



Employment Court of New Zealand

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HG v Employment Relations Authority [2021] NZEmpC 157 (20 September 2021)

Last Updated: 26 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 157](#)

EMPC 305/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for leave to be joined as a third respondent
BETWEEN	HG Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	NEW ZEALAND CUSTOMS SERVICE Second Respondent
AND	ATTORNEY-GENERAL ON BEHALF OF MINISTRY OF BUSINESS AND INNOVATION Intervener

Hearing: On the papers and by telephone conference on 17
September 2021

Appearances: F Karetai Wood-Bodley and W McMaster, advocates for
applicant P Gunn, counsel for first respondent
H Kynaston and H Kahn, counsel for second respondent S
McKechnie and T Bremner, counsel for intervener

Judgment: 20 September 2021

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN

(Application to be joined as a third respondent)

[1] By judgment dated 9 September 2021 the Attorney-General was granted leave to appear as intervener in these proceedings. That leave was granted on the basis that

HG v EMPLOYMENT RELATIONS AUTHORITY [\[2021\] NZEmpC 157](#) [20 September 2021]

the Attorney-General could file and serve written submissions and appear via counsel at the hearing but not call evidence or seek costs.¹

[2] The Attorney-General now seeks instead to be joined as a third respondent.

[3] The grounds relied on in the application for leave to appear as intervener are largely replicated in the application to be joined as a third respondent. The Attorney-General acknowledges that the change in status is sought for the purpose of preserving appeal rights over what is said to be an important jurisdictional question. He requests that, if the Court is not

mind to grant his application, he remain as intervener.

[4] The Employment Relations Authority (the Authority) abides the decision of the Court on the Attorney-General's application. It will consider its position in respect of HG's substantive proceedings once the outcome of this application is known.

[5] The New Zealand Customs Service (Customs) notes that, while it is a manifestation of the Crown, its role in respect of the proceedings before the Authority was as the employer of GF, who was the applicant in the Authority;² Customs as an agency does not have an interest in the broader issues that the Attorney-General has identified. In that sense, although through Customs, the Crown would be able to apply for leave to appeal a decision of the Court, both Customs and the Attorney-General say it is more appropriate that the Attorney-General represents the broader Crown interest in the proceeding. They say that is the most principled way forward.

[6] HG, the applicant in these proceedings, initially questioned the Attorney-General's standing to be joined as a respondent; they also filed a notice of opposition to the application from the Attorney-General to be joined as a third respondent saying they were concerned that they would be facing three parties from the Crown, which they suggested would be contrary to the public interest and prudent fiscal management of public funds and Crown legal business. They said it also would have cost implications in circumstances where HG is represented on a pro bono basis.

¹ *HG v Employment Relations Authority* [2021] NZEmpC 148.

² *GF v New Zealand Customs Service* [2021] NZERA 382 (Member Beck).

[7] HG agrees with the Attorney-General that the questions involved in these proceedings are important ones and, as a result of hearing from the other parties on this application, they changed their position; HG now says they accept whatever determination the Court deemed to be the most appropriate, given the public interest in this matter. HG nevertheless sought the continuation of the conditions set out in the judgment of 9 September 2021.³

[8] I accept that the issues involved in these proceedings are not issues in which Customs, as an agency, is concerned. I also acknowledge the argument that there would be an artificiality in having the Attorney-General appear as intervener, but in effect the principal contradictor, with Customs filing any appeal.

[9] I accept too that it is usual for the Authority to abide in proceedings in which it is named. However, that is not invariably the case.⁴

[10] The Court may look to join a respondent to enable it to more effectually dispose of any matter before it according to the substantial merits and equities of the case.⁵ In these proceedings no orders are sought against the Attorney-General; as noted, he does not wish to file evidence or cross-examine. There are no interests identified by the Attorney-General that go beyond those of the current respondents.

[11] Gaining a right of appeal is not a persuasive reason for the Attorney-General's status to be as a respondent, rather than an intervener. It is not uncommon for interveners to have concerns that they may wish to see considered on appeal, regardless of the concerns of the direct parties to the dispute. This can be seen in this jurisdiction, where it is common to have interventions from the Council of Trade Unions and Business New Zealand. While interveners are expected to stay above the fray, they do not need to be neutral.

³ *HG v Employment Relations Authority*, above n 1, at [7].

⁴ *Rawlings v Employment Relations Authority* [2006] NZEmpC 83; [2006] ERNZ 729; *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 (CA).

⁵ [Employment Relations Act 2000, s 221](#).

[12] Taking these matters into account, I am not satisfied the Attorney-General needs to be joined as a respondent, rather than an intervener, for the Court to more effectually dispose of HG's application for judicial review.

[13] The application is declined. The Attorney-General may remain as intervener on the terms previously set out, except as amended in the minute confirming timetabling for this matter, which is issued separately.⁶

[14] Costs are reserved.

J C Holden Judge

Judgment signed at 3.30 pm on 20 September 2021

⁶ *HG v Employment Relations Authority*, above n 1, at [7].

