IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 78
WRC 17/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for leave to amend statement of defence
BETWEEN	WORKFORCE DEVELOPMENT LIMITED Plaintiff
AND	LYNDA HILL Defendant

Hearing: On the papers filed on 10, 12 and 28 March, 4 and 7 April 2014

Appearances: S Webster, counsel for plaintiff
P O'Sullivan, advocate for defendant

Judgment: 19 May 2014

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mrs Hill was previously employed by Workforce Development Ltd (WDL). She was subsequently dismissed and pursued a personal grievance claiming that she had been unjustifiably dismissed and disadvantaged. The Employment Relations Authority investigated her grievance and determined that she had been unjustifiably dismissed.[1] It made no finding in relation to the second limb of her grievance.

[2] WDL has challenged the Authority's substantive determination. Mrs Hill has challenged the Authority's costs determination.[2] The proceedings were set down for

[1] *Hill v Workforce Development Ltd* [2013] NZERA Wellington 65.
[2] *Hill v Workforce Development Ltd* [2013] NZERA Wellington 92.

three days. While the evidence was heard within that timeframe, submissions were not and a further tentative hearing date has been allocated for 23 June 2014. A date prior to that time has not been able to be accommodated because of counsel's absence on extended leave overseas.

[3] The defendant has filed an application for leave to amend her pleadings to include a claim of unjustified disadvantage. That application is opposed. The parties agreed that the application could be dealt with on the papers. Both parties have filed extensive written submissions. The defendant raises a preliminary issue as to whether leave is required at all.

Approach

[4] It is well established that the Court may allow for the amendment of pleadings at any stage prior to judgment. However, where such an amendment is sought after the evidence has been heard, leave will only be granted in limited circumstances. As was observed in *Brown v Heathcote County Council (No 2)*:[3]

> The discretion to allow an amendment is to be exercised in accordance with the requirements of justice... The later the stage in the proceedings at which the amendment is sought, the greater the risk of injustice to the other party, for the further he will have committed and limited himself to the case alleged against him in the pleadings.

[5] An amendment may be allowed where it is necessary for the purpose of determining the real controversy between the parties, but not if it is likely to result in an injustice to the other party.[4] Such an approach is consistent with s 189(1) of the Employment Relations Act 2000 (the Act).

Analysis

[6] As I have said, Mrs Hill pursued a claim of unjustified disadvantage and unjustified dismissal in the Authority. The Authority found in her favour in relation to the latter claim, but made no findings in respect of the former. WDL then elected to challenge the Authority's determination, doing so on a de novo basis. The

[3] *Brown v Heathcote County Council (No 2)* [1982] 2 NZLR 618 (HC) at 624.
[4] *Marr v Arabco Traders Ltd (No 8)* HC Auckland A1195/77, 12 March 1987 at 11.

statement of claim is solely focussed on the decision to dismiss and seeks a declaration that the dismissal was justified and an order for costs. The statement of defence denies the allegation that the dismissal was unjustified and denies that WDL is entitled to the relief sought.

[7] The first point advanced by Mr O'Sullivan on behalf of the defendant is that leave may not be required as the defendant contended that she had been both unjustifiably dismissed and subjected to unjustifiable disadvantage in the Authority. He submits that while the Authority concluded that the defendant had been unjustifiably dismissed, and made no findings in relation to disadvantage, all matters are globally before the Court on a de novo challenge.

[8] The submissions advanced on behalf of the defendant reflect a misunderstanding. A de novo challenge does not provide the blank canvas that is contended for. If the defendant had wished to take issue with the Authority's determination in so far as the alleged unjustified disadvantage was concerned she was obliged to put that in issue. While reference is made to *Sibly v Christchurch City Council*[5] and *Abernethy v Dynea New Zealand Ltd*[6] these cases were concerned with the extent to which the Court could consider matters not squarely before the Authority. The question in the present case is whether the claim of disadvantage has been adequately pleaded, not whether it would otherwise fall within the scope of s 179(1) of the Act.

[9] No cross-challenge was filed on behalf of the defendant and nor does the statement of defence raise any issues in relation to an alleged disadvantage. As the High Court observed in *AM Satterwhaite & Co Ltd v Knight Tailors Ltd*:[7]

> While there are a number of cases in which it has been said that the principles of law when applied to the facts alleged entitling a plaintiff to relief need not be stated, the absence of reference to the legal results contended for by the plaintiff may well place a defendant in a prejudicial situation or alternatively lead to a much longer trial of an action than is necessary.

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[5] *Sibly v Christchurch City Council* [2002] 1 ERNZ 476 (EmpC).
[6] *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC).
[7] *AM Satterwhaite & Co Ltd v Knight Tailors Ltd* HC Christchurch CP16/86, 9 May 1986 at 2, cited with approval in *Pearce v Accident Compensation Corporation* (1991) 5 PRNZ 297 (HC).

[10] The purpose of pleadings is to put the other party on notice of the case they have to answer and to ensure that the other party and the Court are clearly informed of the legal basis of the claim for relief.[8] WDL could not have known that the defendant was intending to pursue a claim for disadvantage in the absence of a pleading making it clear that this was so. Rather the focus was on the Authority's finding of unjustified dismissal.

[11] Issues relating to the scope of the challenge, and whether a claim of unjustified disadvantage was before the Court, were first raised during the course of the defendant's opening and after the plaintiff's evidence had been given. Mr Webster, counsel for the plaintiff, immediately voiced an objection, based on prejudice, and Mr O'Sullivan reserved the defendant's position. The issue was not pursued again until after the evidence for the defendant had been concluded.

[12] While, as Mr O'Sullivan points out, reg 11 of the Employment Court Regulations 2000 does not encourage prolix pleadings, it cannot sensibly be read as allowing whole causes of action to be omitted but later pursued by a party.

[13] As observed in *Sefo v Sealord Shellfish Ltd*, the Court is entitled to treat a particularly described personal grievance as a personal grievance of another category pursuant to s 122 of the Act.[9] In that case the Court allowed the plaintiff to address the lawfulness of her suspension as a distinct personal grievance for unjustified disadvantage in employment, but this came at the outset of trial and before the evidence had been given. The circumstances in this case are not analogous.

[14] The defendant seeks leave to make three amendments to the statement of defence. First, to para 3 to plead that:

> The matter submitted for determination by the Authority included a discrete claim for unjustified disadvantage accruing from the time of the review meeting of 20th October. That cause of action remains extant as does its independent claim for remedy.

Second, to para 24.1 to amend the prayer for relief as follows:

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[8] As reflected in regs 11(2) and 20(2) of the Employment Court Regulations 2000.
[9] *Sefo v Sealord Shellfish Ltd* EMC Christchurch CC4/08, 14 April 2008.

> A declaration that the challenge is dismissed and the findings of disadvantage and unjustified dismissal returned.

Third, to para 25 as follows:

> The defendant is not required and does not respond to para [25] *except to iterate the scope of the election includes the discrete claims identified at para [3] above*.

[15] As Mr Webster points out, the proposed amendment to para 3 does not inform either the Court or the plaintiff as to the particulars of the claim and assumes that pleadings in the Authority are somehow before the Court on a challenge. They are not. The plaintiff's de novo challenge necessitated de novo pleadings.

[16] There are additional difficulties with the proposed amended statement of defence. The proposed amendment to para 24.1 assumes (erroneously) that the Authority made a finding of unjustified disadvantage. It did not and accordingly there is no finding of that nature to be "returned".

[17] Further, there is a distinct lack of clarity surrounding the alleged disadvantage the defendant is wishing to pursue. It appears to primarily relate to the way in which a disciplinary meeting was conducted on 20 October 2011. It also appears, from the submissions in reply, that the defendant wishes to pursue concerns about the extent to which information was withheld from her throughout the employment relationship and particularly during the 20 October meeting, thereby allegedly compromising her ability to respond to the issues raised on the plaintiff's behalf. Reference is also made to an alleged failure to properly induct the defendant or make her aware of "speculations" made by an officer of the Department of Corrections (Ms Bernard) although in his submissions in reply Mr O'Sullivan says that the speculation issue only has contextual relevance to the dismissal.

[18] While the statement of problem in the Authority refers to a number of alleged procedural deficiencies there is no clear identification of the 20 October meeting as the basis of a discrete disadvantage claim. Nor is there any reference to documentation having been withheld from the defendant. As I have already observed, the Authority makes no mention of the disadvantage claim and any defects in the process (including in relation to the provision of documentation and the 20

October meeting) are noted in the context of the defendant's claim for unjustified dismissal.

[19] Mr O'Sullivan submits that the disadvantage grievance is necessary as a "parachute" claim, in the event that the plaintiff's claim of frustration succeeds. However, the proposed amendments do not seek any separate relief in relation to the alleged disadvantage, other than a toothless declaration, and it is unclear what disadvantage the defendant is said to have suffered as a consequence of the perceived procedural defects referred to other than her dismissal. This suggests that the real controversy between the parties centres on the dismissal rather than an alleged disadvantage.

[20] The plaintiff says that it will be prejudiced if the application is granted. That is because the evidence has already been heard. While there appears to be a degree of overlap in terms of the evidence that would be relevant to a claim of disadvantage (in so far as the parameters of that can be gleaned from the material before the Court) and the current claim of unjustified dismissal,[10] the plaintiff says (and I accept) that it may well have elected to call other witnesses to address the defendant's allegations or have put additional, or different, questions to the witnesses that were called.

Conclusion

[21] I am satisfied, for the reasons set out above, that leave is required by the defendant in order for her to amend her pleadings. Whether leave ought to be granted in the particular circumstances is another matter and, in this case, is finely balanced. I accept that there is some potential for prejudice in allowing the defendant to amend her pleadings to incorporate a claim of disadvantage after the evidence has closed. Ultimately a balancing exercise is required to ensure fairness to both parties. While, by a slim margin, I would be minded to grant leave I am not currently prepared to do so on the basis of the proposed pleading. It is deficient. It does not identify the disadvantage that is said to be unjustified and contains no particulars.

[10] As reflected in the evidence that was given, and the cross examination that was pursued, including in relation to the meeting of 20 October and the scope of the information that was made available to Mrs Hill prior to her dismissal.

[22] While I have declined to accept the amendments as proposed I allow the defendant a final opportunity to file and serve a proposed amended statement of defence. This must be done **within five working days from the date of this judgment**. If the defendant elects to pursue this course, the alleged disadvantage must be adequately identified and particularised, together with the nature and extent of the relief sought in relation to it.

[23] Provided any proposed amendment is adequately articulated leave will be granted.

[24] In the event that the defendant proceeds with an amendment to her pleadings, the plaintiff will be entitled to costs on any additional hearing required as a result of such an amendment, regardless of the substantive outcome of the proceedings.

[25] The plaintiff will have **10 working days** following service of any amended pleadings to file and serve any pleadings in response and to advise the Court, through the Registrar, as to whether it wishes to recall any witnesses or call further evidence. This timetable is set to provide counsel for WDL with sufficient time to reflect on the (extensive) notes of evidence to determine whether further evidence will in fact be required. If so a date for hearing will be set by the Registrar in consultation with the parties' representatives.

[26] I do not accept Mr O'Sullivan's submission that the costs associated with this application should lie where they fall. WDL has been put to unnecessary costs, which could have been avoided had the defendant's pleadings been in order. It is appropriate that the defendant shoulder the financial consequences of that. The plaintiff is accordingly entitled to costs on this application, the quantum of which will be reserved for determination following the substantive hearing.

Christina Inglis
Judge

Judgment signed at 3pm on 19 May 2014