], [40] and [42] of the defendant's brief of evidence; and

(b) paragraphs [14], [16] and [17], [29]–[32] and [49]–[50] of the brief of evidence of the other witness called by the defendant.

[13] Costs are reserved.

J C Holden Judge

Judgment signed at 12 noon on 1 October 2020