IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 95
ARC 72/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VICKI JANE WALKER Plaintiff
AND	PROCARE HEALTH LIMITED Defendant

Hearing: 15 July 2011
(Heard at Auckland)

Appearances: Vicki Walker in person
Garry Pollak, counsel for defendant

Judgment: 1 August 2011

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

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[1] A hearing was convened to deal with two interlocutory matters that had arisen in this case. The first related to the issue of legal representation and whether counsel for the parties may be prevented from continuing to act in the light of the Supreme Court decision in, *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[1] The second related to an application by the plaintiff to call evidence at the hearing from a Mr Keith Handlee who, at one stage, had acted as a mediator in relation to the dispute. At the hearing, I gave an oral decision on both matters and I now proceed to outline the reasons for those decisions.

[2] The plaintiff, Ms Vicki Walker, has challenged a determination[2] of the Employment Relations Authority (the Authority) in which she was the successful

[1] [2010] NZSC 5, [2010] 2 NZLR 444.
[2] AA 276/09, 13 August 2009.

party. Ms Walker was employed by the defendant as its financial controller. In his determination, the Authority Member held that her dismissal on the grounds of alleged incompatibility was unjustified and she was reimbursed for loss of earnings and awarded compensation in the sum of $11,500 for non-economic loss.

[3] In her statement of claim, Ms Walker has elected a hearing de novo but she makes it clear that she agrees with the Authority's conclusion that she had been unjustifiably dismissed. The thrust of her challenge is that the compensation awarded both in respect of her loss of earnings and non-economic loss was insufficient to address the financial loss she allegedly sustained.

[4] Up until relatively recently, Ms Walker has been represented in the proceeding by a barrister, Mr Daniel Gardiner. For its part, the defendant at all material times, with the exception of this interlocutory hearing, has been represented by its counsel, Mr Richard Harrison.

[5] What is clear from the Authority's determination is that both parties had involved their counsel in the employment problem virtually from the outset and the two lawyers then became actively engaged in giving advice to their respective clients and in corresponding with each other about the dispute on instructions from the client. This correspondence was identified and relied upon by the Authority Member in his determination.

[6] Not surprisingly, against that background, this Court became concerned about the appropriateness of counsel continuing to act in the matter. In the course of a telephone directions conference on 21 October 2010 recorded in a minute, Judge Travis indicated that the continuing involvement of both counsel may give rise to a problem that had been highlighted by the Supreme Court in the *Vector* decision. His Honour noted that the pleadings and the determination indicated that both counsel had been closely involved in the events leading up to the dismissal. After making reference to specific paragraphs in the Supreme Court decision, Judge Travis went on to state:[3]

> ...

[3] At [8].

> These indicate that counsel should not appear where they are or have been personally involved in the matters in issue and might be said to have lost objectivity. It is appreciated that in employment law, counsel often become closely involved in disputes and grievances, even to the extent of taking part in the process and in the decision making. This may have implications for them being able to continue to appear as counsel if the matter goes to trial. Counsel will have regard to these issues and consider their implications for their future involvement in this case.

[7] The matter was then referred to a judicial settlement conference before Judge Perkins on 7 March 2011. The parties were unable to settle but in a minute of the same date, Judge Perkins noted that: "if counsel need to step down in view of the *Vector* principle then Ms Walker will be unable to find alternative counsel to come up to speed with the proceedings. She would in that event represent herself."

[8] On 5 May 2011, following on from a further directions conference, Judge Travis noted that counsel had requested a fixture so that submissions could be made to the Court in respect to the representation issue. His Honour noted that Mr Harrison would be filing an affidavit disclosing his role in the plaintiff's dismissal and annexing relevant correspondence and a summary of submissions as to why he should continue as counsel. At that point, Ms Walker was representing herself. Before me, she explained that Mr Gardiner had ceased to act for financial reasons, not because of any perceived problems resulting from the *Vector* case.

[9] Mr Harrison's affidavit, sworn on 27 May 2011, was subsequently filed along with an affidavit from Mr Geoffrey Smith, a senior manager with ProCare, who deposed that the defendant wished to continue to retain Mr Harrison as counsel. In his affidavit, Mr Harrison outlined his extensive involvement in employment law over a period of 30 years, initially as a full-time union organiser but for approximately the last 20 years as a lawyer specialising in the area of industrial relations. Mr Harrison went on to state:

> 3. In the case of employees, it is generally the case that representation is sought at the initiation of a disciplinary or other employment process. Advice and representation will be provided to the employee who in most cases wishes to retain this representation through to resolution; whether this be by way of settlement or determination. A requirement to hand over to new counsel on the grounds of having been instructed at the commencement of an employment process (during which advice will have inevitably been given) will only serve to impose additional barriers to employees bringing claims; adding further cost and undermining their confidence in the process given the high degree of

reliance and trust they often place on counsel who has been with them from the outset.

4. The situation with respect to employer clients varies depending on size and resource. A specialist employment firm depends on the retention of these clients that provide repeat business while for smaller and medium sized businesses and organisations, the reason for wishing to retain counsel is not significantly different to employees; cost and confidence in retaining counsel with whom they have had dealings, knows and understands their business and with whom they have developed a relationship.

[10] In relation to the matter before the Court, Mr Harrison deposed that his initial involvement was in advising the defendant in relation to the employment relationship problem that had arisen regarding Ms Walker and, although he could not disclose his advice due to confidentiality, he indicated that the process followed was no different to that which he followed in other cases. Mr Harrison made the point that although he offered advice, it was always the client who made the decision about whether it wished to act on that advice and initiate or proceed with a particular process including any resulting disciplinary outcomes, in particular, dismissal.

[11] Mr Harrison disclosed as exhibits to his affidavit the letters which had been referred to by the Authority in its determination. He explained that he had written those letters to Mr Gardiner on ProCare's instructions. The first dated 30 November 2007 summarised the background to the dispute and gave details of the next step in the process which ProCare had decided to embark upon. The second dated 18 December 2007, advised of ProCare's decision to dismiss Ms Walker. The lengthy responses from Mr Gardiner were also disclosed. There was nothing exceptional about this exchange of correspondence between legal counsel. It is clear that each counsel was acting on instructions and attempting to project their respective client in the best possible light. Each contains the type of bravado one would expect in the early cut and thrust days of a potentially significant employment dispute.

[12] For the defendant, Mr Pollak submitted that the situation in the present case was distinguishable from the scenario envisaged in the various statements made in the *Vector* case and did not give rise to any issue under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Those rules materially provide:

> 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.
>
> 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
>
> ...
>
> 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court.
>
> 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[13] In relation to *Vector*, Mr Pollak noted that the case involved "interpreting the exchange of letters between the parties' lawyers; Chapman Tripp and Russell McVeagh. Counsel from both firms then argued the meaning of these critical letters which their own firms had drafted (and with which Counsel had been involved) and forwarded on behalf of their respective clients." Mr Pollak referred to the following observations of Wilson J with which Tipping[4] and McGrath[5] JJ associated themselves:

> [147] Whatever the court or tribunal in which they are appearing, it is undesirable for practitioners to appear as counsel in litigation where they have been personally involved in the matters which are being litigated. In that situation, counsel are at risk of acting as witnesses and of losing objectivity.
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> [148] These dangers have long been recognised. In 1940, Myers CJ stated clearly in *Hutchinson v Davis*[6] that "a practitioner cannot be allowed to act in the dual capacities of counsel and witness". Northcroft and Blair JJ agreed. Correspondence between counsel on other than plainly non-contentious issues after litigation has commenced is best avoided, as the rules for lawyers' conduct make clear,[7] but is of less concern than the involvement of counsel in the matters which gave rise to that litigation.

[14] Mr Pollak submitted that these observations by the Supreme Court did not give rise to a "blanket ban" on counsel who had been involved in pre-litigation events continuing to act and he contended that the issue in each case was, "whether

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[4] At [51].
[5] At [99].
[6] [1940] NZLR 490 (CA), at 506, 508 and 522.
[7] Rule 14.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

the lawyer may be required to give evidence of a contentious nature or if the conduct or advice of the lawyer (or of another member of the lawyer's practice) is in issue in the matter before the Court."

[15] Mr Pollak also referred to *Beggs v Attorney-General*,[8] where Miller J, after referring to decisions where it was necessary for counsel to be a witness for the client, observed:[9]

> The principal point made in those cases was that counsel has a duty not to act in both capacities, not that counsel has an unfettered right to choose between them.

[16] Included in the documentation presented at the interlocutory hearing was a letter dated 13 June 2011 to Chief Judge Colgan from Ms Margaret Robins, convenor of the Auckland District Law Society Inc. Employment Law Committee. The letter referred to the *Vector* decision and purported to convey the considered position of members of the committee on the issue of employment law practitioners, "being involved in pre-litigation events (typically disciplinary or restructuring processes) and then acting as counsel in subsequent proceedings." Mr Pollak adopted and incorporated the committee's recommendations into his submissions. After citing passages from *Vector* the letter continued:

> 9. The obligation of counsel to stand aside is enshrined in the Lawyers and Conveyancers' Act, Client Care Rules 2008 at Rule 13.5(1) which provides: *"a lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter"*.
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> 10. In the Committee's view, the *Vector* judgment does not extend or interfere with that obligation. Instead, it simply illustrates a situation where, for whatever reason, a delineation that should have been applied was overlooked.
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> 11. This means that, in the majority of cases, *Vector* is unlikely to be relevant. This is because most cases in the employment jurisdiction do not involve interpretation of practitioners' correspondence. Even so, in the limited cases where such matters are at issue, counsel should excuse themselves. In other cases, evidence about key events and/or the interpretation of documentation should be able to be given by witnesses who were also involved. That said, in the limited cases where the factual issue only involves counsel then that practitioner should opt to assist the court by giving evidence and disqualifying

[8] [2006] 2 NZLR 129.
[9] At [31].

> themselves from appearing as counsel. The Committee's view is that this would be consistent with the decision in *Vector*.

[17] Anecdotally, I have been informed that Wellington based members of the New Zealand Law Society Employment Law Committee share the concerns of their Auckland colleagues on this issue. With respect, I consider that the views expressed in the previous paragraph are soundly based and offer sensible practical guidance to employment law practitioners.

[18] The principles of professional independence embodied in the Client Care Rules and enunciated by various courts over the years are, of course, paramount and the courts will continue to enforce them stringently. This Court recognises, however, that historically the trend has been for employment lawyers to become involved in a dispute between the parties right from the very first blow. Support for this practice is perhaps evident in the provisions of s 143(b) and (c) of the Employment Relations Act 2000 (the Act) which affirm the desirability of resolving employment problems promptly and acknowledge that to this end, "expert problem-solving support, information and assistance needs to be available at short notice to the parties to those relationships". Although s 143 deals with the objects of employment institutions under Part 10 of the Act, the sentiments expressed could well extend to employment lawyers generally. The fact is that, for whatever reason, employment law specialists are likely to receive instructions from employers and employees alike as soon as the employment problem manifests itself and then they are expected to remain closely involved in the decision-making process until the matter is eventually resolved through a negotiated agreement, mediation, investigation by the Authority or litigation in the Court.

[19] Often, the early engagement of specialist counsel can result in a speedy resolution of the dispute with all the attendant benefits to the parties. Such an outcome should not be discouraged by this Court. In those cases, however, which do not settle but progress to litigation, counsel need to be proactive in making a realistic assessment at an early stage on the important issue of whether their involvement in the process has compromised their objectivity. In that event, their obligation is clear. They must stand aside promptly and with due professionalism. If they fail to act accordingly then their continued involvement is likely to be questioned either by the other party or by the Court.

[20] In general terms, the early involvement of counsel in this area of the law in giving advice to a client in relation to an employment problem and in then acting on the client's instructions as the case progresses should not give rise to the type of conflict situation which occurred in *Vector*. Instances of such cases frequently come before the Court and do not give rise to any problem. In fact, it would be a rare employment case that does not involve such a scenario. If, during the course of a hearing, evidence is given by a witness to which counsel, because of his or her early involvement in the case, takes personal exception, then counsel know that all one can do by way of response in that situation is, in colloquial terms, bite one's lip. Equally, it is impermissible under r 13.5.4 ([12] above) for counsel to convey or appear to convey counsel's personal opinion on the merits of the evidence or other issues before the Court.

[21] In relation to the present case, having now had the opportunity of examining the correspondence in question and the involvement of the respective counsel, I accept that this is not a situation where Mr Harrison has disqualified himself from acting for the defendant. The same would apply to Mr Gardiner if Ms Walker had still been able to retain his services. The correspondence between counsel is not at issue and was, as I have indicated, unexceptional. What is at issue in this case, is the conduct of the employer and employee and whether the dismissal was justified in terms of s 103A of the Act, not the conduct or advice of counsel.

[22] The second issue related to Ms Walker's stated intention of calling evidence from Mr Handlee who, at one stage, had acted as mediator in relation to the dispute. Section 148 of the Act imposes strict obligations of confidentiality on persons providing mediation services and those obligations were recognised and enforced by the Court of Appeal in *Just Hotel Ltd v Jesudhass*.[10] Section 148(2) specifically provides:

> (2) No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about –
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> (a) the provision of the services; or

[10] [2007] ERNZ 817; [2008] 2 NZLR 210 (CA).

> (b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of these services,
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> ...

Mediation services in the context of s 148, however, are services provided through the Department of Labour.

[23] In the present case, as I understand it from Ms Walker's submissions, Mr Handlee was appointed by the defendant and not by the Department of Labour. His initial instructions were to investigate certain complaints that had been made about Ms Walker and the defendant's chief financial officer by other staff members. Mr Handlee then apparently decided of his own initiative, to carry out mediation rather than an investigation of the complaints. The parties apparently signed a confidentiality agreement. Even without the express confidentiality agreement, however, confidentiality may have been implicit in the mediation – *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd*.[11] In all events, argument on this issue was short-circuited when Mr Pollak confirmed that the defendant withdrew its objection, leaving Ms Walker now free to subpoena Mr Handlee to give evidence at the hearing, should she so desire.

[24] Finally, I confirm the timetabling agreed at the interlocutory hearing. The substantive hearing (estimated by the parties to take 6 days) is confirmed to start on Wednesday, 14 September 2011. The plaintiff's briefs of evidence are to be filed and served by Tuesday, 9 August 2011 and the defendant's briefs of evidence in response are to be filed and served by Tuesday, 23 August 2011. The plaintiff's briefs of evidence in reply are to be filed and served by Tuesday, 6 September 2011. Mr Harrison is to compile an indexed agreed bundle of documents in the usual format, which should be filed no later than 6 September 2011.

[25] Costs are reserved.

A D Ford
Judge

Judgment signed at 9.30 am on 1 August 2011

[11] [2001] 3 NZLR 343 (CA) at [24].