IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-002269
[2017] NZHC 2810

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
IN THE MATTER OF	application for judicial review
BETWEEN	PHILLIP JOHN SMITH Plaintiff
AND	THE ATTORNEY-GENERAL ON BEHALF OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 18 September 2017

Appearances: P J Smith (Self-represented Plaintiff) in Person
A M Powell for the Defendant
C G Tuck for the Non-Party

Judgment: 16 November 2017

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 16 November 2017 at 1.15 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Crown Law, Wellington
Lawaid International Domain Chambers, Tauranga

Copy To: P J Smith, Auckland

Introduction

[1] Following Mr Smith's escape from custody in November 2014, the Department of Corrections put in place an interim temporary release regime for serving prisoners. Mr Smith seeks judicial review of the decisions suspending the existing regime and establishing the new one.

[2] This judgment addresses two interlocutory applications made in the proceeding:

(a) First, an application by Mr Smith for discovery of the Department of Corrections' internal emails; and

(b) Second, an application by Mr Ray, a non-party, for joinder as second plaintiff to the proceeding. Mr Ray is a serving prisoner who claims to have been affected by the changes to the temporary release regime. In the event that he is joined, he also seeks an order for discovery.

[3] The respondent sues on behalf of the Department of Corrections, and for ease of reference I will simply refer to the respondent as the Department. The Department says that the discovery sought by Mr Smith is neither relevant nor necessary to determine the judicial review application. It also says that the cost of providing the discovery is disproportionate to the likely relevance any documents will have to the subject matter of the proceeding.

[4] The Department also opposes Mr Ray's application on the basis that the proceeding is different in kind, and Mr Ray's presence before the Court is not required to determine the judicial review application.

The temporary release regime

[5] Sections 62 and 63 of the Corrections Act 2004, and regulations 26 and 27 of the Corrections Regulations 2005 provide for a temporary release regime for certain

prisoners.[1]

[6] Section 62(1) provides for the class of eligible prisoners to be specified in regulations. Regulation 26 sets out that class which is defined by reference to the term of imprisonment, eligibility for parole, the prisoner's security classification, and the nature of the offence committed.

[7] Under s 62(2), the Chief Executive of the Department "may" give authority for the temporary release from custody for any purpose specified in regulations which the Chief Executive considers will facilitate the achievement of objectives set out in that subsection. At the relevant time, reg 27 set out the relevant purposes for which temporary release could be granted. Those purposes include: releases to undertake paid employment (release to work) or vocational training, to visit family, to attend programmes designed to assist with rehabilitative and reintegrative needs, and a variety of other stated purposes.

[8] Under s 62(3), the Chief Executive must consider the matters set out in that subsection in exercising the power to grant a temporary release from custody. These matters include: the safety of the community, the need for supervision or monitoring, the benefits of facilitating the prisoner's reintegration, and upholding the integrity of any sentence served by the prisoner.

[9] Section 63 relates specifically to temporary release from custody. It provides that any temporary release is for a period fixed by the Chief Executive, and may be subject to conditions (including electronic monitoring). Under subs (2), the Chief Executive or prison manager may at any time direct the return to prison of any person temporarily released from custody. Subsections (3) and (4) deal with the circumstances in which a person who is temporarily released from custody is deemed to be unlawfully at large.

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[1] Since the commencement of this proceeding, reg 27 has been revoked by reg 7 of the Corrections Amendment Regulations (No 2) 2017.

[10] Finally, under s 196 of the Corrections Act, the Chief Executive is authorised to issue guidelines on the exercise of powers under the Act or regulations.

The interim regime

[11] In November 2014, Mr Smith absconded whilst on a 72-hour temporary release and fled to Brazil. He was subsequently recaptured and brought back to New Zealand.

[12] In the wake of that escape, the Chief Executive sent an email dated 11 November 2014 suspending all temporary releases for prisoners pending a review of the temporary release procedures and policies.

[13] That decision was followed by circulars, including those sent on 14 November 2014 and 3 February 2015, which put in place an interim temporary release regime. Mr Smith alleges that these circulars had the effect of restricting the class of prisoners eligible for temporary release, and the purpose for which they may be released. It is this interim regime which Mr Smith challenges by way of judicial review.

[14] The circulars remained in force until 19 October 2015, when they were replaced by fresh guidelines on the implementation of the regime.

The pleaded claim and defence

[15] Mr Smith challenges the decisions made in the email sent on 11 November 2014, and in the circulars sent on 14 November 2014 and 3 February 2015.

[16] He pleads two causes of action. In the first cause of action he claims that the decisions were *ultra vires* and an unlawful fetter of discretion. The key pleaded allegations are as follows:

(a) The Chief Executive had no power to suspend the release regime under ss 62 and 63 of the Corrections Act 2004 and it was therefore *ultra vires* and illegal;

(b) The 14 November 2014 and 3 February 2015 decisions:

(i) restricted the class of prisoners permitted to apply for temporary release and were therefore *ultra vires* s 62(1) of the Act and reg 26;

(ii) restricted the purpose for which temporary release could be granted and were therefore *ultra vires* s 62(2) of the Act and reg 27; and

(iii) unlawfully fettered the discretion of decision-makers to grant temporary releases to those classes of prisoner with a sentence of greater than 24 months, and for the purposes set out in reg 27.

[17] Mr Smith alleges unlawful dictation in the second cause of action. He pleads that the discretion to decide whether to review the release to work authority for any prisoner was vested in the prison director once the powers under ss 62 and 63 were delegated to that prison director by the Chief Executive. He says the 14 November 2014 and 3 February 2015 decisions directed the prison directors to review the release to work regime for certain categories of prisoners, and as such they were an act of dictation and, accordingly, unlawful.

[18] The plaintiff seeks declarations that the decisions were *ultra vires* and illegal or were otherwise an act of dictation. Orders quashing the decisions are also sought in both causes of action.

[19] The Department does not dispute that the emails and circulars were sent, and relies on other circulars sent around the same time. It also admits that the 14 November 2014 and 3 February 2015 circulars contained a request to prison managers to review the conditions of prisoners involved in release to work programmes, and pleads that this was to assess whether the prisoner should be subject to GPS monitoring during the temporary release.

[20] However, the Department denies that the decisions were unlawful. It also pleads by way of affirmative defence that Mr Smith lacks standing, and that the proceeding has been rendered moot by the fact that the interim regime is no longer in force.

[21] A strike-out application challenging Mr Smith's standing to bring the judicial review application was unsuccessful.[2] Palmer J ruled that Mr Smith was sufficiently affected by, and connected to, the decision at issue to have personal standing to bring his claim. But, even if he did not, the Judge considered there was sufficient public interest standing for Mr Smith to bring the claim.[3]

Discovery application

[22] The Department has already discovered several documents in the proceeding either voluntarily, or by way of initial discovery served with its statement of defence.

[23] That discovery includes: the temporary release and release to work circulars, versions of the Prison Operations Manual which are currently in existence, and which were in existence at the relevant dates, the email message dated 11 November 2014, and a delegations table which sets out those who have delegated authority to approve temporary releases and who have the primary role of doing so. In addition, the Department has agreed to disclose statistical information about the number of prisoners approved for temporary release and release to work programmes on a year-to-year basis.

[24] Mr Smith's application has been significantly refined so that he now seeks emails between 9 November 2014 and 9 December 2014 (a period of one month) using search terms "release to work" or "RTW", "temporary release" or "home leave", and "cease" or "suspend" or "withdrawn", between the following people:

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2 *Smith v The Attorney-General on behalf of The Department of Corrections* [2017] NZHC 1647, [2017] NZAR 1094.

3 At [3].

(a) the Chief Executive;

(b) the National Commissioner; and

(c) Prison Directors at Auckland Prison, Rimutaka Prison, Christchurch Women's Prison, and Otago Corrections Facility.

[25] The Department maintains its opposition to the discovery application, even on that narrow basis. It estimates that confining the discovery as proposed by Mr Smith would still result in approximately 3,000 documents which would need to be reviewed for relevance.

Legal principles

[26] The Court has a discretion whether to grant discovery in judicial review proceedings under s 10 of the Judicature Amendment Act 1977. The Court must exercise its discretion to make a discovery order on a case by case basis such that proceedings are disposed of in an efficient and timely fashion.[4]

[27] In *Wellington International Airport Ltd v Commerce Commission*, Hammond J made the following observations about the exercise of that discretion:[5]

> [40] … "Discovery" is confined to what is in issue on the pleadings. Documents are relevant if they may (not "must") either advance the parties own case, or damage the opponents case, or if alternatively they would lead to a course of inquiry which would do so. It is sometimes said that a document is discoverable if it "throws light" on the case. The scope of discovery is therefore generally determined by a liberal construction of the pleadings.
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> [41] Secondly, assuming that something is relevant in the sense I have just indicated, the Court nevertheless has a discretion. "Relevance alone, though a necessary ingredient, does not provide an automatic sufficient test for ordering discovery" (*Science Research Council v Nasse* [1980] AC1029 at 1067 per Lord Wilberforce; approved of in that respect by our Court of Appeal in *Brierly Investments Limited v Lion Corporation Limited* [1987] 1 NZLR 600).

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4 *Air New Zealand Ltd v Auckland International Airport Ltd* (2001) 16 PRNZ 783 (HC) at [29] and [35].

5 *Wellington International Airport Ltd v Commerce Commission* HC Wellington CP151/02, 25 July 2002 at [42].

> [42] Thirdly, however it is cast – and this has been put in various terms in the leading appellate judgments – the critical test is whether discovery is "necessary" for disposing fairly of the proceedings.

[28] In *Northland Environmental Protection Society v Chief Executive of the Ministry for Primary Industries*, Woodhouse J observed that the discretion in s 10(1) does not require an applicant to establish necessity, although a Judge may determine that the discovery is not necessary and therefore decline to order discovery in a particular case.[6]

[29] As with discovery in ordinary proceedings, relevance is a necessary pre-condition to an order for discovery. Relevance is to be determined by the pleadings. The fact that the proceeding is a judicial review will also be pertinent to the assessment of relevance. As Wild J observed in *BNZ Investments Ltd v Commissioner of Inland Revenue*, judicial review is intended to be "a comparatively simple process of testing that public powers have been exercised after a fair process and in a manner which is both lawful and reasonable".[7]

[30] Discovery must also be proportionate. The principle of proportionality is reflected in the High Court Rules relating to discovery. Rule 8.2(1)(a) provides an obligation on parties to cooperate to ensure that the processes of discovery and inspection are proportionate to the subject matter of the proceeding.

[31] In *Commerce Commission v Cathay Pacific Ltd*, Asher J said that in order to determine proportionality, it is first necessary to consider the chance of finding relevant documents and their degree of relevance. That should then be balanced against the costs of carrying out the discovery process. His Honour also said that broader considerations such as the amount at issue, the resources of the parties, and delay to the proceedings may also be relevant to the proportionality inquiry.[8]

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6 *Northland Environmental Protection Society v Chief Executive of the Ministry for Primary Industries* [2016] NZHC 406 at [8] and [10].

7 *BNZ Investments Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,078 at [15].

8 *Commerce Commission v Cathay Pacific Airways Ltd* [2012] NZHC 726 at [12]–[13] and [18].

Should discovery be ordered in this case?

[32] The first question concerns relevance. As the Department submits, the discovery sought will not be relevant to the legality of the decisions challenged by Mr Smith. Those challenges will be ostensibly determined by considering the provisions of the Corrections Act and Regulations and whether the decisions are authorised under those provisions.

[33] However, the emails may be relevant to the allegation that there was an unlawful fetter of the discretion to grant a temporary release and that prison officers acted under dictation from the Department. Emails which set out how the interim regime was to be applied and how in fact it was implemented may also be relevant to the unlawful fetter and dictation grounds of Mr Smith's claim.

[34] Those emails may also be relevant to the question of relief. Declaratory relief is discretionary and the court will not grant relief where the question is moot, or where it will not serve any purpose.[9] The Department claims that any relief is moot given that the interim guidelines are no longer in force. Mr Smith disputes this position. He submits that the effect of the interim regime is still being felt by those prisoners who had their temporary release or release to work approvals withdrawn or curtailed. The question of relief is therefore a live issue on the pleadings as currently drafted.

[35] I do not consider Mr Smith's contention can be simply dismissed as speculative, as the Department submits. His position derives some support from the Government enquiry into Mr Smith's escape (the Traynor report). The findings of that report were summarised in an affidavit sworn on behalf of the Department, which was cited in Palmer J's decision on standing.[10] That affidavit records that the number of prisoners released outside work programmes was reduced from 443 to 264. The interim regime was also said to have significantly adversely affected prisoner morale, and delayed the progress of a considerable number of prisoners on reintegrative pathways who were benefiting from temporary releases.

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9 See e.g. *Kung v Country Section NZ Indian Association Inc* [1996] 1 NZLR 663 (HC) at 666.

10 *Smith v Attorney-General on behalf of the Department of Corrections* [2017] NZHC 1647 at [8].

[36] In addition, several affected prisoners have commenced proceedings against the Department seeking compensation for loss of wages incurred as a result of the suspension of the release to work programme. Mr Ray's claim is of a similar ilk. Accordingly, there does appear to be a reasonable foundation for Mr Smith's allegation that the decision had real effect, and that effect may be ongoing. Against that background, it cannot be said that Mr Smith's claim was speculative, and nor could it be said that his application for discovery was a fishing expedition.

[37] The next question is whether the discovery sought is proportionate. I do not underestimate the time and resources involved in searching potentially 3,000 emails for relevant documents. It may be that the exercise could be further streamlined given the discussion of the relevance of these documents as set out in this judgment. But ultimately this claim involves an interim regime which is alleged to have been contrary to law. On the basis of the Traynor report, it appears that a large number of prisoners were affected by the changes to the regime. In that respect, there is a public interest in the proceeding which makes the costs and resources involved in searching for the emails within a one month period proportionate to the subject matter of the proceeding.

[38] Mr Smith's discovery application, as refined, is accordingly granted. Discovery orders are set out at the conclusion of this judgment.

Joinder application

[39] Mr Ray is serving a sentence of life imprisonment. He was previously employed under a release to work programme, working six days a week. On 11 December 2014, he was stood down from his work and his approval for home visits was withdrawn. He returned to work on 5 January 2015 under GPS monitoring and subject to weekly site visits by his release to work case manager.

[40] Mr Ray says that being withdrawn from the temporary release programme caused him considerable stress and frustration. He lost the income from his job, was detained in custody, and his release programme and parole was put at risk. Mr Ray's counsel confirmed that Mr Ray is seeking lost wages and compensation for what he

regards as an unlawful detention in custody between 11 December 2014 and 5 January 2015.

[41] Mr Ray applies to join the proceeding on the basis that the Court should have a set of actual facts by a person directly affected by the interim measures which will enable the Court to settle whether the interim measures in fact fettered the discretion to grant a release.

Legal principles

[42] A court may order the joinder of a plaintiff under s 10(2)(b) of the Judicature Amendment Act 1972 and r 4.56 of the High Court Rules. Rule 4.56 allows a Judge to add a plaintiff because the person "ought to have been joined" (r 4.56(1)(b)(i)); or the person's presence before the court may be "necessary to adjudicate on and settle all questions involved in the proceeding" (r 4.56(1)(b)(ii)).

[43] The principles relevant to joinder to a judicial review proceeding were canvassed in *Attorney-General v Dotcom*.[11] The Court of Appeal confirmed that the discretion to join new parties should be exercised in a way which is consistent with the objectives of s 10 of the Judicature Amendment Act and in particular, that judicial review proceedings should be simple, untechnical, and expeditious.[12] The application of that principle means that it will not usually be appropriate for review proceedings to expand to include claims for compensation, but, as the Court noted, there is no absolute ban to that effect.[13]

[44] Counsel for the Department also referred to the judgment of *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* in which Hammond J summarised the relevant principles as follows:[14]

> (1) It is not possible and would be inappropriate to lay down any general propositions which apply to all cases of this kind.
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> (2) To the extent that it is possible to articulate useful guidelines, it may well be appropriate to join a party, where that party's interests are

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11 *Attorney General v Dotcom* [2013] NZCA 43, [2013] NZLR 213.
12 At [45].
13 At [41].
14 *Westhaven Shellfish v Chief Executive of Ministry of Fisheries* (2002) 16 PRNZ 501 at [14].

> directly or indirectly effected [sic], or possibly even where that party has a distinctly arguable case to be so effected [sic]. This because it would then be unjust to decide such issues in their absence.
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> (3) The decision-making process does not finish at that point. Joinder is not an all or nothing thing. The court should, in fairness to the plaintiff, who after all is having another party interposed in proceedings properly commenced by him or her, consider whether the joinder should be for all or only some purposes. Essentially the court has to align the interest sought to be protected with what it is that the fresh defendant, or representative, should be permitted to address. This is itself entirely consistent with the powers conferred by s 10 of the Judicature Amendment Act 1972 on the hearing Judge to clarify issues and shape the proceedings.

Should Mr Ray be joined as second plaintiff?

[45] The first point to note is that Mr Ray's claim is fundamentally different in nature to the existing application for judicial review. The draft claim has not yet been pleaded, but, as described by Mr Ray's counsel, it is essentially a private civil claim for damages. Although both claims spring from an allegation that the decisions implementing the interim regime were unlawful, they have a different focus. Mr Smith's judicial review claim is focused on public law grounds, whereas Mr Ray's claim is a claim for lost wages, compensation for a lost opportunity, and for an alleged unlawful detention.

[46] If joined, Mr Ray's claim would introduce new facts and issues to the proceeding which would expand the scope of the proceeding. That would be at odds with the simple and expeditious focus of judicial review proceedings. The Court of Appeal's words of caution in *Dotcom* about annexing a civil claim for damages to a judicial review claim are particularly apt in this case.

[47] Mr Smith, who supported Mr Ray's application, submits that Mr Ray's presence before the Court is necessary to decide the question of relief in the judicial review proceeding. In that respect, Mr Smith says that joinder will fill any gap regarding Mr Smith's standing to seek relief.

[48] I do not agree that Mr Ray's presence before the Court is necessary to determine the question of relief. In large measure, Mr Smith has already overcome the standing hurdle to his claim. Palmer J ruled that he had sufficient personal and

public interest standing to bring the judicial review application. The issue regarding relief is not so much about standing as it is about mootness and utility. Some general information about the number of prisoners affected has already been provided. The Traynor report provides further information on the impact, and I have granted Mr Smith's application which may also afford documents relevant to the question of relief. I do not consider any further information by way of a civil claim brought by a prisoner is necessary to determine the judicial review application. But even if it is, that information could be put before the court by way of affidavit evidence. It is not necessary to join Mr Ray to the proceeding for that purpose.

[49] On balance, I do not consider Mr Ray ought to be joined, or that his presence is necessary to determine the judicial review application. Mr Ray's claim is fundamentally different to Mr Smith's application, and it would be inconsistent with the principle that judicial review is a simple and expeditious procedure to allow it to be expanded by way of joinder.

[50] The application for joinder is accordingly declined.

Result

[51] The application for discovery is granted. The Department is ordered to provide discovery of emails between 9 November 2014 and 9 December 2014 using search terms "release to work" or "RTW", "temporary release" or "home leave", and "cease" or "suspend" or "withdrawn", between the following people:

(a) the Chief Executive;

(b) the National Commissioner; and

(c) Prison Directors at Auckland Prison, Rimutaka Prison, Christchurch Women's Prison, and Otago Corrections Facility.

[52] Mr Ray's application for joinder is dismissed.

[53] Memoranda in support of any costs orders are to be filed within 10 working days of receipt of this judgment, with memoranda in opposition to be filed five working days thereafter.

Edwards J