IN THE EMPLOYMENT COURT
AUCKLAND

AC 40/06
ARC 98/05

IN THE MATTER	of a challenge to determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out matters in the amended statement of defence

BETWEEN	BRIAN SAIPE Plaintiff
AND	WAITAKERE ENTERPRISE TRUST BOARD Defendant

Hearing: 13 July 2006
(Heard at Auckland)

Appearances: Mr Brian Saipe in person
Mr J Haigh QC and Mr PA Craighead, counsel for the defendant

Judgment: 25 July 2006

Interlocutory Judgment of Judge M E Perkins

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[1] Mr Saipe was employed as a business facilitator by the defendant from 1996 until 2002. His employment was terminated on the grounds of redundancy on 29 November 2002. He submitted a personal grievance, which was investigated by the Authority and which resulted in two determinations, one dated 27 September 2005 dealing with substantive matters and the other dated 22 December 2005 dealing with costs.

[2] Mr Saipe has lodged a “non de novo” challenge to both of the determinations of the Authority. In respect of the determination on costs, if I can deal with that determination first, he is challenging virtually all of the findings. Primarily, however, he raises an issue as to whether the Authority was correct in refusing to reimburse him for costs incurred in respect of the mediation, which accompanied the Authority’s investigation.

[3] In respect of the determination on the substantive issues Mr Saipe does not challenge the majority of the findings, which were in his favour. He seeks to upset the finding that he is only entitled to the statutory three months reimbursement of lost wages the Authority has awarded pursuant to s128(2) of the Employment Relations Act 2000 (the Act). Mr Saipe does not challenge the award of compensation. To the extent that the substantive determination finds that he is not entitled to legal costs he challenges that decision.

The Pleadings

[4] The amended statement of claim Mr Saipe has filed specifically states that he does not seek a full hearing of the matter (a hearing de novo). He seeks a hearing only in relation to the specified parts of the determination I have summarised. He pleads that the Authority made errors of law but a consideration of the particulars shows they are in reality and if proved alleged errors of fact.

[5] In response to the pleadings filed by the plaintiff, the defendant has filed an amended statement of defence to the amended statement of claim. These documents now prevail. The defendant in respect of the remedies, which the plaintiff is challenging, admits that the Authority’s findings were correct. However, and in compliance with regs 20 and 21 of the Employment Court Regulations 2001 (the Regulations), the amended statement of defence, in addition to the admissions and denials required to be pleaded, specifies certain further matters upon which the defence to the challenge is based. This is in order to provide reasonable particularity so that the plaintiff and the Court are fully and fairly informed with the nature and details of the defence. Further, the amended statement of defence contains an indication of the defendant’s view of the appropriate nature and extent of the hearing.

The Strike Out Application

[6] The plaintiff when faced with the defendant's pleadings in this form filed an application to strike out. In response to this application the defendant filed a notice of opposition.

[7] In compliance with s182(3) of the Act, the Court allocated a hearing in chambers in order that the application to strike out could be managed but at the same time the ambit of the non de novo hearing could be determined and directions issued accordingly. Following that chambers hearing on 13 July 2006, I issued a minute as to its outcome. I indicated to Mr Saipe that I had concerns as to the prospects of success with the application to strike out. I indicated that that would be the position if the application remained in its present form. If he wished to continue with the application then it would need to be redirected. It was my view that the application to strike out was an endeavour to usurp the functions of the Court in directing the nature and extent of the hearing of a non de novo challenge pursuant to s182(3) of the Act.

[8] At the hearing Mr Saipe and Mr Haigh made submissions on the nature and scope of the hearing subject to Mr Saipe's decision as to whether he intended to proceed with the application to strike out. There was necessarily some discussion on the strike out application but only on the basis that if Mr Saipe intended to proceed with it then it would have to be allocated a proper fixture and be argued. I indicated to Mr Saipe some of the statements and findings contained in *Cliff v Air New Zealand Ltd* [2005] 1 ERNZ 1. The purpose for that was to endeavour to explain to Mr Saipe that the application to strike out may be impeding upon functions resting entirely with the Court and which could not be dealt with by way of a strike out application. In response to this Mr Saipe indicated that he wished to have further time to consider whether he would proceed with the application to strike out. Accordingly, I allowed him until 4pm on Tuesday 18 July 2006 to file a memorandum indicating his intentions. He did file a memorandum on that date indicating that he was not intending to proceed with the application to strike out. Nevertheless he indicated matters still of concern to him, as to the form of the pleadings, which were contained in the defendant's amended statement of defence. I presume he served a copy of his memorandum on the solicitors for the defendant. Under normal circumstances I would have allowed the defendant time to respond to those further matters, but in view of the decision I intend to make in this matter, that is not necessary.

[9] Before departing from a consideration of the application to strike out, it is clear that there is no specific provision in either the Act or the Regulations providing for such an application to be made. One reason for this may be that it is in the Court's initiative to govern the form and the content of pleadings by virtue of regs 11, 20 and 21 containing elaborate provisions as to the contents of statements of claim and statements of defence. However, those regulations in themselves may not provide an avenue whereby a party could apply to strike out a pleading whether it be a cause of action or defence and the position is probably more appropriately covered by reg 6. This provides that the Court may have recourse to the provisions of the High Court Rules as nearly as may be practicable.

[10] Rule 186 of the High Court Rules deals with the striking out of a pleading and provides as follows:

> ***186 Striking out pleading***
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> *Without prejudice to the inherent jurisdiction of the Court in that regard, where a pleading—*
>
> *(a) Discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading; or*
>
> *(b) Is likely to cause prejudice, embarrassment, or delay in the proceeding; or*
>
> *(c) Is otherwise an abuse of the process of the Court,—*
>
> *the Court may at any stage of the proceeding, on such terms as it thinks fit, order that the whole or any part of the pleading be struck out.*

[11] If Mr Saipe had proceeded with his application to strike out then in my view he would have had to establish a reason for criticising the contents of the amended statement of defence by reference to regs 20 and 21 (dealing with statements of defence). Alternatively, he would need to establish one or more of the three criteria set out in rule 186 of the High Court Rules.

[12] My perception of his somewhat convoluted application is that he would not have grounds under regs 20 and 21 for reasons I shall elaborate upon more fully when dealing with the nature and extent of the hearing. On the basis of the documents presently before me and of course without hearing argument on the matter, I consider that I would have had difficulty finding that Mr Saipe's application would establish that the amended statement of defence disclosed no reasonable defence or other case appropriate to the nature of the pleading or that it contained a pleading that was likely to cause prejudice, embarrassment or delay in the proceeding or was otherwise an abuse of the Court. The reasons for my saying that

will also become apparent once I have dealt with the matters specifically going to the nature and extent of the non de novo hearing.

[13] Before doing that I comment that Mr Saipe as a layman has nevertheless approached this matter in a sophisticated and subtle fashion. The provisions of the Act applying to non de novo appeals insofar as the nature and extent of the hearing is concerned are not without difficulty. I can understand the approach taken by Mr Saipe in filing an application to strike out. However, I hope that he will now realise, having considered what I am about to say in this decision, that the application to strike out was misguided to the extent that it did not deal squarely with the issues traditionally required in order for the Court to decide whether a pleading should be struck out or not. It seemed to me at the time of the last chambers hearing and indeed now, that Mr Saipe's objections did not need to be the subject of a strike out application. They could be more properly dealt with in respect of the decision that I have to make as to the scope of the evidence. I complement him on the intelligent way that he has approached the matter. I believe, however, there would be a prospect of a grave injustice not only to the defendant but also possibly himself, if the evidence was to be limited. I accept that, approaching the matter from the position one might normally take in a limited appeal of this nature, there might otherwise be some logic to what he has submitted.

The Employment Relations Authority's determination

[14] The substantive findings of the Authority under both its substantive determination of 27 September 2005 and its determination on costs dated 22 December 2005 can be summarised as follows:

(a) Limitation prevented Mr Saipe from commencing an action to recover loss, which he alleges arises, in relation to the loss of his motor vehicle provided by the employer.

(b) Termination of Mr Saipe's employment by the defendant was not genuinely based on his position of employment being redundant.

(c) That Mr Saipe was unjustifiably dismissed because the termination of his employment and more specifically the issue of redundancy was not handled in a fair manner.

(d) The remedies awarded were three months reimbursement of lost wages, compensation of $8,000 and an allowance towards his costs and disbursements of $3,988.56.

[15] The decision to award no more than three months reimbursement of lost wages, is, in the Authority's decision, only briefly reasoned. It appears to be based on a failure by Mr Saipe to properly mitigate. The question is raised as to whether, if he failed to mitigate, he should be entitled to any reimbursement for a period less than three months or at all. In respect of the award of compensation the Authority has apparently decided not to make any deduction for contributory conduct as *"Mr Saipe was dismissed for redundancy through no fault of his own*". In respect of the limited award of costs it appears, as I have previously mentioned, that there was a decision not to reimburse Mr Saipe with more by virtue of the fact that there could be no reimbursement for such costs, expenses or disbursements incurred in the course of that part of the proceedings relating specifically to the mediation.

[16] In respect of the findings I have summarised above, Mr Saipe has filed a challenge only against the award of three months loss of wages and the decisions and findings in respect of costs. For obvious reasons he does not challenge the substantive findings of the Authority as to the lack of genuineness for the redundancy and unjustifiable nature of the dismissal. Nor does the defendant. Indeed the statement of defence specifically confirms that the Authority's findings were correct. This must be in their entirety for no cross-challenge to any of the Authority's findings or determinations has been filed by the defendant.

The Challenge/Nature And Extent Of The Hearing

[17] I turn now to the issue to be resolved as to the nature and extent of the hearing required to deal with Mr Saipe's challenge. More specifically I must decide the scope of the evidence in view of the fact that Mr Saipe has confined his challenge to only two remedies contained in the determinations. In dealing with this issue I need to return to the pleadings despite the withdrawal of the strike out application.

[18] It is clear that it is the prerogative of Mr Saipe to decide the findings and determinations of the Employment Relations Authority he wishes to challenge. However, despite his submissions to the contrary, it is not for him to limit the extent of the evidence the Court may hear in respect of those issues. In deciding the extent and nature of the hearing the Court has to have regard to the overall justice and equity of the matter not only as that applies to the plaintiff but also to the defendant.

[19] Mr Saipe clearly takes objection to several provisions contained in the amended statement of defence. He says those matters are pleaded purely to enable the defendant to extend the evidence into areas not relating specifically to the particular findings and determinations challenged. They are, he submitted, designed to enable the defendant to cross-challenge findings and determinations of the Authority, which it is bound to accept.

[20] I shall come more specifically to the areas of his discontent in a moment. However, in reply to Mr Saipe's submissions, Mr Haigh spoke to those matters contained in the notice of opposition to the strike out application. They apply equally to the issue of the scope of the evidence. The defendant is not challenging the determinations made by the Employment Relations Authority. As I have indicated it has not filed a cross-appeal. However, as Mr Haigh submitted, there is an absence of a full record of the evidence presented before the Employment Relations Authority. On some of the matters raised in the statement of defence the Employment Relations Authority has made no findings or has not properly reasoned its findings. He submits that in such circumstances the Court should and the defendant wishes it to hear, evidence on the matters relevant to the determinations which are the subject of the challenge and in order to support the determinations reached. As he further submitted it should not be overlooked that the proceedings are in the nature of an appeal.

[21] Mr Haigh indicated to the Court that it would have been open to the defendant to have lodged a cross-challenge seeking a hearing de novo. But it has preferred not to do that in circumstances where it substantially supports the findings of the Authority and is prepared to accept the determinations made in favour of Mr Saipe. He indicated that if the High Court Rules applied in their entirety it would still even now be open to the defendant to file a cross-challenge or appeal. If the High Court Rules were literally applied that could be done any time up to seven days prior to the hearing. The practice note of Chief Judge Goddard I referred to in my earlier minute, modifies the extent to which the High Court Rules apply in this regard. The procedure required in the Employment Court as specified in that practice note is that the cross-appeal or cross-challenge is to be contained in the statement of defence when it is filed without the need to file a separate notice. Obviously in the present case the defendant would be out of time to do that and would need to seek the leave of the Court. Certainly it would not be appropriate having regard to the procedure, length and nature of a hearing of a challenge in this Court to entitle a defendant to simply file the cross-notice seven days prior to the hearing. That might

be appropriate for an appeal in the High Court where evidence would rarely be required. But certainly not where the Employment Court would be embarking effectively upon a new trial. That is one of the reasons why the modification to the High Court Rule has been set out in the practice note issued by Chief Judge Goddard on 18 July 2003. That is not to say that the defendant is estopped at this stage from applying for such leave. But certainly it would need to be done sooner rather than later if that is now contemplated.

[22] However, as Mr Haigh has indicated, the defendant is reluctant to escalate the matter beyond the narrower issues the plaintiff, Mr Saipe, has notified. He added the reservation, however, that if the outcome of the present consideration by the Court is such that the defendant would not be permitted to lead evidence on the matters raised in the amended statement of defence, then the defendant might be left with no alternative but to seek leave to file a cross-notice raising a challenge de novo. For the reasons I am shortly to give, I doubt whether the defendant will now need to contemplate such a procedure.

Principles

[23] The principles applying in the determination by the Court as to the nature and extent of a non de novo challenge are well established. In *Cliff* Chief Judge Colgan stated as follows:

> *[7] The election that challengers must make under s 179(3) refers not so much to the nature of the presentation of the case in Court but, rather, to the extent to which the decision under appeal is challenged. An election by the challenger "seeking a full hearing of the entire matter (. . . a hearing de novo)" indicates that all matters that were before the Authority will be at issue on the challenge. What has become known colloquially as a "non-de novo challenge" (because of the absence of reference to this in s 179) is a narrower form of appeal in the sense that it identifies some but not all of the determination that is under appeal. That is exemplified by s 179(4) which requires a party not seeking a hearing de novo to specify what it says are errors of law or fact in the Authority's determination and other particulars as to the issues to enable the Court to conduct a restricted and more focused hearing of the appeal. But the election does not dictate the way in which the appeal will be heard. So, as here, there may be evidence or further evidence about the matters in issue in the non-de novo challenge and in such a case it is particularly appropriate, and indeed necessary, for the Court to make its own decision on the point or points as required by s 183.*

[24] There was further consideration by Chief Judge Colgan in *Slight v Boise New Zealand Ltd* unreported, Colgan J, 9 March 2005, AC 9/05. The decision is summarised and commented upon by Churchman, Toogood, Foley, *Brookers, Personal Grievances* (2002) 14.5.05 as follows:

> *In* Slight v Boise NZ Ltd *9/3/05, Colgan J, AC 9/04, the Court, referring to the election that a challenger must make, stated that such an election requires important tactical forensic decisions to be made by both parties which may affect the outcome, and the aphorism "procedure is power" applies to such decisions. The issue in this case was the extent to which the parties can dictate the manner in which a non de-novo hearing is conducted. The plaintiff had elected a non de-novo hearing and submitted that the Court should determine the matter by reference solely to the documents which it wished the Court to consider, and which were attached to the statement of claim. These included the statements of problem and reply filed in the Authority, Authority minutes and witness statements. The Court held that while the plaintiff was entitled to select the issues it required the Court to determine, it was not entitled to insist upon the mode of trial by limiting the documentation the Court could consider.*
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> *It held it would be unsafe and unjust to determine the issues solely by reference to the documents the plaintiff wished the Court to consider. In arriving at this conclusion, the Court was influenced by the fact that included among the grounds of challenge were assertions that the Authority's determination was against the weight of evidence. Colgan J stated (at paras 33-34):*
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> > *"It is difficult, if not impossible, to determine what was the weight of evidence considered by the Authority when, at best, only some of that evidence may be before the Court or, at worst, what is tendered may not reflect accurately the best evidence of a fact or event.*
> >
> > *"To approach the case as the plaintiff proposes would be to deprive the defendant of statutory procedural rights to which I consider it is entitled in what is, in effect, adversarial litigation to be conducted for the first time."*
>
> *The Court acknowledged that proceeding in the way proposed by the plaintiff would mean a shorter hearing time, with consequent cost saving to both parties, but these factors were outweighed by the defendant's right to access justice and the necessity for the Court to justly determine the case on the best evidence available. …*

[25] I have set these passages out as fully as I have because it seems to me they express the considerations particularly pertinent to the present case. As I said earlier and it is clear from these passages, that while the appellant in a non de novo challenge may identify the portions of the determination that are under appeal the prerogative rests entirely with the Court to set the parameters as to the evidence. The interests of justice to both parties must prevail.

Findings

[26] Mr Saipe submits that in the context of the entire findings of the Authority and the fact that his challenge is limited to only two of the remedies granted, it is not open to the defendant to raise issues relating to the extent to which his actions contributed towards the situation that gave rise to the personal grievance. He submits that this is particularly so in view of the finding in the determination that he was dismissed for redundancy through no fault of his own and that therefore there is no issue of any contributory conduct by him. That statement as I have indicated is

made simply in the context of the award of compensation, which Mr Saipe does not challenge.

[27] There are provisions in the amended statement of defence, which he covered in his now withdrawn application to strike out, and which he still maintains should not be allowed to be used to permit a means of widening the challenge or allowing the defendant to effectively cross-challenge on a de novo basis. The particular paragraphs in the amended statement of defence to which he refers are paragraphs 3(b)(iv), 3(b)(vi), 3(c) and a portion of paragraph 3(b)(iii). In summary they raise the issue as to the extent the employee's behaviour or actions may provide a basis for reducing the remedy of reimbursement. As an aside, I also perceive that if he had considered the matter he would probably for the same reasons object to the inclusion in the amended statement of defence of the reference in paragraphs 1 and 2 to section 124 of the Act. The defendant pleads that in considering the quantum of compensation for lost income the Court must have regard to that section and hear evidence relating to that.

[28] Mr Saipe has submitted that the Court is not permitted to consider such matters when dealing with an appeal within the confines of the remedy of reimbursement for loss of salary. The starting point must be that where the Court is considering the nature and extent of a remedy in respect of a personal grievance it must have regard to s124. That section requires the Court consider the extent to which actions of the employee contributed towards the situation that gave rise to the personal grievance and if so reduce the remedy that would otherwise have been awarded. This is a situation where Mr Saipe is applying to extend a remedy granted by the Authority of loss of salary limited to three months reimbursement. In his submissions he has indicated that he is endeavouring to extend that remedy under the challenge to the equivalent of 29 months and 1 week lost remuneration, amounting to a sum in excess of $133,000. To that he is seeking to extend the existing costs award of $2,377.60 to $9,565.89 in addition to the provable disbursements and expenses.

[29] Where such a substantial increase is being sought it would be quite unjust to fetter the defendant's entitlement to lead evidence in the way sought by Mr Saipe. While the challenge to the determination is not one made de novo the Court is nevertheless compelled to have regard to s124 of the Act in reaching its decision on the extent of the remedy for reimbursement under challenge.

[30] Quite apart from this I have already indicated that the reasons for the Authority limiting the lost remuneration to three months salary appear to be primarily based upon issues of mitigation. However, in reaching that decision it is quite likely that the Authority will also have taken into account the whole of the evidence it heard at the investigation. Certainly the defendant pleads it that way. The finding that there is no issue of any contributory conduct by Mr Saipe relates specifically to the quantification of the compensation. It is also somewhat ambiguous in that it states that Mr Saipe was dismissed for redundancy through no fault of his own. That may be so but it is not to say that there were not issues relating to the conduct of Mr Saipe, which may nevertheless have been taken into account in the exercise of the discretion to limit salary to three months and possibly even in the remedy of costs. It is difficult when there is no record of the proceedings before the Authority to say what part this evidence may have played separately from the assessment of quantum.

[31] In dealing with issues of the kind presented in this case the Court retains a discretion as to the scope of evidence. Each case will be determined by its own particular circumstances. There are of course going to be non de novo challenges coming before the Court, which are limited to very discrete issues and where the evidence necessary to determine such issues can be substantially limited from that which may have been presented to the Authority during the course of its investigation. Obviously there will be cases, which will be decided simply upon the Court's interpretation of a strictly legal issue. In that case the nature and extent of the hearing can be very limited indeed. However, where a non de novo appeal is brought to challenge a remedy, the Court would be placed in an extremely difficult situation if it was not entitled to hear evidence on all relevant matters, which as a matter of fairness and justice it would require to hear. This is particularly so if it is being asked to reach a decision substantially different from the determination of the Authority. The present is such a case.

Conclusions

[32] Applying these considerations I reach the conclusion that the defendant is quite entitled to plead the matter in the way it has. I say that in the context of my consideration of the nature and extent of the hearing, rather than the application to strike out, which Mr Saipe has withdrawn. That being said it indicates that the parties will be entitled to lead quite extensive evidence even though the challenge is non de novo and effectively limited to two issues arising from the determination. I

apprehend from Mr Saipe's submissions he is under the impression that simply because these matters have been pleaded the Court will take the position that they are true. Obviously that cannot be so. The defendant will still need to lead sufficient evidence to prove the matters pleaded in the amended statement of defence. In the same way Mr Saipe will need to lead evidence (his suggestion of providing an affidavit will not be acceptable) to prove the matters alleged in his amended statement of claim. The fact remains, however, that unless the parties in this case are left free to choose the evidence to be adduced as they see fit to

support the pleadings, the Court will be left in a quandary on account of both parties. Insofar as Mr Saipe is concerned there is a danger that if the evidence is limited in the way that he suggests he may be left as not discharging the onus of proof upon him. I have already adverted to this at the earlier chambers hearing. He has referred to it in his most recent submissions. Insofar as the defendant is concerned the Court, if I limited the evidence, might be left in a situation where it would simply be unable to deal fairly with the challenge by failing to have evidence which should properly be taken into account in deciding whether the Authority's determination should be upheld. To use the words of Chief Judge Colgan in *Slight*:

> *"To approach the case as the plaintiff proposes would be to deprive the defendant of statutory procedural rights to which … it is entitled ..."*

[33] The challenge nevertheless remains limited to the issues raised by the plaintiff. The parties are free to call such evidence as they consider necessary to prove the positions as respectively pleaded. The parties are free to establish the evidentiary basis for any legal submissions, which the Court is entitled or required to take into account in assessing whether the remedies, the subject of the challenge, should be upheld or varied. However, the test of admissibility of any evidence led will be relevance to the limited issues raised in the challenge.

[34] At the chambers hearing it was indicated to me that if I did reach the decision I have, then the hearing is likely to last for four and possibly five days. In view of this the system for management of hearings applies. However, in addition the parties may consider, in view of my findings, it is appropriate to have a further chambers hearing. For this purpose the matter can be placed in the next appropriate callover. I would hope that the issue of documents could be resolved then. I express concern at Mr Saipe's submissions as to the number of documents he intends using. While I have extended the scope of the evidence beyond what he wishes my comments as to relevance apply equally to documents.

[35] Finally, I did mention the prospect of the defendant applying for leave to file a cross-challenge de novo. While I perceive no application will be made, I am not sure what effect my findings will now have on the defendant's attitude to that. If such an application is nevertheless to be made then the appropriate documents should be filed as soon as possible so that that issue can be resolved well before any substantive hearing of the matter.

M E Perkins
Judge

Interlocutory Judgment signed at 3.45pm on Tuesday, 25 July 2006

Solicitors: