

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 45
ARC 45/09**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF preliminary issues

BETWEEN SEAN MILLER
Plaintiff

AND FONTERRA CO-OPERATIVE GROUP
LIMITED
Defendant

Hearing: 23 March 2010
(Heard at Auckland)

Appearances: Tony Drake, counsel for plaintiff
John Rooney and Katherine Burson, counsel for defendant

Judgment: 27 April 2010

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant (“Fonterra”) has applied for a series of preliminary questions to be determined before trial. The plaintiff has opposed these applications principally on the grounds that that the preliminary questions would delay finally resolving the proceedings and unduly increase the length and costs of the proceedings.

[2] These proceedings were removed from the Employment Relations Authority to the Employment Court under provision of s 178 of the Employment Relations Act 2000 (“the Act”). The problem, as originally stated, was whether Fonterra breached an implied term of the parties’ employment agreement that the plaintiff be indemnified for losses arising as a result of criminal charges laid against him in circumstances he says were as a result of his employment. Fonterra denies that the

plaintiff was ever an employee of a company which was later amalgamated to form Fonterra, but if he was, as an alternative, Fonterra has counter-claimed that the plaintiff owed Fonterra a duty of fidelity not to engage in any conduct which was likely to damage Fonterra's business or to undermine the trust and confidence required in an employment relationship.

[3] In its counter-claim Fonterra seeks reimbursement from the plaintiff of a share of the legal costs incurred in dealing with allegedly unlawful exports in an affair which became known as "powdergate" and which is said to have cost Fonterra almost \$1.5 million.

[4] The plaintiff claims to have been employed by Kiwi Co-operative Dairies Ltd (Kiwi), a company which was one of those amalgamated to form Fonterra so as to effectively make the plaintiff an employee of Fonterra. In response, Fonterra alleges that the plaintiff at the relevant time was not an employee of Kiwi, but was an employee of Kiwi Milk Products Ltd (KMPL) which was not one of the amalgamating companies that formed Fonterra.

[5] Fonterra's first application concerning preliminary issues, filed on 20 January 2010, sought the following orders:

- 1.1 The following preliminary questions should be determined first (before other issues in this proceeding are heard):
 - (a) Was the plaintiff employed by Kiwi Co-operative Dairies Limited or Kiwi Milk Products Limited?
 - (b) Is the plaintiff's claim time-barred?
- 1.2 In the event that the preliminary questions identified above are determined in the plaintiff's favour, the following issues should be heard separately, before the substantive issues in this proceeding are determined:
 - (a) Does an employment agreement include an implied term that the employer will indemnify an employee in respect of actions carried out in the course of his employment?
 - (b) If so, what is the scope of that indemnity? Does it, by way of example, require an employer to indemnify an employee for:

- (i) Illegal acts; and/or
 - (ii) Actions outside the employee's authority or duties (as described in the employee's job description [or] otherwise).
- (c) Is the existence of an implied term providing an indemnity barred by the operation of the law relating to illegality?
- (d) Do an employee's professional obligations (eg as a chartered accountant), duties under the Companies Act, or level of seniority or responsibility affect the existence or scope of an implied indemnity owed by an employer?

[6] The grounds in support of that application were that if the preliminary questions identified at paragraph 1.1 above were determined in favour of Fonterra there would be no need to consider the remaining issues in the case. Fonterra also submitted that if the Court found in its favour on the legal issues identified in paragraph 1.2 above, there would be no need for substantive hearing. This, Fonterra submitted, would meet the interests of justice and efficiency and would not prejudice the plaintiff. The application was supported by an affidavit of Fonterra's general counsel, Mr Matthews, which annexed the relevant documentation.

[7] The plaintiff opposed the application and filed a substantial affidavit in opposition setting out the circumstances of his employment with Kiwi and KPML and seeking leave to refer to an affidavit he had sworn and filed in the Employment Relations Authority. A chambers hearing was held on 15 February to deal with the defendant's application.

[8] Mr Rooney submitted that the criteria relevant to applications under what is now rule 10.15 of the High Court Rules, are taken from in *McGechan on Procedure* as follows:

- (a) The likelihood of delay in finally resolving the proceeding;
- (b) The probable length of the hearing of the separate question;
- (c) Whether a decision on the separate question will end the litigation or shorten any subsequent hearing; and

- (d) The need for a just, speedy and inexpensive determination of the proceeding.

[9] Mr Rooney then addressed the factual matters in relation to the first preliminary issue, namely the identity of the employer. He pointed out that establishing the true identity of the plaintiff's employer would be an important precursor to the determination of Fonterra's counter-claim.

[10] As to the limitation defence, Fonterra contends that the event which gave rise to charges under the Customs and Excise Act 1996 of falsifying customs documents related to events that had occurred in May 2001. The plaintiff's proceedings against Fonterra in the Employment Relations Authority were lodged in October 2007, which Fonterra contends is more than six years after the events in question. The plaintiff was discharged without conviction on the charges on 10 May 2007.

[11] Mr Rooney contended that the evidence required in respect of the preliminary questions could be limited and include affidavit evidence as to the plaintiff's employment history, annexing the relevant documents. He submitted that there should be no overlap between the limited evidence required on the legal questions and that required at the substantial hearing. He referred to the possibility that has been mooted that it might be appropriate to convene a full Court to deal with the indemnity claim once all preliminary issues were out of the way, something that would be less likely if there was a large amount of contested evidence to be dealt with at a substantive hearing. Mr Rooney also raised the issue of whether an implied term providing an indemnity was barred by s 162 of the Companies Act 1993.

[12] Mr Drake took objection to this last matter being raised for the first time without notice. In the event this matter became the subject of a separate application filed on 8 March for two further preliminary questions to be determined before trial namely:

- (a) whether s 162 of the Companies Act 1993 prohibits the defendant from indemnifying the plaintiff in the terms pleaded in paragraph 8(i) of the statement of claim and

(b) whether the constitution of KMPL and/or Kiwi prevent the term pleaded at paragraph 8(i) from being implied into the plaintiff's employment agreement and/or renders that term void.

[13] That application was heard in chambers on 23 March.

[14] Section 162 of the Companies Act, insofar as it is relevant, states:

162 Indemnity and Insurance

- (1) Except as provided in this section, a company must not indemnify, or directly or indirectly effect insurance for, a director or employee of the company or a related company in respect of—
 - (a) Liability for any act or omission in his or her capacity as a director or employee; or
 - (b) Costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability.
- (2) An indemnity given in breach of this section is void.
- (3) A company may, if expressly authorised by its constitution, indemnify a director or employee of the company or a related company for any costs incurred by him or her in any proceeding—
 - (a) That relates to liability for any act or omission in his or her capacity as a director or employee; and
 - (b) In which judgment is given in his or her favour, or in which he or she is acquitted, or which is discontinued.
- (4) A company may, if expressly authorised by its constitution, indemnify a director or employee of the company or a related company in respect of—
 - (a) Liability to any person other than the company or a related company for any act or omission in his or her capacity as a director or employee; or
 - (b) Costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability,—

not being criminal liability or liability in respect of a breach, in the case of a director, of the duty specified in section 131 of this Act or, in the case of an employee, of any fiduciary duty owed to the company or related company.

...

[15] Mr Rooney submitted that the exceptions provided for in s 162(4) of the Companies Act did not apply because neither Kiwi nor KPML had constitutions which expressly authorised the giving of such indemnities and any indemnity given would be for criminal liability which was not permitted. He also submitted the plaintiff's claim was not to indemnify the plaintiff for any liability he may have to third parties but in respect of losses he himself has suffered. Mr Rooney referred to a second affidavit of Mr Matthews which annexed the relevant constitutions and submitted there was unlikely to be any other necessary evidence. He submitted that a hearing on these two additional issues along with those previously identified was likely to occupy one day only. He submitted that if the preliminary issues were determined in the defendant's favour this would dispose of the plaintiff's claim that his employment agreement included an implied term that he would be indemnified by Fonterra.

[16] Mr Rooney also noted that the plaintiff had filed an application to strike out the defendant's counter-claim, that this application was opposed and a hearing of this interlocutory issue would be required. Mr Rooney submitted that the strike out application was a relevant consideration when it came to considering the defendant's application under rule 10.15. As there needs to be a hearing of the strike out application, the grounds of opposition advanced on behalf of the plaintiff based on the delay in the final resolution of the matters, Mr Rooney submitted, fell away. If there is to be a hearing on the strike out application he submitted there was no reason why the issues the defendant has raised could not be heard at the same time.

[17] Mr Drake's submissions in opposition commenced with the proposition that the defendant had not discharged the onus of displacing the assumption that all matters in issue were to be determined in one trial. He submitted the defendant had failed to identify a serious question for preliminary determination. In these circumstances he submitted that a separate hearing of any of the questions advanced by the defendant was unlikely to expedite the proceedings and therefore would not prevent inconvenience and would cause countervailing injustice to the plaintiff. He cited *Clear Communications v Telecom Corp of NZ Ltd*¹ where Fisher J noted the

¹ (1998) 12 PRNZ 333.

heavy onus on the party seeking a split trial. The difficulties identified included: the problem of defining separate issues with sufficient precision; judges inadvertently disqualifying themselves by expressing views on issues yet to be addressed; duplication in terms of witnesses and preparation time; the risk of multiple appeals, the risk of a further round of disclosure and other interlocutories and amended proceedings; delay in obtaining a fixture for the second hearing and the risk that the same judge might not be available.

[18] Mr Drake cited the following two passages from *McGechan on Procedure*².

“Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety, and expense.” Per Lord Scarman in *Tilling v Whiteman* [1980] AC 1; [1979] 1 All ER 737 (HL), at p 25; p 744; and

“[T]he course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom – save in very exceptional cases – of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.” Per Lord Evershed MR in *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] 1 Ch 375, at 396.

[19] Mr Drake also submitted that the object of the Employment Relations Act can, in part, be found to be expressed in reg 4, of the Employment Court Regulations 2000. This is the speedy, fair and just determination of proceedings before the Court. He pointed to the lack of any express procedure in the Regulations or in schedule 3 to the Act similar to rule 10.15 of the High Court Rules. He submitted that, given the warnings of “treacherous short cuts”, such as those issued in the cases cited above, the Employment Court should allow the preliminary determination of questions only in exceptional cases unless the parties have agreed that it is appropriate.

[20] Mr Drake stressed the additional expenses that would be incurred by the plaintiff if there were preliminary hearings, the risks of multiple appeals and the excessive delay that would ensue.

² HR10.15.06.

[21] Turning to the individual questions, Mr Drake dealt first with the question of the identity of the employer. He submitted that no serious question had been made out and pointed to the plaintiff's affidavit evidence of his continuous employment with Kiwi from 1996 up until the time of the merger and then his continuing employment with Fonterra by view of the amalgamation provisions in s 225 of the Companies Act. The plaintiff's affidavit annexed copies of various offers of employment from what appeared to have been companies associated with Kiwi which allegedly still remained under the overall umbrella of his employment with Kiwi. The affidavit also annexes letters from Fonterra relating to the plaintiff's redundancy which refer to his employment with Fonterra.

[22] Turning to the limitation period, Mr Drake submitted that there was no proper question for determination concerning s 142 of the Employment Relations Act which provides:

No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[23] Mr Drake referred to the evidence that the plaintiff commenced his action in the Authority on 12 October 2007 and that the alleged breach of contract by Fonterra occurred during the period between 16 October 2001 and 16 November 2002. Mr Drake submitted that the period when the cause of action arose was all within six years of the date that the plaintiff's claim was filed in the Authority. Further he submitted that the application for compliance arose out of losses the plaintiff incurred between 2004 and 2006 and Fonterra's refusal, in July 2007, to indemnify him for those losses.

[24] As to the defendant's questions relating to the alleged implied indemnity, Mr Drake referred to a number of cases where the courts in New Zealand have considered and confirmed the existence of an implied term of indemnity in employment agreements. These include *Attorney-General v Jones*³, *F v Attorney-*

³ HC Wellington M73/79, 16 June 1981.

*General*⁴, *Christchurch City Council v Davidson*⁵, and, most recently, *Tramways and Public Passengers Transport Employees' Union Inc v Wellington City Transport*⁶.

[25] Turning to the question the defendant has posed relating to s 162 of the Companies Act, Mr Drake pointed out that this was not an entirely new provision and that similar provisions were in prior Acts, citing s 204 of the Companies Act 1955 and s 158 of the Companies Act 1933.

[26] Mr Drake developed a submission that the meaning of s 162 was to restrict the powers that directors of limited liability companies have to cause the company which they control to give themselves, and to others, contracts of indemnity and insurance and thus derogate from shareholders' rights. He submitted the provisions that limit the right of a limited liability company to give indemnity when they want to, is a situation to be contrasted with the duty employers have under the common law to indemnify employees in certain circumstances. The common law duty, Mr Drake submitted, applied whether or not the employer wanted to give such an obligation. He submitted that there were strong arguments to show that the purpose of s 162 was not to abrogate the employer's common law duty.

Conclusion

[27] I am concerned that the preliminary issues which the defendant seeks to have determined will not necessarily dispose of all of the plaintiff's claims even if the questions are determined in the defendant's favour. The plaintiff's statement of claim alleges, in addition to the allegation of an implied indemnity, an implied term of mutual trust and confidence and an implied term that Fonterra would not conduct itself in a manner likely to cause the plaintiff harm or damage the relationship of trust and confidence and also relies on the statutory duty of good faith. If the limitation defence is found to apply, this might dispose of all the plaintiff's claims. This will depend upon strict proof as to when the alleged breaches occurred, if the

⁴ [1994] 2 ERNZ 62.

⁵ [1996] 2 ERNZ 1 (CA).

⁶ [2010] NZEmpC 12.

plaintiff's alternative argument that his cause of actions arose in July 2007 does not prevail. Had the plaintiff's claims been based solely on the implied indemnity cause of action then preliminary issues addressed to the enforceability of such an indemnity could appropriately have been determined prior to trial.

[28] I observe that rule 10.15 of the High Court rules opens with the wording "whether or not the decision will dispose of the proceeding" but that is still one of the relevant criteria said to emerge from the case law.

[29] I accept Mr Drake's submission that the preliminary points the defendant wishes to argue may amount to "treacherous short cuts", lead to multiple appeals with a duplication of evidence, the risk of the Judge dealing with the preliminary issues inadvertently being disqualified from conducting the substantive trial and would increase the costs and further delay the substantive hearing. As so much of the substantive evidence to be canvassed for the majority of the preliminary questions that the defendant has formulated will also need to be canvassed at trial I accept Mr Drake's submission that the most appropriate course is to allow these issues to be argued in the one hearing.

[30] The plaintiff's application to strike out the defendant's counter-claim has given me pause. I have considered the possibility of having the preliminary question the defendant advanced regarding the limitation period heard at the same time as the plaintiff's strike out application. For the reasons advanced by Mr Drake and which I have summarised above, in the end I was not persuaded that this question readily falls to be disposed of without a full examination of the role the plaintiff played in the events which gave rise to the prosecution at the heart of these proceedings.

[31] For these reasons I dismiss the defendant's applications and reserve the question of costs.

B S Travis
Judge

Judgment signed at 4.15pm on 27 April 2010