IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 22
ARC 22/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for determination of a preliminary question of law
BETWEEN	SHABEENA SHAREEN NISHA (NISHA ALIM) Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing: By memoranda filed on 12 and 24 December 2014 and 2, 16 and 23 February 2015

Appearances: AF Drake and B Nicholson, counsel for plaintiff
J Douglas, counsel for defendant

Judgment: 25 February 2015

INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN

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[1] The next episode in this interlocutory saga is the plaintiff's application that the Court hear and determine a preliminary question of law. She says this will clarify the issues at hearing and, depending upon the answer to it, may reduce significantly the scope and length of that hearing and, potentially, the number of witnesses.

[2] The question of law that the plaintiff proposes be determined in a preliminary way is an interpretation of the meaning of the phrase "immediately before" as it appears in s 69I(2)(b) of the Employment Relations Act 2000 (the Act).

[3] The defendant opposes the application that the Court should determine this question as a preliminary one of law.

[4] The plaintiff's case is that approximately three weeks before the statutory transfer of her employment under Part 6A of the Act, the plaintiff's terms and conditions of employment with her former employer, PRI Flight Catering Limited (PRI), changed in several material respects. These included the description of her job, her hourly wage rate, and her service-related entitlements.

[5] Upon transferring under Part 6A to the employment of the defendant, the plaintiff asserted her entitlement to those enhanced terms and conditions which she claims to have enjoyed with PRI for the period of the last three weeks of her employment with that company. Her case is that the defendant was required to employ her on those enhanced terms and conditions of employment. That is because, in her circumstances, s 69I(2)(b) of the Act requires that, having elected to transfer to the defendant, the plaintiff was to be employed "on the same terms and conditions by the new employer as applied to the employee immediately before the specified date …". Section 69I(4) defines "specified date" as "the date on which the restructuring takes effect". The plaintiff says that the specified date was 22 February 2011; that is, approximately three weeks after the plaintiff began receiving the enhanced terms and conditions of employment from PRI.

[6] The proposition of law that the plaintiff wishes the Court to establish before the hearing of her substantive proceedings is that the phrase "immediately before" means the day before the specified date and, on the facts of this case, says that this date was 22 February 2011. The plaintiff says that if the Court agrees with that interpretation and application of the law, the defendant will not be entitled to "look beyond 22 February 2011 in an attempt to unilaterally review the plaintiff's terms and conditions and to re-determine whether the plaintiff was entitled to any changes that occurred in the past".

[7] I accept that, if it is in the interests of justice to do so, the Court is empowered to identify and determine, as a preliminary point, a question of law that arises properly in a case. Although there is no express power under the Act or the

Employment Court Regulations 2000 to give such a direction, reg 6(2)(a)(ii) allows the Court, in these circumstances, to dispose of the case as nearly as may be practicable in accordance with the provisions of the High Court Rules. Rule 10.15 of the High Court Rules makes provision for a procedure such as the plaintiff proposes and I adopt that as the model for the decision of this application. The defendant's submissions that ss 177 and 178 of the Act should either determine the matter of jurisdiction or, more realistically, guide the Court, do not avail its opposition to this application.

[8] I accept also that such a preliminary question does not have to dispose finally of the proceedings: that is a function of an application to strike out proceedings, which is quite a different application and in which different tests apply. I accept the rationale for the preliminary determination of such a question as being to expedite proceedings by limiting or defining the scope of the trial in advance, or even perhaps obviating the need for a trial altogether.[1]

[9] The parties' submissions helpfully set out and address principles to be considered when determining whether to grant such an application. These are taken from the judgment of the High Court in *Turners & Growers Ltd v Zespri Group Ltd.*[2]

[10] The first of these factors is whether this procedure is likely to delay a final resolution of the proceedings. The plaintiff submits that in this case it will not. It says the parties have still not resolved all outstanding interlocutory issues, so that these can be progressed in tandem with the determination of this preliminary issue. The defendant says that to allow the plaintiff's application will be to delay a final resolution of the case because it will be dealt with as a discrete issue, either at a hearing followed by a reserved judgment, or otherwise on written submissions filed according to a timetable. The defendant says it is very unlikely that this interlocutory issue will be able to be dealt with at the same time as others in the case. I conclude that the defendant's analysis is more likely to be correct, that is finality of the litigation will be delayed by allowing the plaintiff's application.

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[1] *Ines v Ewing* (1986) 4 PRNZ 10 at [20].
[2] *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [11].

[11] The second, third and fourth principles can be considered together. They address the probable length of the hearing if there is a split trial, the impact of it on the length of any subsequent hearing, and where the balance of the advantages to the parties and the public interest lie in shortening litigation as compared to any disadvantages asserted in opposition to a split trial. In this regard, the plaintiff says that allowing this application will save a significant amount of time. That is said to be because the plaintiff's is a claim for a personal grievance which, before the Employment Relations Authority, occupied more than half of the time spent by the Authority investigating the evidence of witnesses about the plaintiff's terms and conditions of employment immediately before transfer. Counsel for the plaintiff submits, therefore, that the length of a subsequent trial will be reduced by half. Counsel estimates that any hearing of a preliminary issue will take no more than a day, especially if necessary evidence can be provided in advance on affidavit, and so requiring only oral submissions.

[12] The defendant says that, if the application is allowed, the plaintiff will probably have to give evidence twice. Ms Alim now lives in Australia. The defendant challenges the plaintiff's account of the circumstances in which her terms and conditions of employment changed and submits that these are relevant, on a case-by-case basis, to determining what, in this, were the terms and conditions "immediately before" the relevant date. The defendant will wish to cross-examine such evidence as the plaintiff may wish to adduce on the preliminary question and, in these circumstances, there will be no significant saving of time, especially if the Court's judgment on the preliminary point is adverse to the plaintiff.

[13] In these respects, also, the defendant's arguments prevail over those of the plaintiff. In the particular circumstances of this case on its track record so far, the claimed time savings are likely to be illusory, especially if the issue can be argued as a discrete point at the trial in light of evidence about the plaintiff's employment with her former employer, the terms and conditions of that employment, whether, and if so how, those changed, and when.

[14] The next factor of principle is whether a decision, one way or the other, on the separate identified question will end the litigation. Counsel for the plaintiff

accepts that it will not do so but that this is not decisive or even important in this particular case. In these circumstances, little more needs to be said about this test and it does not favour the plaintiff's application.

[15] Next, counsel for the plaintiff submits that there will not be any demarcation difficulties in defining the issues to be addressed at the preliminary hearing and those to be left for a subsequent trial. The plaintiff says that she has already clearly identified and defined three issues and that there will be no need to readdress these at a second trial.

[16] The defendant disagrees, saying that it may be difficult to demarcate the issues and it will be important to address legal questions in the context of the case's factual matrix which can only be established by evidence presented to the Court and, where there is a conflict, a decision adopting one account or the other. The defendant makes the point that if the plaintiff's application is allowed, relevant evidence will not be fully tested leading to that preliminary determination and may, in these circumstances, not ever subsequently be fully tested.

[17] On this factor, also, the defendant's case impresses me as more likely to be correct.

[18] Addressing the question of whether there may be difficulties of issue estoppels in adopting such a course, the plaintiff says there will not be. She rejects the defendant's suggestion that similar evidence will need to be called in a second or substantive trial because the parties should be disqualified from going behind the documentation provided by the plaintiff to support her terms and conditions of employment, and to enable these to be re-determined unilaterally. Therefore, the plaintiff says that if the preliminary question is determined, the defendant will be disqualified from adducing any further evidence on that issue.

[19] I consider that the plaintiff's position misstates fundamentally the Court's role in this regard. Rather than to determine, in a vacuum, the meaning of the phrase "immediately before", the Court's task will be to determine what were the terms and conditions of the plaintiff's employment immediately before her transfer to the

defendant. Although doing so will require a careful investigation into the legislative intention for the words "immediately before", that will be not only into the meaning of a short phrase of two words but also of the section and the part of the Act in light of its purpose. It will also require the Court to determine whether the particular relevant circumstances of the plaintiff mean that her terms and conditions of employment were those which she claims they were immediately before the specified date. This approach militates against the separate narrow preliminary hearing that the plaintiff seeks.

[20] Next, there are two factors: whether there is a risk of inadvertently disqualifying a judge who expresses a view at the first trial on matters that are for decision at the second trial and, associated with this, whether there may be a risk of inadvertent findings at the first trial on matters that are for full evidence and argument at the second trial. The plaintiff says these risks will not eventuate because the Court will already be alive to them and be able to avoid them. Further, counsel for the plaintiff submits that there is unlikely to be any cross-over between the separate issues to be determined which she has identified as follows:

> a Whether the defendant can challenge the changes to the plaintiff's terms and conditions of employment that occurred three weeks prior to transfer;
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> b Whether the defendant had an agreement with the plaintiff, and/or her union, to vary her terms and conditions of employment; and
>
> c Whether the defendant embarked on a course of conduct designed to force the plaintiff to resign.

[21] On the first issue of inadvertent apparent bias, I agree that the risk is low or non-existent in the circumstances of this case but that is simply a neutral factor in the decision and not one which favours the plaintiff's case. On the question of whether there is unlikely to be any double consideration of the separate issue which the plaintiff has identified, I am not persuaded that there will not be. That, in turn, counts against the plaintiff's application.

[22] The next consideration is whether some witnesses may need to be recalled at the second hearing. Counsel further submits that determining the preliminary question posed by her will reduce the number of witnesses in any subsequent trial

and, to the extent that any witnesses may need to be recalled, their evidence will be significantly reduced in scope.

[23] Given the defendant's legitimate wish to challenge the plaintiff's evidential underpinnings for her propositions of law, it is almost inevitable that the plaintiff, and perhaps other witnesses also, will need to give evidence on the proposed preliminary question. Especially in the case of the plaintiff, who resides overseas, the necessity of calling her only once is obvious. The plaintiff's claimed savings of time and cost are likely to be illusory in these circumstances and in my assessment.

[24] The next consideration for the Court is the extent to which the Court and counsel for the parties will need to re-prepare for a second hearing. Counsel submits that there will be no duplication of time as the identity of the lawyers has remained the same throughout the Authority and the Court processes and will be the same for any subsequent hearings.

[25] This also impresses me as a neutral argument, that is, one that favours the position of neither party.

[26] Next is the prospect of multiple appeals. Counsel submits that this is unlikely because the requirement is that appeals from this Court must be on questions of law and by leave. Counsel further submits that once this preliminary question has been determined, the remaining issues involving a claim for a personal grievance are unlikely to involve any further questions of law.

[27] Again, this is an argument that does not detract from the plaintiff's application but is not persuasive of it.

[28] Penultimately, the Court must consider whether there will be a need for a second round of document disclosure or other interlocutory applications and/or amended pleadings following the first trial. Counsel submits that determining the preliminary issue can only reduce the scope of disclosure and of any interlocutory issues.

[29] I do not accept that a separate decision of a preliminary question will be likely to eliminate what would otherwise be some document disclosure or other interlocutory applications, or amended pleadings. Documents which are relevant to the proposed preliminary issue will likely also be relevant to the substantive claim by the plaintiff and the defence to it. I do not agree that allowing the plaintiff's application will inevitably reduce the scope of disclosure and of any interlocutory issues.

[30] Finally, the Court should consider the consequences, if any, of rostering difficulties, to ensure that the same Judge is available for the second hearing. Counsel submits that this is less of a significant issue in the Employment Court than in other courts.

[31] I agree that these are not real considerations in this Court in this case but that, too, is an argument which is neutral and unpersuasive either way.

[32] For the foregoing reasons, I decline the plaintiff's application for a preliminary hearing and decision of the legal issue identified by her. The defendant is entitled to costs on that unsuccessful application, the amount of which will be determined, along with all other questions of costs, at the conclusion of the litigation.

[33] Because there are other defended interlocutory issues concerning document disclosure still before the Court which will need to be determined before the case is set down for hearing, I make no further directions in this judgment.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Wednesday 25 February 2015