

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2015] NZEmpC 67
CRC 18/14**

IN THE MATTER OF a referral of a question of law from the
 Authority

AND IN THE MATTER of various interlocutory applications

BETWEEN AGUS RIYANTO AND 43 OTHERS
 Plaintiff

AND DONG NAM COMPANY LIMITED
 Defendant

Hearing: 17 April 2015, and on documents dated 17 March, 1, 2, 10, 15,
 16, 22, 23 and 24 April 2015

Appearances: P Dawson, counsel for the plaintiffs
 K Reid and J Inns, counsel for the defendant

Judgment: 15 May 2015

INTERLOCTUORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment determines an application brought by the plaintiffs for either a representation order, or an order that the claims of 10 plaintiffs only proceed to a hearing and the remainder are adjourned to a date to be fixed.

[2] The background is that 87 crew members from three South Korean flagged fishing vessels (*Sur Este 700*, *Sur Este 707* and *Sur Este 709*) owned by the defendant filed claims in the Employment Relations Authority (the Authority) alleging that wages were due. If the three actions had proceeded before the Authority they would have been consolidated. However, in a determination of

1 July 2014, the matter was removed to the Employment Court without the Authority investigating them.¹

[3] In this Court, the plaintiffs in respect of each vessel filed separate statements of claim. I am currently concerned with a claim brought by 44 crew members who it is alleged worked on *Sur Este 707*, that vessel being registered to fish in New Zealand fisheries waters pursuant to s 103(4) of the Fisheries Act 1996; it is also alleged that this Court has jurisdiction in relation to the employment relationship between the plaintiffs and the defendant by virtue of s 103(5)(g) of the same Act. The plaintiffs currently allege that:

- a) The defendant breached the obligations it owed to them under their employment agreements by failing to pay the plaintiffs their full wage entitlements.
- b) The defendant breached s 6 of the Minimum Wage Act 1983 by failing to pay the plaintiffs their full wages entitlements. This cause of action will involve a consideration of the findings made in *Idea Services Limited v Dickson* to support a contention that the plaintiffs be paid the minimum wage 24 hours per day and seven days per week for the period they were on call at sea.²
- c) The defendant breached s 12A of the Wages Protection Act 1983 by seeking and receiving premiums in respect of employment for some or all of the plaintiffs.

[4] In respect of the claim that the plaintiffs be paid for each hour that they were at sea, quantum is not yet pleaded. Alternatively, the plaintiffs seek orders that the defendant pays each of them for unpaid wages and for wrongfully retained sums in specific amounts. The claims arise between April 2007 and January 2013. The initial estimate of unpaid hours for the 44 plaintiffs is \$3,235,008.19, and for wages

¹ *Agus Riyanto & 86 others v Dong Nam Company Ltd* [2014] NZERA Christchurch 94.

² *Idea Services Ltd v Dickson* [2011] NZCA 14.

alleged to have been retained wrongfully by the defendant's agent, \$1,233,836, in all a total of \$4,468,844.19.

[5] For its part, the defendant denies each of the plaintiffs' claims, pleading in effect that all wages have been properly paid.

[6] On 25 February 2015, the Court was advised of a proposal that leave would be sought permitting specified plaintiffs to proceed with their claims in a representative capacity, relying on r 4.24 of the High Court Rules; alternatively an order would be sought that the claims of some plaintiffs only would be dealt with at an initial hearing whilst the claims of the remaining plaintiffs would be adjourned for a date to be fixed if necessary. The Court accordingly established a timetable to deal with that application, and set it down for hearing on 17 April 2015. The Court also established a timetable for the filing of evidence and documents for the purposes of a substantive hearing, a management meeting pursuant to regs 55 to 59 of the Employment Court Regulations 2000 (the Regulations), and a five-week hearing which is scheduled to commence on 5 October 2015.

[7] By 15 April 2015 a number of other interlocutory applications had been filed which required timetabling. There were applications filed by both parties for verification orders, an application filed by the defendant for an order confirming that the plaintiffs' lawyers had authority to act, and an application also filed by the defendant to cross-examine Mr Dawson in respect of an affidavit he had sworn in support of the application for a representation order or an order that selected claims only would proceed. I issued a minute on 15 April 2015 which timetabled these applications.

[8] Then at the request of counsel for the defendant, a telephone conference was held with counsel on 16 April 2015 to ensure that all matters were being addressed appropriately for the purposes of the hearing scheduled for the next day. In the course of that telephone conference, Mr Dawson confirmed that he would be appearing as counsel, because senior counsel who had hitherto represented the plaintiffs had a short time previously accepted judicial office. I invited Mr Dawson to consider his position as counsel, since he had filed and served an affidavit in

respect of which there was now an application to cross-examine, which suggested its contents were likely to be controversial. I referred to r 13.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (CCC Rules), which provides that if after a lawyer has commenced acting in a proceeding and it becomes apparent that the lawyer or a member of his or her practice is to give evidence of a contentious nature, the lawyer is required immediately to inform the Court and unless the Court directs otherwise, cease acting. I indicated that the Court had an interest in this matter by reason of r 1.20(1) of the High Court Rules.³ Mr Dawson advised the Court that he would be in a position to address that issue at the commencement of the hearing on the following day.

[9] Later that day the Registrar received an email from Mr Dawson indicating that because of the issues relating to the application of r 13.5.2 of the CCC Rules the plaintiffs would now seek leave to withdraw their application.

[10] At the commencement of the hearing on 17 April 2015, the foregoing issues were discussed with counsel in detail.

[11] The first issue related to Mr Dawson's position. He elaborated on the predicament which had arisen for the plaintiffs. Lead counsel had become unavailable unexpectedly, and in the time available it had not been possible to brief alternate counsel. I indicated that given the complex arrangements which had been made in order to progress the plaintiffs' claims, it was preferable to deal with the various issues that required resolution in accordance with the timetable imposed by the Court, and that the applications which were scheduled for hearing on that day should not be adjourned. I considered whether I should exercise the power to grant leave to Mr Dawson to appear as counsel under r 13.5.2 under the CCC Rules for the purposes of the interlocutory hearing. In all the circumstances, I concluded that a robust approach was justified.⁴ Although it was regrettable that the difficulty had arisen, undue prejudice was unlikely to arise if Mr Dawson was permitted to appear as counsel at the interlocutory hearing; I granted leave accordingly.

³ Which apply having regard to reg 6 of the Employment Court Regulations 2000.

⁴ As in *Pioneer Insurance Co Ltd v Anderson* (2008) 19 PRNZ 45 (HC).

[12] Next, I also considered the application to cross-examine Mr Dawson which had been the subject of written submissions filed the previous day. Rule 7.28 of the High Court Rules allows the Court to exercise a discretion to order the attendance for cross-examination of a person who has made an affidavit in support of an interlocutory application, where there are special circumstances.

[13] Counsel for the defendant submitted that there were for the purposes of the present application critical issues of disputed fact on the application for a representation order. This related to the extent of any common interest in the subject matter of the proceeding between any or all of the plaintiffs. It was asserted that the opinion evidence of Mr Dawson as to commonality needed to be tested by cross-examination. It was further submitted that some aspects of the affidavit contained inadmissible hearsay or opinion, and should be struck out or alternatively given no weight by the Court.

[14] I considered that Mr Dawson's affidavit contained opinion evidence in the nature of submissions from counsel. These statements were to be contrasted with more detailed opinion evidence given by deponents of affidavits filed by the defendant which will be summarised shortly. The deponents were Mr Wills, who gave evidence as to fact, and Mr Mincher who gave evidence of a series of analyses he had conducted of relevant documents. No request had been made for those deponents to be cross-examined. The affidavit also annexed documents provided by the plaintiffs who reside in Indonesia, so that it was not straightforward to obtain affidavits from them, as well as documents obtained on discovery.

[15] I accordingly ruled that the content of the affidavit would be treated as submission; and because the exhibits were not Mr Dawson's documents in any event, submissions could be made as to their relevance and weight for interlocutory purposes. The application to cross-examine Mr Dawson was dismissed.

[16] In light of the foregoing conclusions and after taking time to consider the position, Mr Dawson advised the Court that the plaintiffs would proceed with their application.

[17] Shortly before the hearing commenced, a late affidavit was filed for the plaintiffs in reply to the evidence filed on behalf of the defendant. That affidavit was from Mr Field who described himself as an analyst. He gave a detailed commentary on the conclusions reached by Mr Wills and Mr Mincher. The defendant was potentially prejudiced by the late filing of this material, which it was said had occurred because Mr Field was overseas. A short timetable was established so as to provide the defendant with the opportunity of responding to this material, and for the filing of supplementary submissions with regard to the plaintiffs' alternate application for an order that the claims of 10 plaintiffs' only should proceed.

[18] In light of the foregoing, counsel proposed and the Court agreed that the interlocutory application which required resolution could be dealt with on the papers. Directions were agreed for the other outstanding interlocutory applications and these are now recorded in a separate minute. All supplementary evidence and submissions have now been filed.

The plaintiffs' application

[19] The plaintiffs' interlocutory application seeks orders in these terms:

Application A: that the 10 nominated plaintiffs may pursue claims against the defendant for the benefit of groups of plaintiffs in relation to defined issues, such that findings relating to the nominated plaintiff on those issues would apply to all the plaintiffs identified in each group.

Application B: In the alternative, that the claims of the 10 nominated plaintiffs proceed to a hearing and the remaining claims are adjourned to a date to be fixed following that hearing.

[20] The groups of plaintiffs and the defined issues were set out in a schedule to the application. With reference to the defined issues, the proposed groupings are:

- a) Numbers of hours worked: it was proposed that in respect of factory and deck workers, three of the named plaintiffs would represent 32 other such workers, on the basis that the issue of hours worked by the three could adequately represent the remainder during the period in which they all worked on the *Sur Este 707*. It is proposed that on the same basis, two cooks would represent one other; one bridge worker

would represent one other, and two engineers would represent one other.

b) Work conditions: a definition of this term was proposed as follows:

- Those conditions which were included in the contract of employment between the plaintiff and defendant, whether expressed or implied.
- The duties carried out by the plaintiff.
- The defendant's expectations of the plaintiff.
- The availability, timing and duration of breaks.
- Start and finish times.
- Length of each work period.
- The provision and timing of meals.
- Living conditions during the period in which the plaintiff was not engaged in work.
- Sleeping conditions.
- The defendant's expectations and requirements of the plaintiff during the periods when the plaintiff was not working. The same representation is proposed in respect of this category as for the previous category, in respect of deck and factory workers, cooks, bridge, and engineers.

For this issue, the same groupings would apply as for the first issue.

c) Method and level of remuneration: this term would be defined as:

- Payments made by the defendant to the plaintiffs in New Zealand;
- Payments made by the defendant to their agent in Indonesia;
- Payments received by the plaintiffs in Indonesia; and,
- Incorporates any deductions made from wages by the defendant or their agents.

It was proposed that the method and level of remuneration for the 10 nominated plaintiffs during the periods in which they worked would

fairly and adequately represent all of the plaintiffs who worked during those periods; further, the contract dates of the 10 nominated plaintiffs' would cover the entire claim period. Although the level and method of remuneration changed from time to time throughout the claim period, any change in the level and method of remuneration would be applied to all plaintiffs who were employed at that time.

[21] In his supporting affidavit, Mr Dawson stated that there are issues of fact which are common to all plaintiffs, namely:

- a) All plaintiffs were employed by the defendant under a standard form contract of employment which incorporated the terms and conditions of the Code of Practice on Foreign Fishing Crew (COP) entered into between the Department of Labour, the Seafood Industry Council and the NZ Fishing Guild Inc in 2006, later superseded by Immigration Instructions in 2012.
- b) In accordance with the COP and the employment agreements there were common terms and conditions, including provisions as to the basis and means by which crew would be paid.
- c) All plaintiffs claimed their hours of work were under-recorded by the defendant.
- d) All plaintiffs claimed that monies alleged to have been paid by the defendant to the plaintiffs in Indonesia (through the defendant's agent) were never received by the plaintiffs.
- e) All plaintiffs have claimed that the defendant deducted amounts from the plaintiffs' entitlements in excess of deductions permitted by law or the COP.

[22] Mr Dawson also asserted that there are common issues of law namely:

- a) All plaintiffs claim that the defendant breached the obligations that it owed the plaintiffs under their employment agreements by failing to pay them their full wage entitlements.
- b) All plaintiffs claim that the defendant breached s 6 of the Minimum Wage Act 1983.
- c) All plaintiffs claim that the defendant breached s 12A of the Wages Protection Act 1983 by seeking and receiving premiums in respect of employment from some or all of the plaintiffs.
- d) All plaintiffs claim that they are entitled to be paid the minimum wage 24 hours per day and seven days per week for the period they are on call at sea, and in the alternative their entitlements are to be calculated based on hours worked performing duties on board the vessel less the amounts paid to them already.
- e) South East Resources (2001) Ltd is liable to the plaintiffs as guarantor of the obligations of the defendant.

[23] The affidavit goes on to discuss the proposed basis on which a representation would be made, as already described. In summary, it is contended that each of the 10 plaintiffs could fairly and adequately represent the others in each of the proposed categories of crew for each of the proposed defined issues. To support this assertion, reference was made to exhibits which consisted of unsigned will say statements as attached to a notice to admit facts dated 3 November 2014 (these facts were not accepted by the defendant); a selection of Seafood Industry Council (SEAFIC) timesheets covering the six-year claim period at six-monthly intervals; and a sample of documents reflecting the method by which crew were allegedly paid as asserted by the defendant.

The defendant's response

[24] In its notice of opposition, the defendant opposed the making of the requested orders, in these terms:

- a) Each plaintiff makes a claim for lost wages, the quantum of which is different in each instance. Each plaintiff will need to show that he worked individually for hours which exceeded those for which he was paid. It does not follow that even if one individual plaintiff was unpaid – which is denied by the defendant – other individual plaintiffs were also underpaid. Nor is that allegation pleaded in the statement of claim.
- b) The 10 plaintiffs named in the notice of application do not have the same interest in the proceedings as the groups of individuals it is proposed they would represent because:
- The plaintiffs carried out different duties on different days, and worked periods of time which were not consistent or related as between plaintiffs.
 - In many instances the proposed representative plaintiff was employed over a different period of time to those he is to represent.
 - There was no proper evidential basis to determine the shifts worked, the duties carried out, and the time taken to perform those duties so as to assess the similarity or otherwise of any of the plaintiffs' causes of action.
 - Nor was there a proper evidential basis for determining the amounts paid and received by the plaintiffs as wages and allowances.
- c) The defendant contends it would be highly prejudiced in pursuing its defence if the matter were to proceed by way of a representative claim.

[25] To support its opposition the defendant filed two affidavits. Mr Wills deposed to the fact that he is an independent fisheries observer who between 2007 and 2012 would have undertaken at least one trip per year on *Sur Este 707*. He

described the six different roles which were performed by crew; these included factory workers, deckhands, assistant oilers, and a galley boy. After describing the duties of each category, he stated that during times when the vessel was working longer hours, factory workers would be split into different shifts. Each would undertake different jobs at different times. Thus it would, for example, be difficult to assess what one factory worker did and confidently say that he worked the same hours and under the same conditions as another. He said there were even greater differences between the duties and working times of individual deckhands and factory workers, and also helmsmen and assistant oilers.

[26] Mr Mincher's affidavit contains a series of analyses with regard to each of the proposed categories. First he has produced a spreadsheet which he says graphically outlines the fact that the nominated plaintiffs' contract periods do not coincide with those of other plaintiffs in their respective group. He concluded that the documents which he has analysed reflect mobility in the crew; this is because some positions must be filled at all times and the factory workers are ultimately the source of relieving workers. With regard to the factory and deck workers group, he produced an analysis showing that the three nominated persons in aggregate do not cover the entire period of the claim. In the cooks' group he says there is a vast gap in the continuum because the two nominated representatives were not working on the vessel while the other member of the group was. Similarly, the bridge representative was not working on the vessel while the other member of that group was; again the nominated person could not be treated as representative. With regard to the engine room workers, both nominated members were recorded as working hours that were inconsistent with the group in which they had been placed.

[27] Turning to the crew payment system, he said he had examined the will say statements and what was clear was that each plaintiff received payments in differing amounts at different times. It was his conclusion that a crew member in any particular group did not receive, earn or withdraw the same amount of earnings as any other member of that group. It was his opinion that the proposed persons would not be representative of others in their particular group.

[28] Finally, he stated that he has analysed documents disclosed by the plaintiffs, including bank records, wage lists, wage records, and personal records, concluding that in at least three of the groups, the records disclosed by the nominated plaintiffs do not always cover the periods they worked. In all cases they do not cover the periods worked by other members of the groups which they are nominated to represent.

Reply evidence

[29] As mentioned earlier, Mr Field filed an affidavit in reply to the affidavits of Mr Wills and Mr Mincher. He said that the timesheets relied on for the defendant are a fabrication and are unreliable. This is because will say statements of the crew showed that they regularly worked a 16-hour day and often longer; such hours were not reflected in the timesheets which had been relied on for the purposes of analysis. Mr Field also critiqued other aspects of Mr Mincher's evidence, stating that he considers it to be "full of misleading and erroneous statements". He contended that port-of-call payments were always the same for each crew member on the same fishing trip, as all receive the same minimum hourly rate at a minimum of 42 hours per week. The specific amounts would increase for all crew at the same time over time.

[30] The defendant was given leave to file further evidence in response to Mr Field's affidavit, since it was filed late. An affidavit in reply from Mr Mincher responded to Mr Field's contention that because the time records are unreliable, so also is the analysis. Mr Mincher said the analysis was not based on the totality of hours recorded, but based on the observation that the number of hours recorded for groups of plaintiffs working in the same role on the vessel was the same but there were differences between the hours recorded for workers in other roles.

[31] Mr Mincher contested the criticisms made of his analysis by Mr Field, because it did not take account of the fact that there was a core system of monthly payments with a subsequent reconciliation against minimum hourly wage requirements. He also disputed Mr Field's interpretation of the contract documents.

Submissions: Application A

[32] After making reference to the relevant legal principles, it was submitted for the plaintiff that the affidavit evidence for the defendant was unreliable. Reference was made by counsel to a number of documents that were attached to the submission filed for the plaintiffs. The first was a report of a Labour Inspector which had been made regarding work practices of a recent voyage of the *Sur Este 707*. This had followed a briefing from a Ministry of Primary Industries (MPI) observer. According to the report the captain of the vessel had confirmed that:

- One continuous shift operated on the vessel.
- The hours of work recorded by the defendant on the crew wage and time records were not prepared on the basis of hours actually worked, but on the basis of how long it should have taken the crew to process a volume of fish.

[33] It was submitted it would be unconscionable for the Court not to make a representation order in reliance of the content of the defendant's wage and time records, when the captain of the vessel had confirmed those records were false.

[34] Counsel submitted that the evidence contained in Mr Wills' affidavit is unreliable because he was engaged to prepare observer's reports containing, amongst other things, details of fish caught. It was not his role to deal with manpower issues.⁵ It is submitted that his evidence is also at odds with certain statements given by the captain of the vessel to the Labour Inspector.

[35] The plaintiffs' submission then referred to an affidavit prepared for the purposes of a criminal prosecution brought by MPI against the captain and first officer of *Sur Este 707*. From that evidence counsel constructed a table as to volume of fish caught over a short period. It was submitted that the timesheets relied on by the defendant record hours that bear no resemblance to the tonnage of fish caught, and by necessary inference the actual hours worked.

⁵ It is unclear from the Labour Inspector's report whether Mr Wills was the observer referred to in that report.

[36] It is accordingly submitted that the best evidence of work practices which is available is that given by the plaintiffs themselves, as summarised in seven sworn statements attached to counsel's submissions. These statements were prepared for the purposes of the charges which were brought against the captain and first officer of the vessel, although the nature of those charges was not explained. These statements were made by five of the proposed 10 plaintiffs. Although prepared for a different purpose, there is some evidence therein of work practices on the vessel. It was submitted that this is primary evidence as to work practices, which confirms the extent of hours worked.

[37] Finally, it was submitted that it would be inequitable and unconscionable to deny the plaintiffs the making of a representation order, since they are indigenous seafarers who do not have the means to travel to New Zealand to attend trial. If each plaintiff was required to attend trial, there would inevitably be unnecessary expense and duplication.

[38] For the defendant, a summary of the evidence before the Court was provided. An outline of relevant legal principles was also given; then reference was also made to previous cases in this Court where application for representation orders were made.

[39] In counsel's analysis of Application A, it was accepted that there were some aspects of each of the claims brought which were common to all of the plaintiffs, for example the terms and conditions upon which they were employed. However, for each head of claim there were critical aspects where there was no common interest as between the plaintiffs as a whole, nor any particular group of plaintiffs. The particular position of each of the plaintiffs would need to be examined by the Court.

[40] In summary the difficulties were described in these terms:

- a) Under the analysis relating to the application of whether time spent sleeping amounts to "work" attracting the minimum wage under s 6 of the Minimum Wage Act 1983, the particular circumstances of each

individual employee may lead the Court to reach different conclusions in respect of each.

- b) With regard to underpayment of wages there was no proper evidential basis to determine the shifts worked, the duties carried out and the time taken to perform those duties. Thus the similarity or otherwise of the plaintiffs' causes of action could not be assessed. Nor was there a proper evidential basis to determine the amounts paid and received as wages and allowances. The evidence called for the defendant confirmed that the proposed member plaintiffs do not have the same interest in the defined issues, because they do not fall into the same groups as the nominated plaintiffs.
- c) The plaintiffs were proposing to establish their claims with reference to handwritten timesheets kept by some of them. Even if the Court were to conclude that informal timesheets more accurately reflected hours worked by those crew members, it did not follow that those timesheets would provide an accurate record of time worked by other crew members. The degree of similarity of each plaintiff's working hours to that of the handwritten timesheets kept by other crew would be a critical issue at trial. If the Court were to find that the requisite degree of similarity of working conditions as between groups of plaintiffs existed so that damages could be dealt with on a representative basis, the Court would be determining a critical issue that will be contested at the trial. In reality, each of the plaintiffs needed to be called so that they could be cross-examined as to their individual circumstances.
- d) As regards the issue of whether unlawful deductions had been made from the plaintiffs' wages by agents, no evidence had been provided which identified the individuals who were alleged to be the agents of the defendant; nor was there evidence or a pleading as to whether the same agents are alleged to have been used by all the plaintiffs. Thus it was impossible to assess any common interest.

- e) In conclusion, it was submitted that although the authorities confirm that a liberal approach is to be applied to applications for representation orders in cases where an injustice can be avoided, in this case the issues as to liability were complex and would need to be assessed on an individual basis. There were issues of credibility so that cross-examination would be necessary. Damages issues could not be resolved by global orders.

Resolution of Application A

[41] The plaintiffs' application is made under r 4.24 of the High Court Rules which provides:

4.24 Persons having the same interests

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interests in the subject matter of a proceeding—

- a. with the consent of the other persons who have the same interests; or
- b. as directed by the Court on an application made by a party or intending party to the proceeding.

[42] In *Credit Suisse Private Equity LLC v Houghton*, the Supreme Court considered this rule when dealing with an issue as to limitation of actions. The majority decision was delivered by Glazebrook J who emphasised:⁶

- a) The principle purpose of a representative action is the promotion of efficiency and economy of litigation. The whole point of having a representative proceeding is to avoid clogging the Courts with a multiplicity of individual actions covering the same subject matter, which would undermine the efficiency and economy of litigation.⁷
- b) Flexibility in how r 4.24 is applied accords with the modern approach to representative proceedings; the rule should be applied to ensure that

⁶ *Credit Suisse Private Equity LLC v Houghton* [2014] 1 NZLR 541 (SC).

⁷ At [147] and [158].

the overall objective of the High Court Rules as outlined in r 1.2 is achieved.⁸ A liberal approach is justified in light of those objectives.⁹

- c) Where injustice can be avoided, the rules should be applied to promote the expedition and economy of proceedings.¹⁰
- d) Although the approach of McGechan J in the earlier decision of *R J Flowers Limited v Burns*¹¹ accords with the objectives of the High Court Rules and the goal of representative proceedings, it should not be treated as a last word on the matter. But as long as defendants are not compromised and the aims of underlying representative actions are advanced, there is scope for continual development in this area.¹²

[43] Representation orders have been made in this Court from time to time; in those instances the principles described above have been applied.¹³

[44] A concern with regard to the application for representation orders in this instance relates to the somewhat unsatisfactory nature of the evidence filed in support. The Court is being invited to assess the difficult issue of common interest from will say statements that refer to the circumstances of the individual workers, but which do not refer expressly to the circumstances of others in each proposed category. Reliance is also placed on a small sample of documents that may or may not be indicative of practices which occurred across the full period of the claim which runs from 2007 to 2013, as well as sworn statements prepared for a prosecution the details of which are not before the Court, and statements contained in a Labour Inspector's report which was not formulated for the purposes of the present application. The Court is being asked to draw inferences from these materials; moreover those inferences are strongly contested by the analysis and submissions advanced for the defendant.

⁸ At [129]-[130].

⁹ At [151].

¹⁰ At [151].

¹¹ *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC).

¹² *Credit Suisse Private Equity LLC v Houghton*, above n 6, at [152].

¹³ *Chapman v Waitamata Stevedoring Services Ltd (No 2)* [1992] 3 ERNZ 756 (EmpC); *United Food Workers v Talley* [1992] 3 ERNZ 423 (EmpC); *Law v Caterair NZ Ltd* [1998] 2 ERNZ 159 (EmpC); *Anderson v Capital Coast Health Ltd* [2000] 1 ERNZ 256 (EmpC).

[45] In short, on the material which is before the Court for the purposes of the present application, there is significant controversy as to whether the nominated plaintiffs have the same interests as all the remaining plaintiffs in the subject matter of the proceeding. I find that the evidence filed for the purposes of this application demonstrates that there is a significant degree of dispute as to the extent of any common interest. This is particularly evident with regard to the question of whether the work undertaken by any particular individual from any of the identified categories is necessarily the same as that undertaken by other individuals in that category. This is the case not only for the main category of workers – factory and deck workers – but also the other proposed categories.

[46] These concerns are not restricted to issues of quantum; I accept the submission made for the defendant that there will also be liability issues, the answer to which may well differ between plaintiffs. Consequently this is not a case where it would be possible in the first instance to resolve issues of liability, and quantum for some plaintiffs; and then provide for the possibility of quantum being dealt with subsequently for the remaining plaintiffs.

[47] Furthermore, to decide that the necessary common interest existed would, in effect, be to decide at an interlocutory stage that key elements of the pleaded causes of action are made out. I am not persuaded that it is appropriate to rule at this stage that the evidence of one party or the other should be preferred.

[48] Accordingly, I do not conclude that the plaintiffs are correct in their assessment of the extent of the common issues or that it is appropriate to make representation order in the terms sought. It may be possible to reach such a conclusion at trial once the parties' evidence has been properly tested, but it would be premature to conclude now that the 10 plaintiffs are indeed representative of others in the proposed categories for the purposes of the issues which have been identified. The result is that the application for a representation order is dismissed.

[56] Although timetabling orders have already been made in other respects for the purposes of that hearing, there is one issue which needs to be addressed in this judgment. It relates to the issue of whether the plaintiffs were required to pay a bond or security in order to gain employment with the defendant. Particulars relating to that assertion need to be provided. If this allegation is to be pursued, the plaintiffs are to file and serve an amended statement of claim within seven days of this judgment; and the defendant may file and serve a statement of defence to that amended statement of claim within seven days thereafter.

[57] I agree that the proceedings for the balance of the plaintiffs, in respect of the three vessels, should be progressed. I do not consider that a formal order of stay of those claims is appropriate. Counsel for the plaintiffs is to file and serve an application for directions in respect of the three subject proceedings within 14 days of the date of this judgment. I anticipate there will be an issues conference after the judgment with regard to the claims of the 10 plaintiffs has been issued; at that point there is likely to be more certainty as to what assistance is needed from the Court. If issues that have little or no merit are thereafter pursued, there may be cost consequences.

[58] Costs with regard to the applications considered in this judgment are reserved and will be dealt with following the substantive hearing.



B A Corkill
Judge

Judgment signed at 3.00 pm on 15 May 2015