STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 28, 2014)

RHODE ISLAND AND SOUTH EAST MASSACHUSETTS CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., on behalf of itself and its Members; E.W. AUDET & SONS, INC. and NEW ENGLAND MECHANICAL CONTRACTORS ASSOCIATION, INC. on behalf of itself and its Members Plaintiffs,	:	
v.	:	**C.A. No. PB 13-4340**
CHARLES J. FOGARTY, In his Capacity as Director of Rhode Island Department of Labor and Training Defendant.	:	

DECISION

SILVERSTEIN, J. Rhode Island and South East Massachusetts Chapter, National Electrical Contractors Association, Inc., on behalf of itself and its Members, E.W. Audet & Sons, Inc., and New England Mechanical Contractors Association, Inc. on behalf of itself and its Members (Plaintiffs) bring this action seeking a declaratory judgment regarding the calculation of fringe benefit payments made to apprentices on certain government projects as determined by Charles J. Fogarty, in his official capacity as Director of Rhode Island Department of Labor and Training (Defendant). Jurisdiction is pursuant to G.L. 1956 §§ 9-30-1 and 42-35-7.

I

Facts and Travel

Plaintiff E.W. Audet & Sons, Inc. (Audet) was the subject of an investigation by the Department of Labor and Training (DLT) in regards to work that Audet was doing on the Fields Point BNR Removal Wastewater Treatment Facility Project (Project). The Project qualified as a prevailing wage job as defined by G.L. 1956 § 37-13-3. The investigation concluded that Audet was paying its apprentices working on the Project a percentage of the fringe benefits due, rather than full fringe benefits. Audet was notified that it is the DLT's position that apprentices must be paid one hundred percent of fringe benefits due on prevailing wage jobs. In both May and August of 2013, conferences were held between Audet and DLT to see if the matter could be settled. However, settlement was determined to be unlikely, and DLT informed Audet that it would be sending notice to schedule a violation hearing. To the Court's knowledge, no hearing on the purported violation by Audet has been scheduled.[1]

Plaintiffs seek a declaratory judgment that the position adopted by the DLT regarding the payment of fringe benefits to apprentices on prevailing wage jobs is inconsistent with the DLT's regulations and federal law. The Court denied Plaintiffs' Motion for a Temporary Restraining Order and assigned the matter for a trial on its merits and a hearing on Defendant's Motion to Dismiss.

[1] The Court is aware that a violation hearing and decision was rendered with respect to another company involving DLT allegations of non-payment of full fringe benefits for apprentices on a prevailing wage job. That matter is currently on appeal to the Superior Court, Allied Elec. Group, Inc. and Andrew Giuliano v. State of Rhode Island Dep't of Labor and Training, C.A. No. PC-2013-3514.

II

Standard of Review

Under the Uniform Declaratory Judgment Act (UDJA), this Court possesses the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. Additionally, § 42-35-7 provides that:

> "[t]he validity or applicability of any rule may be determined in an action for declaratory judgment in the superior court of Providence County, when it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question."

A decision to grant or deny relief, however, is purely discretionary under the UDJA. Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997). Nonetheless, "[a] court may not assume subject-matter jurisdiction over a declaratory-judgment action when a plaintiff fails to join all those necessary and indispensable parties who have an actual and essential interest that would be affected by the declaration." Id. at 754 (citing In re City of Warwick, 97 R.I. 294, 296, 197 A.2d 287, 288 (1964)).

The stated purpose of the UDJA is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Sec. 9-30-12; see also Millett v. Hoisting Eng'rs' Licensing Div. of Dep't of Labor, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977) ("The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies."). Factors to be considered when determining whether declaratory relief is appropriate include "the existence of another remedy, the availability of other relief, the fact that a question may readily be presented in an actual trial,

and the fact that there is pending, at the time of the commencement of the declaratory action, another action or proceeding which involves the same parties and in which may be adjudicated the same identical issues that are involved in the declaratory action." Berberian v. Travisono, 114 R.I. 269, 273, 332 A.2d 121, 123-24 (1975).

III

Analysis

A

Nonjoinder of Necessary and Indispensable Parties

Defendant argues that Plaintiffs' case should be dismissed for lack of subject-matter jurisdiction due to the failure of Plaintiffs to join all necessary and indispensable parties.[2] Defendant contends that this failure is fatal because any relief the Court may grant would not be binding on all parties with an interest in the case. Defendant acknowledges that certain exceptions do exist when the potential parties are so numerous as to make it impractical to join all necessary and indispensable parties, but Defendant contends that the class size here is actually readily identifiable. See Sullivan, 703 A.2d at 754 (mentioning an exception to the general rule requiring joinder when it would be "impracticable"). In fact, Defendant points to the fact that Plaintiffs have already identified and provided notice to numerous employer associations and trades that pay less than full fringe benefits as support that identifiable parties exist that are both necessary and indispensable. Defendant reasons that Plaintiffs' mere notice to these parties is fatal to their declaratory judgment claim.

[2] Defendant advances this argument in a post-trial memorandum and at a post-trial hearing limited to this issue. Both parties were asked by the Court, and in fact did submit, memoranda of law on the issue of joinder of potentially necessary and indispensable parties.

Plaintiffs acknowledge that there are similarly situated employer associations and trades that do not pay full fringe benefits to apprentices that have not been joined to this case. However, Plaintiffs argue several points as to why the nonjoinder of these parties is not fatal to their claim. First, Plaintiffs contend that because the missing parties in this case were not members of a board or council, all of which are finite in number, the rule requiring joinder does not apply to this case. Rather, Plaintiffs state that the number of parties to be joined would create an unreasonable burden. Therefore, Plaintiffs argue that the Court should look to Connecticut law which would allow the Court to determine that the absent parties' rights are adequately represented and decline to dismiss the case for lack of subject-matter jurisdiction. See Batte-Holmgren v. Comm'r of Pub. Health, 914 A.2d 996 (Conn. 2007). Plaintiffs further argue that these parties are not indispensable simply because they are similarly situated. Plaintiffs equate these associations to insured parties, arguing that if joinder is required in this case, then in any case where a court is interpreting an insurance policy, that all similarly insured individuals would also need to be named in declaratory judgment actions.

This Court agrees that several of the seminal cases that our Supreme Court has decided regarding indispensable and necessary parties in declaratory judgment actions have involved members of boards and commissions. See Sullivan, 703 A.2d at 754 (declining to "excuse the plaintiffs' failure to join as indispensable parties to this lawsuit all the members of the nine-person Warwick City Council."); In re City of Warwick, 97 R.I. at 296-97, 197 A.2d at 288 (finding that failure to join all board members "deprives the decree appealed from of any binding effect as to the board members not joined and could in the future lead to needless litigation if the rights declared herein were attempted to be enforced against them[]"). However, necessary and indispensable parties are not merely limited to members of such boards or commissions. See

Thompson v. Town Council of Town of Westerly, 487 A.2d 498 (R.I. 1985) (holding that a landowner was a necessary and indispensable party when the zoning change was directed at property of which he was the sole owner).

For example, in Abbatematteo v. State, 694 A.2d 738 (R.I. 1997), plaintiffs sought declaratory relief against defendants for purported unconstitutional implementation and operation of the retirement system. Specifically, plaintiffs alleged that defendants paid significantly more generous retirement benefits to certain individuals as compared to what plaintiffs were paid or expected to be paid. The Court in Abbatematteo held that "[d]isposition of the action in plaintiffs' favor . . . would reduce or eliminate pension benefits for these 'favored' members of the retirement system. As such the trial justice correctly ruled that these members were indispensable parties that should have been joined to the action." Id. at 740.

Likewise, the absent employer associations here are indispensable parties that should have been joined in the action. Plaintiffs claim that joinder in this case would be extremely burdensome and that the Court should simply allow representation by the current parties. However, Plaintiffs have specifically identified various entities that they have already provided notice to of these proceedings. See Visconti Aff. Rather than joining these entities to the case, Plaintiffs ask the Court to adopt Connecticut law and find that their interests are adequately represented so as to excuse joinder. See Batte-Holmgren, 914 A.2d at 1005.

While our Supreme Court has mentioned the possibility of looking to Connecticut law in the past with regards to nonjoinder of parties in declaratory judgment actions, it was referring to the body of Connecticut law that predated Batte-Holmgren. In In re City of Warwick, our Supreme Court wrote in dicta that "impracticability may exist when the members of the class whose rights are to be affected are so numerous or service upon them would entail such

difficulties as would impose an unreasonable burden on the moving party." Id. at 297, 197 A.2d at 289 (citing Nat'l Transp. Co. v. Toquet, 196 A. 344 (Conn. 1937)). When such impracticability exists, then the Court mentioned the possibility (without conclusively deciding) of applying the Connecticut rule which allows a court to use its judicial discretion when deciding who should be joined. Id.; see also Thompson, 487 A.2d at 500 ("This court in *In Re [sic] City of Warwick* assumed without deciding that we would, under appropriate circumstances, adopt the Connecticut rule which gives a court discretion to decide who should be joined when the identification of members of the class whose rights are so numerous, or service upon them would entail such difficulties as would impose an unreasonable burden on the moving party.") (internal citations omitted).

This Court declines to adopt the reasoning of the Batte-Holmgren Court here, finding that joinder is not necessary if the absent parties are adequately represented. In fact, such reasoning seems antithetical to our Supreme Court's interpretation that § 9-30-11 "is mandatory and that failure to join parties who have an interest which would be affected by the declaration is ordinarily fatal." In re City of Warwick, 97 R.I. at 296, 197 A.2d at 288 (emphasis added). Additionally, this Court finds that Plaintiffs have failed to show that the members of the class whose rights are to be affected are not so numerous nor would service upon them create an unreasonable burden so as to excuse joinder. This is especially so when Plaintiffs have already identified many of the class members and requested that these members voluntarily join and participate in the financing of this litigation.

The Court also notes that it is exactly because the other employer associations and trades are similarly situated that their absence is fatal to the claim. See Thompson, 487 A.2d at 499 (stating that a court cannot assert jurisdiction when "the judgment would not be binding on all

persons who have an interest in the dispute[]"). Because these other employer associations and trades, just as Plaintiffs, do not pay full fringe benefits, they certainly have an interest in the outcome of the case. Moreover, the Court finds that insurance cases, which Plaintiffs analogize to, are extremely fact intensive situations and distinguishable from the case at hand. For example, a similarly situated insured's policy will not be implicated until a triggering event, such as an accident, occurs, whereas here, Plaintiffs are fully aware that it is the current policy of these employer associations and trades to pay less than full fringe benefits. Thus, the Court finds that Plaintiffs' claim lacks subject-matter jurisdiction for failure to join similarly situated employer associations and trades.

B

DLT's Fringe Benefits Policy

Ordinarily, once a trial court has found that a claim lacks subject-matter jurisdiction, that court will not address the merits underlying the claim. However, the issue regarding necessary and indispensable parties, as it relates to subject-matter jurisdiction, was not raised until late in the trial, was later briefed in post-trial memoranda, and a post-trial hearing was conducted limited to the issue. Prior to all of this, a two-day trial was held on the merits of whether DLT's fringe benefit policy was lawful. Accordingly, this Court finds that it is appropriate to further address the merits of the claim, disregarding for the moment that the Court found no subject-matter jurisdiction.[3] If this Court is reversed on appeal with regards to issue of subject-matter

[3] In McKenna et al. v. Williams et al., 874 A.2d 217, 230 (2005), our Supreme Court addressed the merits of an issue after finding that the action could not be maintained in either the Superior or Supreme Court. Nonetheless, the Court addressed the merits because of the "public importance" of the issue. Id. Here, this Court notes that not only are there numerous other employer associations and trades that have been identified as paying less than full fringe benefits, but there also currently exists a matter on appeal in the Superior Court where this issue

jurisdiction, there would be no need to retry the matter as the merits are addressed. Thus, turning to the merits of the case, Plaintiffs and Defendant differ over the interpretation of the prevailing wage statutes; specifically, whether the statute is clear on how apprentices are to be paid fringe benefits.

According to § 37-13-7(a), contractors must pay their employees the prevailing wage on public works projects of more than $1,000. Section 37-13-7(b) states that the terms—"wages," "scale of wages," "wage rates," "minimum wages," and "prevailing wages"—include the basic hourly rate of pay and fringe benefits. Pursuant to § 37-13-8, "the director of labor may adopt and use such appropriate and applicable prevailing wage rate determinations as have been made by the secretary of labor of the United States of America in accordance with the Davis-Bacon Act." Furthermore, G.L. 1956 §§ 28-45-9 and 28-45-13 require that DLT approve and register apprenticeship programs and that the program agreements pay apprentices according to a "graduated scale of wages." Similarly, DLT's Rules and Regulations Relating to Prevailing Wages, Revised 10-28-2011 (2011 Rules and Regulations), provide that:

> "[a]ny contractor . . . doing work on a Public Works Project, must pay the full prevailing wage rate for the classification of the work performed by an apprentice unless such apprentice is registered under an apprenticeship program sanction by the [RIDLT]. Moreover, all general contractors . . . who perform work on any public works contract awarded by the state and valued at one million dollars ($1,000,000) or more shall employ apprentices required for the performance of the awarded contract. The number of apprentices shall comply with the apprentice to journeyman ratio for each trade approved by the [DLT]." ¶ 5.

In addition, the 2011 Rules and Regulations state that DLT will be guided by the Davis-Bacon wage determinations in accordance with § 37-13-8 ¶ 7. The Rules and Regulations Relating to

---

has been raised. Therefore, this Court "feel[s] compelled to go further and [] address the merits." Id.

Prevailing Wages were later amended in March 2012 (2012 Rules and Regulations) and June 2013 (2013 Rules and Regulations).

It is Plaintiffs' contention that DLT's regulations do not require the payment of full fringe benefits to apprentices, but rather apprentices are to be paid a portion of the fringe benefits. Plaintiffs argue that because the regulations state that "for apprentices who are registered, a percentage of the base hourly rate must be taken in accordance with the scale listed in the apprentices' apprenticeship agreement[,]" that implicitly means that fringe benefits are also to be reduced since base hourly rate and fringes are both considered "wages." See 2012 Rules and Regulations ¶ 5.[4] Plaintiffs also contend that because DLT has adopted the Davis-Bacon wage determinations, that DLT must also adopt the accompanying Code of Federal Regulations, which provide "[a]pprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program." 29 CFR 5.5(4)(i).

Defendant argues that DLT's interpretation of how fringe benefits are to be paid to apprentices is supported both by its regulations and by law, and that such interpretation is entitled to deference. Specifically, Defendant points to the fact that Rhode Island's prevailing wage laws are silent with respect to fringe benefits as they apply to apprentices. Rather, Defendant argues that DLT has consistently enforced its policy that full fringe benefits must be paid to apprentices, even when working under an approved apprenticeship program. As proof, DLT specifically addresses such a situation on its website under "Prevailing Wage Questions and Answers," which states that even if an approved apprenticeship program exists, the required fringe rate may not be reduced.[5] Additionally, Defendant argues that DLT is allowed to adopt

[4] Paragraph 5 was amended from 2011 to 2012 by changing "full prevailing wage rate" to "base hourly rate of pay." This change was retained in the 2013 Rules and Regulations.
[5] The Court notes that this question and answer portion of DLT's website carries no force of law.

the Davis-Bacon wage determinations without adopting the accompanying federal regulations. According to Defendant, Davis-Bacon sets a floor for minimum protection which a state may trump by providing greater protection.

Both Plaintiffs' and DLT's interpretation of the prevailing wage laws and the payment of fringe benefits are reasonable. See Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 346 (R.I. 2004). The statute requires that apprentices be paid a graduated scale of wages, but it does not require that both components (basic hourly rate of pay and fringe benefits) be scaled. See §§ 28-45-9, 28-45-13, 37-13-7(a). Because DLT allows the basic hourly rate of pay to be scaled, it satisfies the requirement that apprentices be paid a scaled wage, even though the apprentices are paid full fringe benefits. All that is required to satisfy the ambiguous language of the statute is that apprentices are paid a "graduated scale of wages." As long as either the basic hourly rate of pay is scaled or the fringe benefits are scaled, or both are scaled, it will be a reasonable interpretation of the statutory language.

A court must give deference to an agency interpretation that is neither clearly erroneous nor unauthorized when a statutory provision is susceptible to more than one reasonable interpretation. Labor Ready, 849 A.2d at 345-46. See also Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993) ("Deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied."). Thus, even though Plaintiffs' suggested interpretation is reasonable, this Court must defer to DLT's interpretation because it is not "clearly erroneous or unauthorized." Labor Ready, 849 A.2d at 344 ("Nevertheless, when an administrative agency interprets a regulatory statute that the General Assembly empowered the agency to enforce, a court reviewing the agency's interpretation of the statute as applied to a particular factual situation must accord that

interpretation 'weight and deference as long as that construction is not clearly erroneous or unauthorized.'") (citing In re Lallo, 768 A.2d 921, 926 (R.I. 2001)).

Additionally, DLT is not required to adopt the federal regulations that accompany the Davis-Bacon wage determinations. Section 37-13-8 provides that the DLT "may adopt and use such appropriate and applicable prevailing wage rate determinations as have been made by the secretary of labor of the United States of America in accordance with the Davis-Bacon Act . . . ." Nowhere in the statute does it require that the DLT additionally adopt further regulations associated with the Davis-Bacon Act. Further, the Seventh Circuit Court of Appeals has noted "that Congress intended [Davis-Bacon] to be complementary to, rather than preclusive of, state law." Frank Bros., Inc., v. Wisconsin Dep't of Transp., 409 F.3d 880, 886-87 (7th Cir. 2005). Further, the United States Supreme Court has held that "[t]he language of the [Davis-Bacon] Act . . . plainly show[s] that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." U.S. v. Binghamton Const. Co., 347 U.S. 171 (1954). Clearly, it was contemplated that the Davis-Bacon Act and state prevailing wage laws would coexist as long as they did not conflict with one another or frustrate each other's purpose. See Frank Bros., Inc., 409 F.3d at 893. Here, the DLT simply adopted the Davis-Bacon wage determinations. The DLT did not, as Plaintiffs would have this Court find, adopt the complete Davis-Bacon Act including associated federal regulations.

IV

Conclusion

Based on the foregoing analysis, the Court finds that Plaintiffs have failed to join necessary and indispensable parties. Additionally, Defendant's interpretation of the statute is entitled to deference by this Court. Therefore, this Court denies the declarations that Plaintiffs seek. Counsel for Defendant may present an order consistent herewith.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Rhode Island and South East Massachusetts Chapter, National Electrical Contractors Association, Inc., on behalf of itself and its Members and E.W. Audet & Sons, Inc. v. Charles J. Fogarty, In his Official Capacity as Director of the Rhode Island Department of Labor and Training.
CASE NO:	PB 13-4340
COURT:	Providence Superior Court
DATE DECISION FILED:	January 28, 2014
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiffs:	Girard R. Visconti, Esq.
For Defendant:	Sean M. Fontes, Esq., Angelyne Cooper, Esq.