



Employment Court of New Zealand

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Pilgrim v Attorney-General [2022] NZEmpC 168 (12 September 2022)

Last Updated: 15 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[\[2022\] NZEmpC 168](#) EMPC 85/2022

IN THE MATTER OF a declaration under [s 6\(5\)](#) of the
[Employment Relations Act 2000](#)

AND IN THE MATTER OF the appointment of Court expert
BETWEEN SERENITY PILGRIM, ANNA COURAGE,
ROSE STANDTRUE, CRYSTAL LOYAL,
PEARL VALOR AND VIRGINIA
COURAGE
Plaintiffs

AND THE ATTORNEY-GENERAL SUED ON
BEHALF OF THE MINISTRY OF
BUSINESS, INNOVATION AND
EMPLOYMENT, LABOUR
INSPECTORATE
First Defendant

AND HOWARD TEMPLE, SAMUEL VALOR,
FAITHFUL PILGRIM, NOAH HOPEFUL
AND STEPHEN STANDFAST
Second Defendants

Hearing: 9 September 2022 (Heard at Christchurch)

Appearances: BP Henry, D Gates and S Patterson, counsel for
plaintiffs G La Hood and A Piaggi, counsel for first
defendant
P Skelton KC, SG Wilson, J Hurren, C Pearce and H
Rossie, counsel for second defendants
R Kirkness, counsel to assist the Court

Judgment: 12 September 2022

SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE v THE
ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR
INSPECTORATE [\[2022\] NZEmpC 168](#) [12
September 2022]

INTERLOCUTORY JUDGMENT (NO 17) OF CHIEF JUDGE CHRISTINA INGLIS

(Appointment of Court expert)

[1] This judgment relates to a proposal to appoint a Court expert in respect of these proceedings. The proposal was set out

in a minute dated 6 September 2022. As was observed, it had become apparent (including from counsel's opening submissions) that a key issue in these proceedings relates to the extent to which the plaintiffs exercised "choice" as to working (and living) at Gloriavale and signing the Commitment, as well as the extent to which they "submitted". I indicated that I had formed the preliminary view that I would likely be assisted by an expert opinion and was considering appointing a suitably qualified psychologist.

[2] The proposal was strongly opposed by the second defendants (the Gloriavale defendants), and was supported by the plaintiffs and the Attorney-General (on behalf of the first defendant). All were agreed that the Court has jurisdiction to appoint an expert. Where they differed was in respect of the source of the jurisdiction and the way in which the Court's discretion should be exercised.

[3] I heard from counsel on Friday 9 September 2022. I indicated that I would issue a judgment promptly, in light of the time pressures that apply. This judgment deals with the issue.

Power to appoint Court expert

[4] The Employment Court has the statutory power under [s 189\(2\)](#) of the [Employment Relations Act 2000](#) to:

... accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[5] Mr Skelton KC, counsel for the Gloriavale defendants, submitted that this power was narrowly confined to, for example, calling for a witness to bring a particular document/s to Court during the course of a hearing. I do not accept that the power is

limited in this way. The provision is broadly worded. It is directed at supporting the exercise of the Court's jurisdiction to determine matters coming before it consistently with equity and good conscience. A narrow reading of [s 189](#) would undermine, rather than support, the clear Parliamentary intent of the provision.

[6] I see [s 189\(2\)](#) as the enabling provision in this case. If I am wrong about that, the power to appoint an expert arises via reg 6 of the [Employment Court Regulations 2000](#) and through that route the High Court Rules. In this regard reg 6 provides that:

6 Procedure

(1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.

(2) If any case arises for which no form of procedures has been provided by the Act or these regulations ... the court must, ..., dispose of the case-

(a) as nearly as may be practicable in accordance with-

...

(ii) The provisions of the High Court Rules affecting any similar case; ...

[7] The High Court Rules contain provisions relating to court appointed experts. Rule 9.36 provides that the Court may:

... at any time, on its own initiative or on the application of a party, appoint an independent expert ... to inquire into and report upon any question of fact or opinion not involving questions of law or of construction.

Exercise of discretion

[8] Mr Skelton submitted that it would be "unheard of and prejudicial" to appoint a Court expert halfway through the trial. The difficulty with that submission is that r

9.36 makes it clear that the Court may appoint an expert "at any time". So, while it may not be a step that has been previously taken

during the course of proceedings in this Court, it is nevertheless one which is clearly anticipated by the High Court Rules. And, as Mr Kirkness (counsel appointed to assist the Court) observed, it has been a

step taken in other Courts: *Taueki v McMillan* was referred to by way of example.¹ In that case the expert was appointed after the hearing:²

[29] The evidence of the parties was heard on 29 March 2005. At the conclusion of the hearing I adjourned the proceedings to consider appointing expert witnesses to assist the parties and the Court. I considered it appropriate that the area that is the subject of the application be mapped and places of historical significance or relevance to the parties should be clearly identified. I also considered that definitions of wāhi tapu, both in a historical and cultural sense, and in a legal context, would assist in the proper disposal of the proceedings. Three expert witnesses were subsequently appointed for these purposes.

[9] Mr Kirkness also drew my attention to the High Court's judgment in *Bayly v Hicks*³ and the subsequent judgment of the Court of Appeal judgment in the same proceedings.⁴ In the High Court, the Judge decided that an expert was required to decide on the best way to subdivide property and made an interlocutory judgment to that effect. This was appealed. Notably the Court of Appeal dismissed the appeal, recognising the Court's discretion to appoint an expert. The Court of Appeal did however express a note of caution, stating that:

[45] We further accept that it might be imprudent for a judge to proceed with that judge's own proposition in the face of implacable opposition from both parties. There would be no jurisdictional bar, but a judge would naturally be cautious about imposing her or his will in such a situation, particularly when a good deal of further action is required in relation to obtaining relevant consents.

[10] As I have already observed, while the Gloriavale defendants are strongly opposed, the same cannot be said of the plaintiffs nor the first defendant.

[11] Mr Skelton raised additional objections. The appointment of a Court expert would, it was said, involve significant additional cost and delay to the Gloriavale defendants, who would need to cross-examine the Court appointed expert and instruct their own expert (possibly from overseas). Whether or not any party will wish to cross-examine any expert appointed by the Court will no doubt depend on the contents

1 *Taueki v McMillan* (2014) 324 Aotea MB 144.

2. See too *Mighty River Power Ltd v Wanganui Gas Ltd* HC Auckland CIV-2010-404-8091, 16 June 2011, a case involving the appointment of an expert by the Court midway through the hearing, on the request of the parties.

3 *Bayly v Hicks* [2011] NZHC 920; (2011) 13 NZCPR 568.

4 *Bayly v Hicks* (2012) NZCA 589, [2013] 2 NZLR 401.

of any report the expert prepares. I accept however that the appointment of a Court expert will likely add to the cost of these proceedings. I accept too that it would likely add to the timeframes involved. Such matters, while relevant, must be balanced with other considerations, including the extent to which the Court may be assisted by the evidence.

[12] I note, in relation to time and cost considerations, that while reference was made to the possibility of any Court appointed expert having to interview each of the plaintiffs, I do not anticipate that would be necessary (even if it was open to the Court to direct such interviews). By the end of the hearing the Court will have heard a considerable amount of evidence (much of which is contested) about the individual circumstances of each of the plaintiffs, to inform an assessment of their status for the purposes of s 6. I envisage that an expert would be able to provide an opinion in respect of broader issues, directed at the extent to which being born and raised in a community such as Gloriavale may (in the expert's opinion) impact on the exercise of power and control; choice and submission. That, in turn, may assist the Court in considering the tests it generally applies in determining the real nature of the relationship, including having regard to direction and control.

[13] Mr Skelton also submitted that it was for parties in this Court to call their own evidence and it was not for the Court to enter the fray, absent exceptional circumstances. The plaintiffs could have called an expert and did not. The Court, it was said, was not akin to the Employment Relations Authority, which has an investigative, rather than adversarial function. I do not disagree with the proposition that the Court differs materially from the Authority, but nor do I think that appointing an expert (which is expressly provided for in the High Court Rules) offends against the proper role of the Court. The central point is whether the Court is likely to be assisted by the appointment; the special nature and extent of this Court's jurisdiction reinforces the point.

[14] Finally, it was submitted that had the appointment of an expert been flagged at the outset it may have impacted on the nature and scope of the second defendants' cross-examination. Any such prejudice can adequately be addressed in

other ways, including recall if necessary.

[15] Having balanced the above matters I am satisfied that it is appropriate to appoint an expert. Counsel appointed to assist the Court is directed to take steps to identify a suitably qualified person and to liaise with counsel for the parties with a view to seeking agreement on the appointment, formulation of the questions on which an opinion is sought, and as to the documentation to be provided. These matters are then to be referred to the Court for formal directions to be made, and/or resolution of any outstanding issues, and any consequential orders in terms of process.

[16] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 2.45 pm on 12 September 2022

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