IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2020] NZEmpC 109
EMPC 254/2019

IN THE MATTER OF	an application for a declaration pursuant to s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	a challenge to objection as to disclosure
AND IN THE MATTER of	an application for directions as to representation
BETWEEN	JASON MCCOOK First Plaintiff
AND	HAILEY RENEE MALU Second Plaintiff
AND	JAMES LOGIE WRIGHT Third Plaintiff
AND	SAMUEL GREGORY Fourth Plaintiff
AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT First Defendant
AND	MADISON RECRUITMENT LIMITED Second Defendant

Hearing:	5 June, 1 July 2020 (heard at Wellington)
Appearances:	P Cranney and F Fitzsimons, counsel for plaintiffs S Hornsby-Geluk and P Gillespie, counsel for first defendant G Service, counsel for second defendant
Judgment:	27 July 2020

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL
(Challenge to objection as to disclosure
and application for directions as to representation)

Introduction

[1] The two issues requiring resolution in this case concern disclosure sought by the plaintiffs from the first defendant; and whether they can bring a representative action.

[2] The four plaintiffs entered into employment agreements with Madison Recruitment Ltd (Madison), who then placed them for work purposes with the Inland Revenue Department (IR or the Department).

[3] Subsequently, they brought proceedings under s 6 of the Employment Relations Act 2000 (the Act) contending that their real employment relationship was with IR, not Madison.

[4] Briefly summarised, it is alleged that IR and Madison entered into a Master Services Agreement, under which Madison provided certain services, as stipulated in a managing document and "Statements of Work" (SoW); and that workers who entered into employment agreements with Madison were then required by it to provide certain services to IR, according to a system which regulated the manner in which Madison workers would work for the Department.

[5] The plaintiffs contend that the real nature of the relationship was an employer/employee relationship with IR. Further, that the documents signed between each plaintiff and Madison, which were styled as employment agreements were, for material purposes, neither agreements nor employment agreements. The plaintiffs say that IR controlled the plaintiffs at all material times, and that they were integrated into the Department.

[6] IR and Madison strongly resist these allegations on the basis that Madison employed workers that it agreed to supply certain services to IR, which it did via its employees.

Background

The disclosure issue

[7] The proceeding was commenced in August 2019. On 5 September 2019, the plaintiffs served on IR a notice requiring disclosure in which some 42 categories of documentation were sought.

[8] On 10 September 2019, IR filed a notice of objection to disclosure on the basis that 37 categories of documents were either irrelevant or that disclosure would be oppressive. In essence, IR contended that much of the documentation sought related to a broad range of individuals who were not named as plaintiffs.

[9] On 21 September 2019, IR disclosed some 623 documents that were considered within the scope of the unopposed categories of the notice of disclosure. A second tranche of 601 documents was provided on 13 November 2019. Mr Cranney criticised IR's method of releasing these documents because the list summarising them was not in date or any other order. He says these were avoidable problems, but no relevant directions are sought; nor, in my view, are they required now.

[10] On 14 November 2019, an affidavit was filed by IR to the effect that if all the documentation referred to in the plaintiffs' original notice was disclosed, millions of documents would potentially need to be collated and prepared for release which would be oppressive. It was submitted that significant resource had already been devoted to disclosure processes.

[11] A challenge to the objection was filed, timetabled and scheduled for hearing on 13 December 2019. On that date, after hearing from counsel, I adjourned the disclosure challenge to allow the parties to continue their attempts to resolve the issues directly.

[12] Discussions occurred between the parties in early 2020 which were successful in refining the disputed areas; however, not all issues were able to be resolved.

[13] On 17 March 2020, after hearing from counsel at a telephone directions conference, I directed the plaintiffs to file an amended challenge to objection to disclosure and to specify the documents for which rulings were being sought.

[14] On 1 May 2020, the plaintiffs filed an amended challenge to objection in respect of four categories. IR filed an amended notice of opposition on 8 May 2002. I will outline the details shortly.

The hearings and submissions

[15] The challenge came on for hearing on 5 June 2020 when I received submissions from counsel concerning the disputed categories.

[16] For two reasons, it was necessary to adjourn the hearing part-heard. The first related to the fact that not long before the hearing a request had been made by the plaintiffs for a category of documents not referred to in their challenge. That request followed the introduction of an issue in a third amended statement of claim filed on 17 April 2020 which concerned delegations under s 41 of the State Sector Act 1988. It was also evident that the disputed categories of documents could be refined further. Accordingly, I directed the plaintiffs to file and serve a memorandum updating the list of categories of documentation for which rulings were sought.

[17] The second issue related to the impact of provisions of the Tax Administration Act 1994 (TAA), a topic which arose for the first time at the hearing. As will be explained later, some provisions of that statute could be relevant to issues of disclosure by IR if the Commissioner considers the release of documents could affect the integrity of the tax system or maintenance of the law. This was plainly a matter which needed detailed submissions, which counsel were not in a position to present at that stage.

[18] The hearing resumed on 1 July 2020. Submissions had been filed in the meantime which indicated there were three broad categories of documents which were

in dispute: documents concerning delegations, training material, and performance and disciplinary matters.

[19] At the resumed hearing, Mr Cranney, counsel for the plaintiffs, advised the Court that the last category was no longer in issue, which left two only. In more detail, these were:

Documents concerning delegations

a) a permissions matrix (including Parts A, B and C);

b) a delegations matrix, and a service delivery monetary matrix;

c) "Meeting in a Box" materials made available to Customer and Compliance Services' (CCS) leaders from February 2018, including those made available from an "Enabling You" link;

d) a document entitled "Leaders Guide on Decision Making";

e) a formal document or documents setting out policy/practice in relation to delegations;

f) documents about the issue of delegation relating specifically to Madison or Madison workers, if any exist and have not been provided;

g) any formal document or written policy dealing with the topic of IR's delegations directly to Madison workers;

h) the Minister's prior written approvals under s 41(2A) of the State Sector Act if they existed in relation to either Madison workers or Madison;

i) any delegations to Madison itself;

Documents concerning delegations

a) training materials; and

b) Frontline Foundation learning materials covering the topics of account maintenance, compliance and income tax; and Working for Families learning materials.

[20] In essence, Mr Cranney submitted that that all the documents sought were relevant to a s 6 analysis as pleaded and needed to be disclosed.

[21] Ms Hornsby-Geluk, counsel for IR, advised that its position with regard to each category was:

a) The contested documents were not relevant in a legal sense.

b) It would be oppressive for IR to have to prepare substantial volumes of documents, beyond those already disclosed, for disclosure.

c) Under s 18 of the TAA, release of the information sought would adversely affect the integrity of the tax system or would prejudice the maintenance of the law; and the Commissioner wished to exercise her privilege under s 18D by which she could not be required to produce the further documents to the Court.

Relevant principles as to disclosure

[22] The starting point for disclosure is reg 40 of the Employment Court Regulations 2000 (the Regulations), which provides:

> **40 Availability of disclosure**
>
> (1) … any party may require any opposing party—
>
> (a) to disclose and make available for inspection any documents which are in the opposing party's possession, custody, or control
>
> …

[23] One of the issues in this case relates to the concept of relevance for disclosure purposes. Regulation 38 defines relevance in this way:

38 Relevant documents

(1) … a document is relevant, in the resolution of any proceedings, if it directly or indirectly—

(a) supports, or may support, the case of the party who possesses it; or

(b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or

(c) may prove or disprove any disputed fact in the proceedings; or

(d) is referred to in any other relevant document and is itself relevant.

…

[24] The role of pleadings in assessing relevance is important. The leading authority on this topic is *Airways Corp of New Zealand Ltd v Postles*, a Court of Appeal decision which considered the former reg 48 of the Employment Court Regulations 1991.[1]

[25] For the purposes of that regulation, the Court of Appeal said:

> [5] With respect we consider the judge erred in law in drawing for present purposes a distinction between pleadings and proceedings. The pleadings define the ambit of the proceedings and thereby define the issues to which questions of relevance must be related. While the concept of relevance should not be looked at narrowly, it can never be divorced from the issues raised by the pleadings. That is what is meant by the reference in reg 48 to any disputed matter in the proceedings.

[26] The former reg 48 did not state that a document is relevant if it "directly or indirectly" falls within any of the defined categories. That phrase was added when reg 38 of the current Regulations was introduced. But the addition of these words reinforces the conclusion of the Court of Appeal that, whilst the pleadings define the ambit of the issues, the concept of relevance should not be looked at narrowly.[2]

[27] As noted, a further legal issue relates to the provisions of the TAA, since it is argued for IR that on the basis of provisions in this legislation, the Commissioner was able to claim a statutory privilege in relation to disclosure and had properly done so.

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1 *Airways Corp of New Zealand Ltd v Postles* [2002] 1 ERNZ 71 (CA).

2 See *ASB Bank Ltd v Nel* [2017] NZCA 559, [2017] ERNZ 879 at [17].

[28] Regulation 44(3) specifies the three grounds of objections to disclosure. If the TAA submission is correct, the applicable ground is that of reg 44(3)(c), that disclosure would be injurious to the public interest. It is well established that this immunity protects from disclosure information the secrecy of which is essential to the proper working of the government: *Science Research Council v Nassé*.[3]

[29] In *BNZ Investments Ltd v Commissioner of Inland Revenue*, the Supreme Court held that the then secrecy provisions of the TAA in effect addressed public immunity issues; it was accordingly not necessary to resort to the common law principle of public interest immunity or its statutory expression in s 70 of the Evidence Act 2006.[4] For reasons which I shall elaborate on shortly, I consider that the dicta of that case continues to apply.

[30] The particular provisions relied on by IR took effect on 18 March 2019.[5]

[31] The starting point is s 18D, which is headed "Disclosures made in carrying into effect revenue laws".

[32] Under a sub-heading of "Disclosures for court proceedings", s 18D provides:

> (4) *Section 18 does not apply to–*
>
> (a) prevent the disclosure of sensitive revenue information to a court or tribunal if the disclosure is necessary for the purpose of carrying into effect a revenue law:
>
> (b) *require a revenue officer to produce a document in a court or tribunal, or to disclose to a court or tribunal a matter or thing that comes to their notice in the performance of their duties.*
>
> (Emphasis added)

[33] The provision which is referred to in s 18D(4), s 18, deals with "Confidentiality of sensitive revenue information", but contains a subsection dealing with "Other revenue information" which provides:

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3 *Science Research Council v Nassé* [1980] AC 1028 (HL).

4 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709 at [71].

5 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019, s 10.

> (3) Despite sections 18D to 18J and schedule 7, the Commissioner is not required to disclose any item of revenue information if the release of the information would adversely affect the integrity of the tax system or would prejudice the maintenance of the law.

[34] "Revenue law" is a term defined in s 16C and includes the Inland Revenue Acts. "Revenue information" means information that is acquired, obtained, accessed, received by, disclosed to, or held by the Commissioner under or for the purposes of a revenue law, or under an information-sharing agreement. The same section includes a definition of "Sensitive revenue information", which encompasses the confidential information relating to the affairs of a taxpayer.

[35] Section 6(2) of the TAA defines the "integrity of the tax system" as follows:

> (a) the public perception of that integrity; and
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> (b) the rights of persons to have their liability determined fairly, impartially, and according to law; and
>
> (c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and
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> (d) the responsibilities of persons to comply with the law; and
>
> (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and
>
> (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

[36] Section 6A describes the Commissioner's duty of care and management, which includes the duty to collect over time the highest net revenue that is practicable within the law having regard to, amongst other things, the "importance of promoting compliance, especially voluntary compliance" by all persons with the Inland Revenue Acts.

[37] Turning to the enactment of these provisions, Ms Hornsby-Geluk relied on commentary issued by the Minister of Revenue in June 2018, in which he outlined the proposed changes he was about to introduce to the House.[6]

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[6] Hon Stuart Nash *Taxation (Annual Rates 2018–19, Modernising Tax Administration, and Remedial Matters) Bill – Commentary on the Bill* (June 2018).

[38] In the course of the commentary, the Minister referred to what would be described as "confidentiality provisions". He said that amendments were proposed to the current "tax secrecy" rules to more clearly focus on the core information which needed to be protected, namely information that identifies, or relates to, taxpayers. It was also proposed to modernise and restructure the confidentiality rules to improve the clarity and navigability of the legislation.

[39] Against that background, he stated that s 18, as amended, would set out a new confidentiality rule.[7] In the first instance, sensitive revenue information would be protected.

[40] He also stated that the new subsection 18(3) would protect information that, whilst not specifically about taxpayers, was:[8]

> ... still highly sensitive and the release of which could adversely affect the integrity of the tax system or prejudice Inland Revenue's ability to enforce the law. This would include information about matters such as audit or investigative techniques or strategies, compliance information, thresholds, analytical approaches and so on. The release of such information, if not protected, could affect the Crown's ability to collect revenue.

[41] He went on to discuss the confidentiality exceptions framework, and in that context referred to s 18D; of this provision he said:[9]

> The first category of exceptions, set out in proposed new section 18D, relates to disclosures made in carrying tax laws into effect. Further details of each exception are set out in proposed new schedule 7, part A. *Proposed new section 18D encompasses the existing exceptions in sections 81(1)* (carrying into effect), *81(1B)* (disclosures relating to a duty of the Commissioner), 81(1BB) (disclosures in a co-located environment), *and 81(3)* (disclosures for court proceedings).
>
> (Emphasis added)

[42] Section 81, as referred to by the Minister, was a provision which had previously been included in pt 4 of the TAA, under the heading "Secrecy" and which, under the Bill, would be repealed, to be replaced by the amended provisions of s 18 and s 18D.[10]

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7 At 45.
8 At 45.
9 At 47.
10 See generally at 37–38 and 44–45.

[43] After referring to this background, Ms Hornsby-Geluk took the Court to *BNZ Investments Ltd*.[11] In this decision the Supreme Court considered the secrecy provisions which were then in place; the Court stated in relation to s 81(3), the predecessor to s 18D(4):

> [55] Section 81(3) creates a privilege from being required to produce, which attaches to any material relating to the affairs of taxpayers coming to the notice of officers of the Inland Revenue Department in the performance of their duties. The privilege protects that material from requirements of compulsory disclosure in court proceedings. As indicated, the legislative history confirms that the statutory privilege was introduced in 1952 to clarify the basis and extent of that protection of the position of the Commissioner. Its purpose is to reinforce tax secrecy obligations under s 81.
> ...
> [69] ... Disclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner's statutory functions. ...

[44] Ms Hornsby-Geluk submitted that this dicta continues to apply, having regard to the express statement made by the Minister that s 18D encompassed the existing secrecy, or confidentiality, exception. This meant, she said, that the Commissioner could resist disclosure by exercising a statutory privilege under the recently enacted provisions of the TAA.

[45] Mr Cranney submitted that the language adopted in the former s 81, as considered by the Supreme Court, was materially different to that which now appears in ss 18(3) and 18D. I disagree. Although, the current formulations use more simplified language, I do not consider there are any material differences, whether one considers the text, or the reasonably obvious purpose demonstrated by that language, which is to protect the integrity of revenue information as used in the tax system. Parliament achieved that purpose by continuing to allow for a privilege to be exercised, as had long been the position.

[46] However, in determining whether the privilege had been properly claimed in this case, I indicated there should be a proper evidential basis to enable the Court to assess the conclusions reached. It was agreed, therefore, that an affidavit would be

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[11] *BNZ Investments Ltd*, above n 4.

provided to the Court to enable an evaluation of the reliance on the provisions of the TAA.

[47] In my minute of 1 July 2020, I directed the Commissioner to file that affidavit.

[48] Affidavits were then filed from Ms Rapley, corporate counsel for IR, and from Ms Amanda Gray, a Capability and Outcome Specialist, Level 2. This evidence related to the TAA issue and to other topics. Mr Cranney also filed submissions as to the contents of these affidavits.

Counsel's obligations

[49] Before turning to consider the individual categories of disputed documents, it is necessary to address a submission made by Mr Cranney as to the obligations of counsel when dealing with disclosure.

[50] Mr Cranney emphasised the onerous obligation which falls on counsel when dealing with disclosure. He submitted this was emphasised in r 8.13 of the High Court Rules 2016 (HCR), which applies via reg 6 of the Regulations. That rule states that a solicitor acting for a party must take reasonable care to ensure that the party he or she is acting for understands the obligations of a discovery order and fulfils those obligations. He relied on commentary in *McGechan on Procedure* which stressed that particular care should be taken by a solicitor who instructs an employee of his or her client to deal with discovery.[12]

[51] The commentary in *McGechan* referred to *Myers v Elman*,[13] where a solicitor left the preparation of an affidavit of documents to a clerk who was not a solicitor; the Court found that the solicitor, as an officer of the Court, could not escape responsibility to the Court for the proper discharge of duties by delegating these to an unqualified person who was not amenable to the jurisdiction which is exercised by the Court over solicitors and its officers.

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12 *McGechan on Procedure* (online ed) at HRPtSubpt1.06(2)
13 *Myers v Elman* [1940] AC 282 (HL).

[52] Mr Cranney also referred to dicta of Judge Colgan, as he then was, in *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1)*, when he said:[14]

> The pretrial process of discovery and litigation places serious, even onerous, duties upon counsel to ensure that the rules governing discovery or disclosure of documents are strictly adhered to. That is because a party is obliged to disclose documents unfavourable to that party's position in litigation as much as to make available documents which support that party's position. It is also because, unlike the trial, there is little or no independent supervision by a Judge of what is to be disclosed and what is to be withheld unless, of course, there is a formal challenge to disclosure as here. Counsel is, ultimately, responsible for the conduct of the litigation and cannot delegate important aspects of that to someone who ... has no accountability to the Court for the discharge of legal professional duties.[15]

[53] At the resumed hearing, Mr Cranney repeated these points by submitting that senior counsel appearing in a proceeding had the ultimate responsibility of ensuring disclosure obligations were being carried out properly, which could not simply be devolved to employees of the party represented by counsel.

[54] He said that in this case documents had been disclosed on a sequential basis – including some which had been provided on the delegations issue shortly before each of the two disclosure hearings, after counsel initially said that relevant documents did not exist. There was, he said, a real concern as to whether counsel's obligations were being fulfilled properly.

[55] For her part, Ms Hornsby-Geluk said that she had not personally perused many documents herself; that was because she was acting on the instructions of IR, and working with her junior, Mr Gillespie, who as in-house counsel had considered "thousands of documents". She said that the process of discovery had been undertaken within IR by trained lawyers who were experienced in discovery and understood the issues.

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[14] *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1)* [1998] 3 ERNZ 500 (EmpC) at 515.

[15] Similar observations were made in *Fox v Hereworth School Trust Board* [2014] NZEmpC 154, (2014) 12 NZELR 251 at [3]–[5].

[56] She also referred the Court to *Miller v The Commissioner of Inland Revenue*,[16] where the Court considered a claim for legal professional privilege in respect of documents prepared by Department lawyers. Baragwanath J concluded that in-house solicitors were entitled to the same privileges as all other practitioners, regardless of rank, and were subject to the same obligations.[17] It was inappropriate to draw a distinction between in-house counsel and those practicing privately if the former were acting as true lawyers and not in some other capacity. He concluded that the proper approach, where such an issue arose, was to require the in-house practitioner to demonstrate affirmatively that he or she had been acting as a lawyer when giving the relevant legal advice, and not simply as an employee possessing specialist skills.[18]

[57] The decision is of potential relevance in this case when considering any assessments of documents by in-house lawyers and/or junior counsel for the purposes of determining whether documents should be disclosed. With these considerations in mind, I directed the filing of affidavit evidence outlining the process which had been followed, which Ms Hornsby-Geluk indicated IR would be willing to provide. I indicated it would not be necessary for counsel themselves to file such evidence. The two affidavits which were then filed by senior IR staff, as referred to earlier, provided evidence on this topic.

[58] In her affidavit, Ms Rapley described the process as involved in dealing with the plaintiffs' requests for disclosure. She explained that part of her role is to manage a corporate legal team, which is a small group of in-house lawyers within IR, providing legal services to the Department on non-tax technical legal matters, including employment law. Mr Gillespie is a member of that team.

[59] Various IR staff were involved in assembling documents for review. Mr Gillespie has been closely involved in that exercise, discussing relevant requests with applicable IR staff, and his manager, Ms Rapley.

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16 *Miller v The Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC).
17 At 13,017.
18 At 13,018.

[60] She confirmed that whilst Mr Gillespie had taken primary responsibility for the disclosure process with regard to the documents currently requested, in every instance where IR proposed to withhold a document for reasons of relevance, oppression or under the TAA, Mr Gillespie, Ms Rapley, and senior tax lawyers had met with and discussed each requested item in detail with Ms Hornsby-Geluk.

[61] The original notice of disclosure was expressed in broad and wide-ranging terms. Documents disclosed had led to amendments being made to the plaintiffs' pleading. Shortly before the hearing, efforts were made to comply with fresh requests for documents that had not been included in the list of documents to be considered in the upcoming challenge.

[62] I am satisfied from the considerable detail provided in Ms Rapley's affidavit on these topics, and in light of the principles outlined in *Miller*, that the responsibilities of counsel have been properly discharged. That some of these were dealt with on a piecemeal basis is, in my view, understandable, given the broad scope of the requests which were made initially and subsequently, and the number of documents which had to be vetted for disclosure.

Context as provided by the pleadings

[63] The necessary context for the delegations issue is provided by several paragraphs of the statement of claim where the plaintiffs have pleaded that s 41 of the State Sector Act defines the scope of the lawful delegation of any of IR's functions, responsibilities, duties and powers; that it is unlawful and contrary to that section for IR to delegate any of her functions, responsibilities, duties and powers to Madison; and that it is lawful and in accordance with the section for the Commissioner to delegate any of her functions, responsibilities, duties and powers to the plaintiffs if they are employees, but unlawful if they are not her employees.

[64] It is also pleaded that Madison workers were to be trained as would be the case for other IR staff.

IR's explanation as to the disputed categories of documents

[65] As can be seen from the description of documents relating to delegations set out earlier,[19] in three instances documents about delegations to Madison itself were sought.[20] Ms Rapley says, however, that delegations are not able to be provided to entities, and there are therefore none to Madison. It is confirmed, however, there are delegations to Madison employees, including the plaintiffs. It is the categories relating to these persons which therefore fall for consideration.

[66] Ms Rapley explained in detail the way in which these delegations operated, her comments being supported by a brief memorandum from the manager in charge of revenue delegations when the plaintiffs were employed with IR. This explanation is of assistance in undertaking the processes involved.

[67] Ms Rapley then provided information as to the steps taken in connection with the various listed categories.

[68] First, the delegations matrix. It was explained that this document largely deals with roles in a part of the organisation known as Service Delivery, which was disestablished in February 2018 and replaced by CCS in the same month. She said the plaintiffs only ever undertook work in the CCS group. They were not given delegations under the delegations matrix, but under a new "Enabling You" process through a specific delegation instrument. It is accordingly submitted that the delegations matrix is not relevant to the matter before the Court.

[69] Also requested was a service delivery monetary matrix. Ms Rapley stated that this is still relevant to parts of the organisation which had not yet gone through a change management process, but that the plaintiffs were not assigned to those parts of IR.

[70] IR's objection is, therefore, one of relevance. A ss 18 and 18D objection is also raised.

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19 Above at [19].

20 Plaintiff's List of Documents Sought (8 June 2020) at 2(f) and 2(h)–(i).

[71] The plaintiffs requested a permissions matrix, known as a Reserved Decisions Matrix. Ms Rapley stated that the relevant parts of this matrix have been provided, being two confidential memoranda, and the document entitled "Enabling You" which explains how the delegation process worked; along with another document entitled "SSC Guidance – Delegations Under s 41 of the State Sector Act 1988" and an explanation as to the way in which IR manages its delegations under the "Enabling You" programme. Also provided was a brief explanation of the Reserved Decisions Matrix/Enabling You system, as it applied to IR employees on the one hand and contractors/third party agents on the other. Any further documents in this subcategory were the subject of a TAA objection.

[72] The next requested category related to "Meeting in a Box" materials which were made available to CCS leaders from February 2018; this included material available from the "Enabling You" link. The material was a collation of scripted information sent to leaders when talking to their teams; they were an aspect of technical and other updates in relation to "Transformation", a technological people and process change programme with which IR had engaged for several years. Disclosure was resisted on ss 18 and 18D grounds.[21]

[73] The plaintiffs requested a document referred to as "Leaders Guide on Decision-Making". Such a document could not be located, but another, called the "Leader Connect – Leading Decision Making" was.[22]

[74] It was concluded that the information was not relevant as the plaintiffs were not recipients of this training, which was for leaders; it contained no information relevant to the plaintiffs' claim. A s 18 and s 18D objection was raised.

[75] The final category of documents on which evidence was provided related to training materials. There had been a general request for these and a specific request relating to "Frontline Foundation" learning materials covering the topics of account maintenance, compliance, as well as "Working for Families" learning materials.

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[21] In her submissions Ms Hornsby-Geluk submitted it would be oppressive to disclose this material, but evidence of such a problem was not submitted in the affidavits of Ms Rapley or Ms Gray.

[22] Again, although it was originally contained in Ms Hornsby-Geluk's submissions that it would be oppressive to disclose those documents, no evidence was filed to that effect.

[76] Ms Gray provided information on this topic, as she had been responsible for managing the operational relationship with Madison. She explained in detail the information contained in IR's training materials, which she said constituted Revenue information. She said it was not disputed the plaintiffs had been trained, but the training of Madison employees was narrower than those of IR employees, as they were not exposed to the full suite of training that was available to the latter.

[77] She said that if training was to be regarded as building a pyramid, the base layer was foundation learning, with further training and skills thereafter added, layer upon layer, as skill and tenure progressed. Madison employees were trained, she said, as to the base layers of the pyramid, whilst IR employees continued to be trained in further layers which added different skills and tax technical knowledge as they grew more senior.

[78] She said that when IR employees commenced their employment, the training they received would depend on the nature of their role. If such persons were to answer voice contacts, they would generally receive "Frontline Foundation" training so as to provide an overview of how the tax system operates. This would serve as a foundational platform for further and more specific training as needed.

[79] A schedule of the modules available to IR employees was provided to the Court, it being noted that not every IR employee would complete each training module; the schedule demonstrated what was available, choice of modules being dependant on employee and business needs. She also said that additional training might be needed in such areas as mental health and people capabilities, as well as IR's Whānake approach, by which the Department manages the performance and development of employees.

[80] She contrasted this training with that undertaken by Madison workers. Frontline Foundation learning would be the same as for IR employees, but thereafter specific training would depend on the tasks and activities described in each SoW and could differ between sites depending on demand.

[81] Three of the four plaintiffs had received Frontline Foundation training, and two had also received Working for Families training.

[82] To demonstrate the difference between IR employees and Madison workers, a spreadsheet relating to the training given to the fourth plaintiff was provided. Initially he had been employed with Madison, but later became a permanent IR employee. As a Madison worker, he completed approximately 52 training modules as part of Frontline Foundation training and Working for Families training; once he was employed by IR he completed an additional 60 modules.

[83] Against this background, two objections were raised. The first was that the assembling of learning materials would be unduly onerous. Each module comprised a series of pages which included links to further pages, as well as other materials such as videos and presentations.

[84] Thus, to source the information, a staff member would be required to identify and collate links to the documents sitting behind each page within each module; following that each link would need to be accessed with screenshots being taken and copied. Such a task had been performed for the "Account Maintenance" module, with the material amounting to 118 pages, approximately 230 screenshots, as well as videos, presentations and other documents. It took two people approximately 30 hours to identify, retrieve and format this information.

[85] Ms Gray also said that the Working for Families materials were made up of two e-Learning topics, and that similar challenges would arise in retrieving these documents.

[86] A second objection was raised under the TAA.

[87] I now deal with each of IR's objections.

The ss 18 and 18D objection

[88] It was Ms Rapley and Ms Gray who gave evidence on this topic in their affidavits. There is no evidence that either held a relevant delegation from the

Commissioner; or if this is not the case, that the Commissioner has adopted the views expressed in their affidavits.

[89] They explained that in overseeing the disclosure process, Mr Gillespie had discussed TAA issues with Ms Rapley, as well as with other senior IR lawyers familiar with the TAA provisions. In doing so, consideration was given to the relevant definitions contained in ss 6 and 6A of the TAA, as set out above.[23]

[90] Ms Rapley stated that she and her colleagues were concerned that if the contents of the documents which were sought became public knowledge, taxpayers could attempt to game the tax system; for instance, they could attempt to bypass the administrative process put in place by IR, and/or manipulate information provided to it in an attempt to obtain an advantage of relevant thresholds.

[91] Ms Rapley said that she and members of her team also considered that releasing the entirety of the information was unnecessary due to lack of relevance. She also said that to do so would, in the view of the team, impact negatively on the tax system and maintenance of the law as it could lead to the gaming of the system.

[92] The conclusion that some documents could be released on the grounds of relevance shows a nuanced approach to the question of whether the privilege should be asserted. It was considered that if documents were relevant, they could be disclosed even although there could be concerns as to the impact of releasing those documents.

[93] It is evident that the analysis carried out by IR staff when assessing the s 18(3) tests focused on the prospect of harm arising as a result of the subject material entering the public domain.

[94] Two issues arise from this evidence. The first is there appears to have been no consideration of Mr Cranney's submission that the Court should consider making a direction that documents be provided on strict terms: one copy would be given to him only as counsel, and that no copy of any document could be made without leave of the Court. He also submitted that if a particular confidential document needed to be

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[23] Above at [35]–[36].

introduced in evidence at the hearing, suitable protective orders could be made. In short, the material would not enter the public domain. I observe that such mechanisms are frequently used by the courts to protect confidential and sensitive documents.

[95] The second issue which arises relates to the fact that s 18(3) refers to the views of the Commissioner. It is clear that these views as to whether the confidentiality criteria of the TAA are met, and whether she will rely on s 18D(4), should always be entitled to respect. But when evidence has been placed before the Court indicating a nuanced approach has been adopted which recognises some documents are potentially relevant, or that disclosure is to some extent appropriate, the Court can review the approach adopted in that regard. In the different circumstances considered in *BNZ Investments Ltd*, the Supreme Court held that when considering the exercise of the privilege in that case that the Court retained the ability to assess whether the Commissioner's approach to the use of documents could be reviewed for non-compliance with the TAA.[24]

[96] In all these circumstances, I require the filing of evidence as to whether the options alluded to by Mr Cranney were considered as an aspect of the s 18(3) analysis, which could allow a restricted release of the documents to him as counsel for the plaintiffs. On the face of it, such an option would appear to balance concerns as to confidentiality on the one hand, and as to the interests of justice on the other.

[97] This evidence should be filed by the Commissioner, or her properly authorised delegate. I also invite counsel to discuss the issue, since they may be able to resolve it in light of the Court's observations.

[98] If necessary, I will finalise my ruling as to the application of ss 18 and 18D after receiving the further evidence and submissions as described below.

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[24] *BNZ Investments Ltd*, above n 4, at [70].

Relevance objections

[99] As noted earlier, relevance issues arise in respect of the delegations matrix, and the service delivery monetary matrix, on the basis that these mechanisms were not utilised for the purposes of the plaintiffs' roles.

[100] I accept the evidence which has been placed before the Court by the Department as to these distinctions. I uphold IR's objection in that regard.

[101] IR submits that training materials need not be disclosed because it accepts that both IR employees and Madison workers undertaking particular work received the same training, at least in respect of the Frontline Foundation hearing package. However, as noted, Ms Gray said three plaintiffs received this training; she did not say all of them did. Some only received Working for Families training.

[102] Mr Cranney submits those materials will be fundamental to the plaintiffs' case because they will illustrate the relationship they have with Madison and IR managers, supervisors and customers. I agree these documents are relevant to the plaintiffs' claims.

Oppressiveness

[103] As summarised earlier, this ground of objection is raised with regard to learning materials. It appears that the material relating to the account maintenance module has been assembled as explained earlier, but not for other modules. Ms Gray says that some 57 hours would be required to obtain further information in respect of other topics. She also says that the information would be unlikely to be of much assistance, given that the format and nature of the training modules are all similar.

[104] I have accepted Mr Cranney's submission that the training material may be relevant when the Court undertakes its s 6 analysis. Although onerous, I conclude that the training materials should be disclosed, subject to the TAA point. Although this will have resource implications for IR, this is a matter which may be relevant at the costs stage of this proceeding.

Summary of disclosure issues

[105] In summary:

a) The first defendant is to file further evidence and submissions as to whether, notwithstanding its views as to the application of s 18(3), documents can be released to counsel for the plaintiffs, subject to Court ordered restrictions. I direct:

(i) The first defendant's evidence/submissions are to be filed and served by 4 pm on 3 August 2020.

(ii) The plaintiffs' evidence/submissions in reply are to be filed and served by 4 pm on 10 August 2020.

I will then finalise the Court's ruling as to whether or not the public interest objection is made out having regard to TAA considerations; and/or whether protective orders should be made as discussed earlier.

b) I uphold the first defendant's objection as to relevance in connection with the delegations matrix and the service delivery monetary matrix.

c) The first defendant's objection to disclosure of the training materials on the grounds of relevance is ill-founded, as is its objection as to oppressiveness.

d) Whether an order as to disclosure of the training documents can be made will have to await the disposition of the TAA point.

Second issue: can the plaintiffs bring a representative action?

[106] On 7 March 2020, the plaintiffs filed a second amended statement of claim. For the first time it was pleaded that the four plaintiffs were suing not only on their own behalf, but also on behalf of 36 persons listed in an attachment.[25]

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[25] This pleading was maintained in the third amended statement of claim.

[107] Initially, there was objection to this course because no consents from the affected persons had been produced. Because these have now been filed, that issue has been resolved.

[108] However, there remains a strong objection to the possibility of a representative action because it is not accepted that the representees have the same interest in the matter which is before the Court, as do the plaintiffs.

[109] It is common ground that r 4.24 of the HCR applies in the Employment Court by virtue of reg 6 of the Regulations.

[110] That rule states:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding –
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[111] In *R J Flowers Ltd v Burns*, McGechan J stated that r 4.24 of the HCR does not "[permit] plaintiffs to bring representative proceedings in situations which would not otherwise be permitted by the Court".[26] In that particular case, it was noted that although the representees had consented to the representation, that was not put forward as permitting the representative proceeding in itself, and that directions had been sought pursuant to the rule.[27]

[112] That approach has been adopted in the present case. I directed that the objections initially raised by the defendants as to commonality of interest be treated as a request to the Court to consider whether a representative action could be brought.

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[26] *RJ Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 264. The predecessor to r 4.24 was in the Judicature Act 1908, sch 2 r 78 as follows: "Where two or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested."

[27] At 264.

[113] The relevant principles are well established and are not controversial in this case.

[114] The Court of Appeal recently summarised the position in this way:[28]

> [14] A critical issue, usually the critical issue, in applications under r 4.24 is what constitutes "the same interest in the subject matter of a proceeding". In *Credit Suisse Private Equity LLC v Houghton,* Elias CJ and Anderson J said that this question is to be assessed purposively to allow the representative proceeding to be a "flexible tool of convenience in the administration of justice".[29] In particular it is to be construed in accordance with the purposes of the High Court Rules, towards the just, speedy, and inexpensive determination of proceedings so that a multiplicity of proceedings can be avoided in circumstances where use of the representative process will not be unfair to the proposed defendant.[30]
>
> [15] In a recent decision, *Cridge v Studorp Ltd*, this Court summarised the principles to be deduced from the relevant authorities as follows:[31]
>
> (a) The rules should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
>
> (b) Access to justice is also an important consideration. Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
>
> (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.
>
> (d) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.
>
> (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.
>
> (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.
>
> (g) The court should take a liberal and flexible approach in determining whether there is a common interest.

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28 *Southern Response Earthquake Services Ltd v The Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 (some footnotes omitted).

29 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2] citing *John v Rees* [1970] Ch 345 (Ch) at 370.

30 *Credit Suisse*, above n 29, at [55]–[56] and [61] per Elias CJ and Anderson J.

31 *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 852 at [11] (footnotes omitted).

(h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.

(i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.

[115] The Court of Appeal went on to state that an additional consideration relates to the merits of the proposed claim. It was explained that a provisional assessment requires no more than consideration of the claims as pleaded, to ensure that on their face they disclose an arguable case on the facts as pleaded. This can be a "broad brush impressionistic approach".[32]

Submissions

[116] In essence, Mr Cranney submitted:

a) The issue common to the four plaintiffs and the 36 representees relate to the identity of the employer; all such workers say that in reality IR was the employer. This conclusion was evident by considering a range of documents already before the Court, which established that each of the workers, in summary:

- were engaged at IR as either customer compliance officers of customer service officers;

- had an identical interest in the pleaded claims;

- were employed pursuant to an agreement between the first and second defendants known as the Master Service Agreement and were subject to the scheme described in the third amended statement of claim, under that agreement; and

[32] *Southern Response Earthquake Services*, above n 28, at [16]–[17].

- worked at IR pursuant to materially identical arrangements, as pleaded, including that IR controlled that work, and the workers were integrated into the Department.

b) The second defendant had filed evidence as to the individual circumstances of each of the 40 workers, which outlined pay rates, training/coaching given, hours of work, duration of placement, and how assignment ended. Any differences were immaterial, because all were engaged under an identical scheme, as agreed between the first and second defendants.

c) If the representative action proceeded, the plaintiffs would give evidence, along with some of the representees.

d) The main reason for the representative action was that the representees would not have to run their own case, which would avoid multiple proceedings and needless costs for all. This was an access to justice issue.

[117] In essence, Ms Hornsby-Geluk submitted:

a) When determining the true nature of an employment relationship, the Court must consider "all relevant matters, including any matters that indicate the intention of the persons".[33] Such an assessment requires a close analysis of the particular facts which are inherently factual and specific to each party. A "broad brush approach" would be necessary if proceedings were dealt with on a representative basis. This would not be appropriate. It was well established that a s 6 inquiry is intensely factual.[34]

b) Developing this point, counsel submitted that a s 6 analysis requires consideration of the personal relationship existing between the parties;

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33 Employment Relations Act 2000, s 6.

34 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [19], [38], [96] and [98]; and *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [3].

that relationship goes to the heart of the employment of a worker and requires careful consideration of the relevant intention in each individual case.

c) Allowing a representative action to proceed in the present circumstances would open the floodgates. It would also remove the focus from the personal nature of the relationship to a generic assessment of categories of workers, which is the antithesis of what is required by s 6.

d) The fact that the present proceedings were being funded by way of a litigation funding agreement meant that a higher threshold was appropriate in establishing whether the named persons had the same interest.

e) There are material differences in the circumstances of each of the workers involved. The plaintiffs' assertion that there is a common interest relies only on the description of the system adopted by the parties; it does not consider the individual circumstances which applied in each instance as required by s 6.

f) Prejudice would arise because:

- The first defendant would not have an opportunity to present evidence in respect of each and every worker or cross-examine those persons if they are not called.

- IR would therefore be deprived of the ability to run a full defence against the represented persons.

- The plaintiffs could effectively cherry-pick their best witnesses, whilst not calling others whose evidence may not be supportive of the plaintiffs' claims.

- Effectively the representees would be plaintiffs, yet would not necessarily be called. If all such persons were in fact called as witnesses, there would not be the economy referred to in the cases as being a feature of representative actions. Indeed, in that circumstance, all such persons should properly be joined as plaintiffs.

[118] In essence, Ms Service, counsel for Madison, submitted:

a) The company took a similar position to IR.

b) There was an existing employment relationship at the material times between the plaintiffs and the representees on the one hand, and with Madison on the other. A declaration, if made, had the potential to disturb that. Accordingly, Madison has the right to defend its relationships and has the right to ask the Court to inquire into the real nature of the relationship that existed in each instance.

c) The plaintiffs' case asserting commonality, which focused on the pleaded statements in the third amended statement of claim, did not refer to the elements of the relationship which the individual workers had with Madison. Significantly, there was no reference to their engagement with Madison, their contact with Madison, and the people with whom they dealt with at Madison. The evidence placed before the Court by Madison as to the nature of the relationship with it confirmed that there was insufficient commonalty.

Analysis

[119] An important preliminary point relates to the legal consequences which arise where persons are represented. Of these, Lord Denning MR stated in *Moon v Atherton*:[35]

> In a representative action, the one person who is named as plaintiff is, of course, a full party to the action. The others, who are not named, but whom

[35] *Moon v Atherton* [1972] 2 QB 435 (CA) at 441 (emphasis added).

> she represents, are also parties to the action. *They are all bound by the eventual decision in the case*.

[120] This proposition is well established in New Zealand, as was confirmed by the Court of Appeal in *Saunders v Houghton*.[36]

[121] Consequently, in considering the criteria of r 4.24 of the HCR, it is necessary to acknowledge that if this case proceeded on a representative basis, and were the plaintiffs to succeed, the defendants would likely be bound by the result not only in respect of the plaintiffs, but also in respect of the representees.

[122] Mr Cranney submitted that no allegations were made against Madison, and no orders were sought against that defendant. That does not, however, alter the legal consequences which would arise if the action proceeded on a representative basis. The issues raised by the defendants need to be considered in light of that effect.

[123] The issue of commonality is central to a consideration of r 4.24, since the rule applies only if the representees have "the same interest in the subject matter of [the] proceeding".

[124] Mr Cranney's submission as to commonality emphasised that each plaintiff and representee was engaged in exactly the same way, pursuant to the provisions of the Master Service Agreement, the managing document "Managing Madison Employees", and under the various standard operating procedures, all as pleaded. He said they were engaged under materially identical arrangements.

[125] Whilst, at this provisional stage, it is evident the workers were engaged under the same overarching system, it would appear there were some differences in their individual circumstances. Their tasks were as described in multiple and differing SoWs. Training varied according to the task required. As noted earlier, three of the plaintiffs received the Frontline Foundation training, and two only received training with regard to Working for Families contacts; no evidence is before the Court as to the particular training received by the remaining workers, but the evidence which has been filed suggests it was tailored to particular circumstances. The workers were engaged

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[36] *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652 at [65].

at a variety of sites, where different employment dynamics may have applied. These circumstances may all be relevant to a s 6 analysis.

[126] It will likely also be necessary, as counsel for IR and Madison submitted, to have regard to the relationship each plaintiff and representee had with Madison. The evidence filed to this point suggests:

a) There were differences in the way in which each such person came to be employed by Madison and placed on assignment at IR. Many responded to different advertising campaigns and initiatives; some were employed by Madison for previous assignments with other clients; and some transitioned to Madison from prior employment with another recruitment agency.

b) Members of the group had different types of employment arrangements with Madison during their respective assignments at IR: some were employed under casual employment agreements; some were employed on single fixed-term employment agreements; some worked multiple separate assignments at IR; and some started on a casual basis and were then transferred to fixed-term employment.

c) Each member of the group spent different amounts of time employed with Madison on assignment at IR, ranging from four months to 17 months.

d) Members of the group were engaged by Madison to perform different roles with different pay rates, durations and shift patterns.

e) Members of the group were provided with different levels of training or coaching by IR, dependent on the role to which they were assigned.

f) Madison had different levels of engagement with members of the group throughout their assignments: some had relatively few interactions, and some required more attention.

g) Members of the group worked at different IR premises across New Zealand.

h) Members of the group ended their IR assignments in different ways: some worked the full duration of their fixed-term employment agreements with Madison; some resigned and terminated their employment early; some continued their relationship with Madison after their assignment with IR ended; and some transitioned from assignments at IR to become employed directly by IR.

[127] This broad-brush preliminary analysis is not to be taken as indicating whether any individual person was or was not an employee of IR; but it tends to suggest there may be a range of circumstances that applied across the group.

[128] Given the need to undertake an intensely fact-specific inquiry as to the real nature of the relationship in all the circumstances, it is not, in my view, appropriate to conclude there is a sufficient commonality of interest as to justify the use of the representative procedure.

[129] Ms Hornsby-Geluk referred to *Beggs v Attorney-General*,[37] where the High Court considered whether six plaintiffs could represent 35 others in civil proceedings arising from a protest in the grounds of Parliament. Those persons had faced criminal charges which were dismissed. Various claims were then made alleging breaches of the New Zealand Bill of Rights Act 1990, and invoking the torts of assault, false imprisonment, malicious arrest and malicious detention.

[130] In determining that it was not appropriate for the case to proceed on a representative basis, the Court found that although there were similarities as to the essential facts of arrest, detention, denial of access to lawyers and legal consequences, each claim would have to be assessed on its own particular facts.[38] The court also said there was substance in submission made for the defendant that it would be deprived

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37 *Beggs v Attorney-General* (2006) 18 PRNZ 214 (HC).
38 At [31].

of the opportunity to present evidence in respect of individual claims, and to cross-examine the plaintiffs' concerns.[39]

[131] Although the facts in *Beggs* are of course quite different from those which arise here, the case illustrates the unsuitability of the representative action process where discrete findings of fact are necessary in order to assess individual claims.

[132] That is the position here. I accept Ms Hornsby-Geluk's submission that, on the facts of this case, to adopt a representative approach would diminish the focus on individual worker's circumstances, contrary to the clear Parliamentary intent of s 6.

[133] I also accept Ms Hornsby-Geluk's submission that if any representees were not called as a witness, there would be an inability to cross-examine that person with a view to establishing the real nature of the employment relationship. Yet, as already explained, were the plaintiffs to succeed the defendants would potentially be bound by the result in respect of such a person.

[134] This prejudice would be avoided, of course, were leave given for joinder of one or more of the representees as plaintiffs. Were that to occur, it would then be necessary and possible to analyse the individual circumstances of each such plaintiff.

[135] For the purposes of applications for declarations under s 6, subs (5) makes it clear that "[one] or more ..." persons may apply for an order of declaration.

[136] Ms Hornsby-Geluk also submitted that a higher threshold may be appropriate where the representative proceeding is being brought pursuant to a funding arrangement.

[137] Whilst that was the position in *Saunders*, that was because the details of a funding agreement required approval by the Court which required careful assessment by the Court.[40] The case is not authority for a general proposition a higher threshold should apply if representees would not meet a costs liability.

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39 At [32].

40 *Saunders*, above n 36, at [16]–[37]; see also *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 30 November 2011 for a succinct discussion on the supervisory jurisdiction of the Court

[138] Here, the plaintiffs and the representees are supported by the New Zealand Public Service Association Inc so that the plaintiffs' legal costs are to be paid by that Union. However, Mr Cranney in correspondence has stated that there is no additional or further funding arrangement.

[139] Ms Hornsby-Geluk submitted that persons who might not otherwise have wished to be included in these proceedings may have been encouraged to join them on the basis they would bear no costs for the litigation. Whether this is so, and/or whether the representees would otherwise bear legal costs has not been the subject of any evidence either way.

[140] A related point concerns access to justice considerations. The authorities make it clear that this is an important consideration, because representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant.[41] However, in the absence of evidence to what the position would be if a representative action is not permitted, this factor cannot assume weight.

Conclusion

[141] In summary, I am not satisfied that there is a sufficient commonality of interest between the plaintiffs and the representees or that it is in the interests of justice for such a procedure to be utilised in this proceeding; I find that prejudice would accrue to the defendants were this procedure to be adopted.

[142] For these reasons, the plaintiffs' application may not proceed on the basis of a representative action under r 4.24 of the HCR. The plaintiffs' claim should be repleaded accordingly. An amended statement of claim is to be filed and served by 4 pm on 3 August 2020; amended statements of defence may be filed and served by 4 pm on 10 August 2020.

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in relation to funding arrangements in representative actions.

41 *Cridge*, above n 31, at [11(b)].

Costs

[143] Costs are reserved in respect of the matters considered in this judgment. If they are in issue, they can be dealt with after the substantive hearing.

B A Corkill
Judge

Judgment signed at 4 pm on 27 July 2020