IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 16
EMPC 281/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for the appointment of a litigation guardian
BETWEEN	DIANE DELE MOODY Plaintiff
AND	SHANE CHAMBERLAIN First Defendant
AND	HER MAJESTY'S ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF HEALTH Second Defendant

EMPC 368/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for the appointment of a litigation guardian
BETWEEN	CLIFF ROBINSON Plaintiff
AND	MARITA AND JOHN ROBINSON First Defendants
AND	HER MAJESTY'S ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF HEALTH Second Defendant

Hearing:	On the papers
Appearances:	P Dale QC, counsel for plaintiffs S McKechnie and C Boyce, counsel for the Attorney-General
Judgment:	15 February 2019

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
[Application for appointment of litigation guardian]

Introduction

[1] There are two separate but related proceedings before the Court (EMPC 281/2018 and EMPC 368/2018). Declarations are sought in each regarding the status of "employer" in the context of the Funded Family Care Operational Policy. The policy was adopted under s 70D of the New Zealand Public Health and Disability Act 2000 and the Funded Family Care Notice 2013, issued under s 88 of that Act.

[2] Mr Dale QC, counsel for the plaintiffs, has applied to the Court for orders appointing a litigation guardian for Shane Chamberlain (adult disabled son of Mrs Moody, plaintiff in EMPC 281/2018) and Marita and John Robinson (adult disabled children of Mr Cliff Robinson, plaintiff in EMPC 368/2018). Issues arose during the course of an earlier telephone conference as to whether the adult children should be party to these proceedings. It appeared to me that each had a demonstrable interest in the proceedings, and potential liability given the employer/employee issue, and that it was appropriate for them to be parties to it. An application for the appointment of a litigation guardian in respect of Shane, Marita and John followed. The application identified a potential appointee. The second defendant took issue with the proposed appointee. Mr Dale has subsequently put forward another name. I do not understand any issue to be taken with this proposed appointee, and the application can be dealt with on that basis.

[3] Counsel agreed that the application could appropriately be dealt with on the papers.

The Court's power to appoint a litigation guardian

[4] It is true, as Ms McKechnie (counsel for the Attorney-General) observes, that the Employment Court has not previously made an order appointing a litigation guardian. It is also correct that there is no express power under the Employment Relations Act 2000 or the Employment Court Regulations 2000 to make such an order. It is not however suggested, and nor could it be, that the Court has no power to appoint a litigation guardian in appropriate cases and as the interests of justice require. Plainly it does.

[5] The procedural route is via reg 6 of the Regulations which provides that in any case in which no procedure has been provided for, the Court must apply the High Court Rules 2016 (HCR). High Court r 4.30 provides that where a person is incapacitated they must have a litigation guardian unless the Court otherwise directs. A litigation guardian is authorised to conduct proceedings in the name of, and on behalf of, an incapacitated person.[1] A litigation guardian may "do anything in relation to a proceeding that the incapacitated person could do if he or she were not incapacitated."[2] A litigation guardian is expected to be partisan and to advance the interests of the incapacitated person.[3]

Should a litigation guardian be appointed?

[6] The litigation guardian rules only disqualify those whose mental incapacity prevents them from conducting litigation. They are designed to facilitate access to the Courts where the incapacitated person will be seriously compromised without that help.[4] The starting point is a presumption of competence. The inquiry then shifts to whether the person is able to understand the nature of the litigation, its possible

---

1 HCR 4.29 (definition of litigation guardian).
2 HCR 4.38 (powers of litigation guardian).
3 *Re Goldman* [2016] NZHC 1010, [2016] 3 NZLR 331 (HC) at [33].
4 *S v Attorney-General (in respect of the Ministry of Health)* [2012] NZHC 661 at [34].

outcomes and associated risks. If the Court is satisfied that a person lacks capacity they must be represented by a litigation guardian unless the Court orders otherwise.[5]

[7] What is incapacity for present purposes? I understood counsel for the Attorney-General to be submitting that a hybrid approach ought to be adopted in this jurisdiction, blending together the approach that is taken under the High Court Rules and under the Protection of Personal and Property Rights Act 1988. I am not drawn to this suggestion. Provisions in the latter Act are designed to protect persons "in respect of matters relating to his or her personal care and welfare"[6] by way of the appointment of a welfare guardian, and capacity is defined differently in both Acts.[7] It seems to me that it is the competence to engage in the legal proceedings before the Court which is the central issue for determination, rather than broader concerns about ensuring personal care and welfare. To cross-fertilise two legislative requirements and their differing purposes is unnecessary and runs the risk of injecting a greater degree of complexity into the proceedings than is required.

[8] There is a further, and more fundamental impediment. Regulation 6(2)(a)(ii) makes it plain that the Court must dispose of the application as nearly as practicable in accordance with the High Court Rules. In the circumstances I consider it appropriate to approach the issue on the following basis. An incapacitated person, for the purposes of disposing of the application before the Court, is a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is either:[8]

- not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or

- unable to give sufficient instructions to issue, defend, or compromise proceedings.

---

5 See *Erwood v Maxted* [2008] NZCA 139 at [26].
6 Protection of Personal and Property Rights Act 1988 (PPPRA), s 6.
7 Compare HCR 4.29 with the criteria in the PPPRA s 6, clearly explained in *X v Y [Mental Health: Sterilisation]* (2004) 23 FRNZ 47 (HC) at [51].
8 HCR 4.29.

[9] The Court must be satisfied of the requisite incapacity on the balance of probabilities.[9] The Attorney-General acknowledges that Shane and John are both profoundly disabled and unable to participate meaningfully in the proceedings. I accept that Shane and John are incapacitated.[10] Ms McKechnie takes issue with the position in so far as it relates to Marita. In this regard she points out that there are particular dangers with the Court taking a relaxed approach to the threshold requirements for incapacity.[11] I agree that caution is required, so as not to unwittingly trample on individual rights and interests which the Courts have a key role in protecting.

[10] Affidavit evidence annexing, by way of exhibit, an assessment report has been described as "best practice" in supporting a claim of incapacity for the purposes of r 4.29.[12] No such assessment is before the Court. That is not, of itself, fatal to the application. I do however need to be satisfied, on an appropriate basis, that Marita is incapacitated before making the orders sought.

[11] There is, as Ms McKechnie points out, no direct evidence on the incapacity point. It appears that Marita has been assessed (via a Needs Assessment Service Coordinator (NASC) client summary), as "high needs". The statement of claim (which has not yet been pleaded to) refers to Marita as "intellectually disabled". It also alleges that Marita has no mental capacity to fulfil employment obligations and refers to an individual support plan. It remains a matter of conjecture, based on the information currently before the Court, as to whether "high needs" equates to incapacity as defined in r 4.29. While it may do, it is a leap of logic I am not prepared to make, particularly having regard to the consequences of the order being sought.

[12] There is a paucity of evidence on which I can be satisfied that the threshold has been met and I am not prepared to make the order sought in respect of Marita on the

---

9 *Corbett v Western* [2011] 3 NZLR 41 at [98].

10 Shane was represented by a litigation guardian in earlier proceedings: *Chamberlain v Attorney-General* [2017] NZHC 1821, [2017] NZAR 1271; *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771.

11 Referring to a number of authorities in support, including *Corbett v Western*, above n 9; see, in particular, the discussion at [95].

12 *Cade v Cade* [2016] NZHC 1624 at [16]. See too the medical affidavit evidence before the Court in *Re Goldman*, above n 3, at [9]-[12].

basis of the information before me. I am however prepared to grant leave for an affidavit to be filed in support of the application in respect of Marita.

[13] I appreciate that there is an understandable wish to keep the costs associated with this litigation down, and to progress the proceedings without unnecessary delay. However, it is important that the Court only make orders of this sort when it is satisfied that it is appropriate to do so, in the interests of the parties themselves and the broader interests of justice.

[14] Any affidavit should be filed and served within 15 working days of the date of this judgment. Any response should be filed and served within five working days of service of the affidavit. Leave is reserved to apply for any further directions or orders, if that is required, in respect of this timetable.

Litigation guardian

[15] No difficulties have been raised in relation to the proposed appointment of Mr Luke Meys as litigation guardian. It appears that he would be well placed to represent both John's and Shane's interests. Mr Meys is accordingly appointed as litigation guardian for John Robinson and Shane Chamberlain in these proceedings. Mr Meys is a legal aid provider and issues relating to the costs associated with his role can be dealt with in the usual way.

Should conditions be placed on the appointment?

[16] Ms McKechnie urged me to impose a number of conditions in respect of the parameters of the appointment of a litigation guardian. In particular, Ms McKechnie submits that the ability of each of the disabled parties to express their views and participate in the proceedings, to the extent that each is able, should be expressed as part of the appointment. She invites analogy with the role of counsel for the child.

[17] I agree that it is important that each of the incapacitated parties have an opportunity to participate in the proceedings so far as may be appropriate. Litigation guardians are not, however, in the same position as counsel for the child and I do not

think it necessary or desirable to impose the same strictures on them. The position is reinforced by r 4.38 and the independent nature of the role of litigation guardian. And, as the Court pointed out in *S v Attorney-General*:[13]

> Once appointed, a litigation guardian has a wide discretion in the way in which they function. Rule 4.38 empowers the guardian to do anything the litigant could do if they had capacity. There is no reason why the litigation guardian could not, depending upon the extent of the incapacity, take into account in decision making any views expressed by the incapacitated person. This is the answer to Mr Ellis' claim that the litigation guardian process is objectionable because one size fits all. The guardian can "fit" his/her conduct of the case into the individual incapacitated person's strengths and weaknesses.

[18] Mr Meys is a lawyer and will be well placed to understand his obligations, to ascertain where the best interests of each of the incapacitated persons lie and the steps that ought to be taken to advance the case in these proceedings.[14]

Residual issues

[19] Finally, Mr Dale raised an issue in respect of the form of the statement of claim filed on 20 December 2018. I earlier directed that the two proceedings would be heard together. It is convenient for the intituling appearing on the Court minute of 18 December 2018 to be adopted going forward, as the Attorney-General has done. It should be noted that r 4.39 requires that the name of the incapacitated person be followed by the words "by his (or her) litigation guardian", together with the guardian's name. I do not require the plaintiffs to file a fresh statement of claim in the circumstances. Further documents filed in this matter should however use the above formulation to avoid any possible confusion.

[20] The proceedings should be scheduled for a case management conference before me in four weeks' time.

---

13 *S v Attorney-General*, above n 4, at [37].

14 The High Court Rules provide a mechanism for removal of a litigation guardian in appropriate circumstances: r 4.46(3).

[21] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2.15 pm on 15 February 2019