IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA109A/10
5146042

BETWEEN	KAREN PIVOTT First Applicant
A N D	PATRICK O'SULLIVAN Second Applicant
A N D	SOUTHLAND ADULT LEARNING PROGRAMME First Respondent
A N D	LITERACY AOTEAROA INC Second Respondent

Member of Authority:	James Crichton
Representatives:	Patrick O'Sullivan, Advocate for Applicants Miriam Sinclair, Counsel for First Respondent Prue Kapua, Counsel for Second Respondent
Investigation Meeting:	On the papers
Determination:	24 September 2010

FURTHER INTERIM DETERMINATION OF THE AUTHORITY

History

[1] By statement of problem filed on 21 December 2009, the first and second applicants (respectively Ms Pivott and Mr O'Sullivan) brought various claims against both the first and second respondents. Statements in reply from both the first respondent, Southland Adult Learning Programme (Adult Learning) and the second respondent, Literacy Aotearoa Inc (Literacy Aotearoa) were filed in due course resisting the claims in the statements of problem.

[2] On 15 March 2010, the Authority convened a telephone conference with the parties' representatives, the purpose of which was to consider and timetable an appropriate response to what, for the sake of a label, became known as the *threshold issues*. Submissions on those issues were timetabled and an interim determination of

the Authority issued on 5 May 2010. The nub of the Authority's decision was there was … *credible basis for the joinder of Literacy Aotearoa to the present employment proceedings brought by the applicants against their employer Southland Adult Learning Programme*. Accordingly, the Authority concluded that Literacy Aotearoa should be struck-out of the present proceedings and ought not to have any further involvement in the matter, as a party.

[3] Contemporaneously with the progress of the present matter, a second claim by the first applicant in this proceeding against the former second respondent in this proceeding, Literacy Aotearoa, was on foot. Amongst other things, the advocate for Ms Pivott had proposed the joinder of actions. Of course, pursuant to the Authority's interim determination of 5 May 2010, Literacy Aotearoa had been struck-out of these present proceedings and so the joinder of actions was no longer in prospect. Mr O'Sullivan, for Ms Pivott, sought a commitment from Literacy Aotearoa for mediation to endeavour to resolve the matter without the necessity of proceeding to the Authority.

[4] The various exchanges between the parties on this issue were sensibly put in front of another Member of the Authority in my absence overseas and that Member equally sensibly indicated that issues of joinder could only be considered by the Authority in respect of a claim actually before the Authority and could not include consideration of a matter yet to be put before the Authority. To formalise the other matter just referred to, Mr O'Sullivan, the advocate for Ms Pivott, filed a fresh statement of problem in respect of Ms Pivott's claim against Literacy Aotearoa;

[5] Ms Pivott's advocate then proposed that the two actions be joined in submissions erroneously dated 9 May 2008 (sic) actually 2010. This application proceeded on the footing that Ms Pivott was in an employment relationship with both Adult Learning, the respondent in file No 5140642 and independently in an employment relationship with Literacy Aotearoa, file No 5303465. It was contended that the grievances which Ms Pivott had raised against each employer were *interconnected*. That memorandum (for ease of reference, the May 2008 memorandum), was referred to both respondents by the Authority. The application for joinder of actions was opposed by both respondents.

[6] Since that time, Mr O'Sullivan for Ms Pivott has filed further submissions dated 23 May 2010 in which Mr O'Sullivan advances the proposition that Literacy

Aotearoa be joined because it is now contended that Literacy Aotearoa is in breach of s.134(2) of the Employment Relations Act 2000 (the Act). This subsection provides for a penalty to be imposed by the Authority against persons who incite, instigate, aid or abet a breach of an employment agreement. Mr O'Sullivan correctly observes that the relevant subsection deliberately refers to *persons* rather than *parties* so that the liability to penalty subsists beyond the category of parties and beyond the principals of any relevant employment agreement.

[7] Ms Pivott's submission suggests that as the Authority has the power to join Literacy Aotearoa to the proceedings brought by Ms Pivott against Adult Learning, it should do so. Of course, the power of joinder is a discretionary power and its use is governed by principle. Of course, the claim on which the joinder rests is hotly disputed by the party it is proposed to be joined. Moreover, the Authority has yet to investigate the employment relationship problem and in the absence of hearing evidence on the matter and testing it by questioning from the Authority and the representatives, it might be thought premature to join Literacy Aotearoa to the present proceedings.

[8] However, the practical reality is that the investigation by the Authority in respect of the employment relationship problem brought by Ms Pivott against Adult Learning, her employer, **may** disclose conduct by Literacy Aotearoa which falls within the ambit of s.134(2) of the Act. Ms Pivott claims that Literacy Aotearoa is broadly guilty of such aiding and abetting in relation to her employment agreement with Adult Learning.

[9] Ms Pivott submits that the appropriate and practical way of dealing with this allegation is to join Literacy Aotearoa to her existing proceedings against her former employer, Adult Learning. She asks rhetorically, in effect, how else is she to progress that argument?

[10] Ms Pivott has also brought separate proceedings against Literacy Aotearoa. Those proceedings are stoutly resisted by Literacy Aotearoa which says there was, at the relevant time, no subsisting employment relationship and therefore the proceedings are misconceived.

[11] Because of the perception that the Authority was not minded to consider the application for joinder of actions, Ms Pivott then filed an application for the removal

of this matter to the Employment Court. By notice of direction dated 9 August 2010, the Authority indicated that this present determination would deal both with the application for removal and the prospect of a joinder of actions. Ms Pivott's advocate has also helpfully taken the opportunity of providing additional submissions and comment on the way forward. It is appropriate now to turn to consider the two issues for determination in the present matter, viz whether a joinder of actions is appropriate and whether or not the matter should be removed to the Employment Court.

Should there be a joinder of actions?

[12] The arguments for and against this issue have been thoroughly canvassed in the preceding section of this determination. The Authority's conclusion is that a joinder of actions is not necessary to achieve the applicant's aims and is an unreasonable imposition on Literacy Aotearoa if the case for a breach of s.134(2) cannot be made. While Mr O'Sullivan's submissions on process are well founded in terms of an adversarial system, his submissions rather overlook the flexibility which the Authority has because of its inquisitorial nature. It is available to the Authority, for instance, to not put a party to proof of its position in circumstances where the Authority is not satisfied that a claim has been made out.

[13] This is, in the Authority's view, just such a case. If, as a consequence of the applicant's case against Southland Adult Learning, the Authority forms the provisional view that Literacy Aotearoa has a case to answer, then the Authority would forthwith want to agree a process with those parties (Ms Pivott and Literacy Aotearoa) to investigate the alleged breach of s.134(2). As matters stand at the moment, Ms Pivott has a claim against her employer, Adult Learning, which stands on its own and has raised a variety of different approaches to drawing in Literacy Aotearoa to those proceedings.

[14] The first of those methods of drawing in Literacy Aotearoa was the suggested joinder of parties which was rejected by the Authority in its interim determination of 5 May 2010. Now, Ms Pivott is advancing the view that Literacy Aotearoa should be joined not as a party but that her proceedings against both respondents should proceed together.

[15] The Authority has tried to make it clear that it has never been opposed to the practical disposition of its business and in particular to the prospect that Ms Pivott's

two actions could be heard one after the other, **if the parties agreed**. However, the position is that the parties did not agree to that suggestion, in particular because Literacy Aotearoa quite properly took the view that it was available to it to contend that there was no employment relationship at all between Ms Pivott and itself and therefore, until that threshold issue had been dealt with, it was understandably not interested in taking matters any further.

[16] Then, Ms Pivott, in an effort to deal with those various objections, suggested that a claim by her against Literacy Aotearoa alleging a breach of s.134(2) of the Act, would meet the case and would enable the Authority to allow for joinder.

[17] I accept that in principle, that cause of action is available (that is, the joinder of those actions) but the remedy sought is discretionary and given the Authority's inquisitorial role, I think the better course is for Ms Pivott's claim against Adult Learning to proceed first in the normal way, during the course of which, Ms Pivott and her witnesses can, amongst other things, tell me why they contend that Literacy Aotearoa has breached s.134(2) of the Act. If I am satisfied that there has been a breach of the statute in that particular regard, I will then promptly agree a process for dealing with that allegation as between those parties.

Should the matter be removed to the Employment Court?

[18] Mr O'Sullivan sought removal of the whole matter to the Court, ostensibly on the basis that an important question of law was involved: s.178(2)(a) of the Act applied.

[19] In the Authority's view, there are fundamental difficulties with this application. The first and by far the most significant is that it is difficult to see what important question of law arises in the present matter. The applicant proposed a joinder of parties at first instance, and that application was considered by the Authority and dismissed by determination dated 5 May 2010. Ms Pivott could have challenged that determination if she saw fit. She chose not to. Then, as I have already made clear, Ms Pivott sought a variety of other ways of involving Literacy Aotearoa which she regards as being intimately involved in the personal grievance she seeks to establish against Adult Learning.

[20] This determination is the first determination by the Authority on the joinder of actions although the matter has previously been the subject of comment in Notices of

Direction not all of which were as clear as they might have been. Ms Pivott's submissions on removal proceed on the erroneous basis that the Authority has already determined the matter and, in doing so, declined to give reasons.

[21] In essence, the authority remains to be convinced that there is an important question of law involved. The various applications for joinder have been considered on their merits, the joinder of parties by the interim determination of 5 May 2010 and the joinder of actions by this determination. Joinder is not especially novel and in each case, the Authority has simply considered the arguments and made a decision which is available to challenge. It is suggested that the real basis for the application to remove was the erroneous belief the Authority had already made a capricious decision and that claim is displaced by the present determination.

[22] The matter is now properly disposed of by the Authority in this determination and it is available to Mr O'Sullivan to challenge it on behalf of his client Ms Pivott if he thinks that appropriate. In the alternative, as I have made clear, the Authority's flexible process will allow the matter to be progressed, albeit not precisely in the way that Mr O'Sullivan proposed.

Determination

[23] For the reasons advanced in the present determination, the application to join Literacy Aotearoa to the present proceeding is declined, as is the application to remove this matter to the Employment Court.

Costs

[24] Costs are reserved.

James Crichton
Member of the Employment Relations Authority