IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 129
ARC 42/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	VIPULKUMAR PATEL Plaintiff
AND	PEGASUS STATIONS LTD Defendant

Hearing: 15 July 2011 (heard at Auckland)
(and by way of written submissions dated 18 August and 6 September 2011)

Appearances: Plaintiff in person
Susan-Jane Davies, counsel for the defendant

Judgment: 13 October 2011

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] The plaintiff, Mr Vipulkumar Patel, is a self-represented litigant and English is his second language. In sworn evidence, he outlined his impecunious situation describing to the Court how his application for legal aid had been unsuccessful and, despite numerous attempts, he had been unable to retain a lawyer. He told the Court how legal aid had sent him a list of lawyers working in the employment field and he had had a meeting with some of them but they were either too busy or were otherwise unwilling to take on his case.

[2] The present interlocutory application relates to an issue over the adequacy or otherwise of the statement of claim Mr Patel has filed in this Court challenging the whole of the determination[1] of the Employment Relations Authority (the Authority) dated 19 May 2011. In its determination, the Authority found that Mr Patel's dismissal from his employment at Mobil's Royal Heights Service Station on 21 June 2010 had been justified. He had been dismissed for failing to follow correctly the procedure prescribed for handling a fuel discount scheme known as the Under Canopy Discount Programme during his shift on 8 May 2010. He had worked at the service station since September 2007. In a subsequent determination dated 4 July 2011,[2] the Authority ordered Mr Patel to contribute to the defendant's costs and disbursements in the sum of $3,338.37.

[3] On 17 June 2011, the defendant filed an application for directions and for a stay of proceedings. The application sought an order requiring the plaintiff to file a statement of claim which complied with reg 11 of the Employment Court Regulations 2000 within 21 days failing which the proceeding would be struck out. The stated grounds of the application were that the statement of claim did not sufficiently particularise the facts upon which the claim was based; that it contained allegations of fact which did not relate to the dismissal and that it asserted dishonesty on the part of the Authority Member. The stay of proceedings was sought until the plaintiff paid the full amount of costs still to be awarded by the Authority. The defendant also sought a statement of means.

The issues

[4] An interlocutory hearing was convened in Auckland for 15 July 2011 to identify the issues and progress the matter. At that hearing, the plaintiff readily agreed to be examined on oath as to his means and a full transcript of that evidence was then made available to Ms Susan-Jane Davies, counsel for the defendant. Thereafter the defendant, appropriately, did not proceed with the stay application.

[5] It soon became apparent, however, that the real issue between the parties at this preliminary stage of the proceeding related to two specific work-related

[1] [2011] NZERA Auckland 214.
[2] [2011] NZERA Auckland 286.

incidents referred to in some detail in the statement of claim which do not appear to be directly related to the plaintiff's dismissal. In brief, the two matters were:

a) Forged signature

On 8 June 2010, Mr Patel complained in a letter to Mobil management that on 8 April 2010 a co-worker (Aman) had forged his signature on a company document (a wages change advice form) without his permission.

b) Health and safety issue

On 1 June 2010, Mr Patel complained that on 29 May 2010 his manager (Riaz Ali) failed to give him permission to see a doctor or go home when he was feeling unwell at work.

[6] Ms Davies submitted that these matters "were not expressed as personal grievance employment relationship problems in and of themselves in the Statement of Problem before the Authority." As counsel expressed it:

> 3. The Authority did not treat them as discrete employment relationship problems during its investigation. It subsumed them into the one employment relationship problem expressly claimed by the Plaintiff in the Statement of Problem.

[7] For his part, Mr Patel alleged in his notice of opposition to the defendant's application:

> 4. ...
>
> (e) The plaintiff filed his case in Employment Relations Authority for his three matters (1) unjustified dismissal (2) on duty health problem and (3) duplicate signature done by fellow staff on PSL official document. But Member of ERA (Rosemary Monaghan) didn't investigate above three matters with honesty and she didn't check evidences which provided by applicant.

[8] The Authority expressly referred to both the above complaints in its decision but treated them as examples of what it described as "Mr Patel's principal argument", namely unfair disparity of treatment.

[9] At the interlocutory hearing before me, the plaintiff informally produced a number of documents including correspondence relating to the two matters described in [5] above that he had sent either to the Authority or to the defendant. No objection was taken to this informal disclosure. Most, but not all of the documentation had been seen by Ms Davies and as she was about to depart on an overseas trip, the Court adjourned the matter to allow her to peruse the correspondence and respond by way of written submissions upon her return. Mr Patel was also given the opportunity to file submissions in response.

Submissions

[10] In her submissions dated 18 August 2011, Ms Davies accepted that the two incidents had been brought to the Authority's attention during its investigation but she submitted: "the Authority chose not to broaden the scope of its investigation beyond the one employment relationship problem pleaded - namely unjustified dismissal." Counsel continued:

> 10. The Court does not have power to characterise these issues as actionable unjustified disadvantage claims even if they were capable of being framed as such.
>
> 11. The Court therefore does not have jurisdiction to hear and decide them as separate claims in these proceedings and so they should be struck out of the particulars of claim in the Statement of Claim.

[11] Ms Davies referred to s 179(1) of the Employment Relations Act 2000 (the Act) which provides:

> **179 Challenges to determinations of Authority**
>
> (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.

Counsel submitted that whether or not this Court had jurisdiction depended on whether the two complaints could be said to have been "matters before the Authority" within the meaning of s 179(1). She referred to "matters" in this context "in the sense of actionable personal grievances in their own right" as distinct from "merely facts relevant to the unjustified dismissal personal grievance".

[12] Expanding on this contention, Ms Davies submitted:

> 15. For them to be actionable matters in the Authority the Plaintiff had to have shown that the stomach ache issue and the forged signature issue were both personal grievances falling within the definition in s 103 Employment Relations Act 2000 and both were raised as grievances in accordance with s114 Employment Relations Act 2000.
>
> 16. The stomach ache issue as raised by the Plaintiff with the Defendant in the above correspondence is not couched as a personal grievance, but even if it were (denied) it is not raised in conformity with s114. It is phrased in the nature of a tort (breach of a duty of care) rather than a disadvantage personal grievance.
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> 17. The Authority had no jurisdiction in tort. The Court's jurisdiction in tort is limited to industrial action.
>
> 18. The forged signature issue as raised by the Plaintiff with the Defendant failed to satisfy the test in s 103(1)(b) Employment Relations Act 2000 in that it does not plead or disclose any actionable disadvantage.

[13] In conclusion, Ms Davies submitted:

> 32. ... The correct course of action is for the Plaintiff to lodge an employment relationship problem with the Authority alleging the two instances of unjustified disadvantage and for the matter to be disposed of in the first instance there.

[14] In his written submissions in response, Mr Patel (understandably) did not refer to any of the legal issues touched upon by Ms Davies but he stressed that the health and safety problem and the forged signature matter were not new matters because he had raised them formerly with the defendant and they were also matters before the Authority.

Discussion

[15] Mr Patel was represented by an advocate when his statement of problem was lodged with the Authority. The first paragraph of his statement of problem recorded the problem as being "Unjustified dismissal on or about 15 June 2010." The second paragraph recorded that the facts that gave rise to the problem were set out in an attached letter. The attachment referred to the forged signature incident as evidence that there had been disparity of treatment between the defendant's treatment of

Mr Patel and other employees. The attachment was silent about the health and safety complaint.

[16] The type of matter a plaintiff can bring before the Court was canvassed by decisions of the full Court in *Sibly v Christchurch City Council*[3] and *Abernethy v Dynea New Zealand Ltd (No 1)*.[4] In *Sibly* the full Court held:

> [47] ... If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

[17] In *Abernethy*, a differently constituted full Court confirmed what it referred to as the "*Sibley* analysis",[5] namely, that a plaintiff could bring for decision by the Court an additional cause of action of unjustified disadvantage which had not been canvassed by the Authority with one important reservation: a plaintiff could not raise a matter in the Court that was not before the Authority. This conclusion was based on the court's analysis of ss 179 and 187(1)(a).

[18] In the present case, Ms Davies submitted that *Abernethy* was "clearly distinguishable" because:

> 29. ... In that case, the employee was seeking to have the same personal grievances as alleged before the Authority heard by the Court, namely his unjustified disadvantage and dismissal grievances. In this case the Plaintiff did not raise any personal grievances alleging disadvantage in the Statement of Problem dated 9 August 2010. He clearly states that the sole ground for the alleged grievance is "unjustified [dismissal] on or about 15 June 2010."

[19] Whilst *Abernethy* can be distinguished on its facts, it seems to me that the legal principle embodied in the *Sibley* analysis, as qualified in *Abernethy*, is of general application and is directly relevant to the facts of the present case. In *Sibley* the issue was whether an additional grievance pleaded in an amended statement of claim could be brought before the Court when it had not been submitted within the statutory limitation period of 90 days nor had the grievance or the allegations on which it was based been before the Authority in the course of its investigation. The

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[3] [2002] 1 ERNZ 476.
[4] [2007] ERNZ 271.
[5] At [33].

Court determined the matter in accordance with the principle stated in [16] above and allowed the additional grievance to proceed.

[20] The situation in the present case is not dissimilar to that considered by Chief Judge Colgan in a case referred to by Ms Davies, *Clark v The Board of Trustees of Dargaville High School*.[6] One of the orders sought by the defendant in that case was an order striking out a number of the plaintiff's causes of action and other paragraphs in his amended statement of claim on the grounds that they were claims in tort for defamation and breaches of duty of care which were not justiciable in the Authority or the Employment Court. The Chief Judge declined to strike out the causes of action in question stating:

> [18] However, I am not prepared to strike out the impugned causes of action. Although they have some of the indicia of [tortious] and other extra jurisdictional claims, they are discernibly employment relationship problems and justiciable as personal grievances if they meet the twin statutory requirements of having been questions before the Employment Relations Authority (s 179) and having been brought within time (s 114).
>
> [19] The jurisdiction of the Employment Relations Authority and the Employment Court is both statutory and limited. However, within employment relationships there is substantial scope for employee complaints against employers to be categorised as disadvantages to the employee's employment or one or more conditions of it, if such disadvantage has been brought about by some unjustifiable action by the employer: s 103(b) of the Act. It is not only breaches of an employment agreement by an employer that can constitute such a personal grievance.

[21] The way in which the Chief Judge viewed the impugned causes of action is conveniently illustrated by his approach to the third cause of action:

> [22] Mr Clark's third cause of action is as follows:
>
> > *13. The neglect of duty of care, and beaches [sic] of contract and policy were a willful [sic] effort to deprive CLARK of his resignation and position at DHS and to define his personal and professional reputation.*
>
> [23] Again, although this pleading may appear, and may even have been intended to be, one in tort which is not justiciable, it is also an employment relationship problem. Mr Clark may allege that, contrary to his legitimate expectations of a fair and reasonable employer, the

[6] AC 3A/09, 20 April 2009.

> Board failed to support and guide him to full teacher registration and its acts or omissions have caused him to suffer unjustifiably stress, humiliation or other like consequences that are remediable under s 123 of the Act.

[22] In the present case, consistent with the Court's approach to strike out applications, apart from the evidence taken as to means, there is no evidence before the Court other than the pleadings, the initial documentation filed in the Authority and the correspondence referred to in [9] above. A brief affidavit was filed on behalf of the defendant on the day of the hearing which related to the application for a stay. The Court has not sighted Mr Patel's employment agreement or any other relevant documentation such as the defendant's house rules and coaching notes which were referred to in the Authority's decision.

[23] With reference to the twin statutory requirements recognised by the Chief Judge in *Clark*, there is no dispute that the two distinct matters which Mr Patel now seeks to have considered by the Court, namely, the health and safety issue and the forged signature issue referred to in [5] above were before the Authority (s 179). In addition, the forged signature issue was raised by Mr Patel with his employer and mentioned in the statement of problem and the health and safety issue was raised by Mr Patel as a personal grievance in his letter of 1 June 2010. Both matters had therefore been raised within time (s 114). It would appear that Ms Davies is correct when she submits that during the Authority's investigation, Mr Patel's advocate merely relied on the two incidents as "facts giving rise to disparity". It is also clear that the Authority in its determination dealt with the two incidents in terms of the disparity allegation rather than disadvantage grievances in their own right. It seems to me, however, that notwithstanding the fact that the two issues were not presented to the Authority as disadvantage grievances, the principle recognised in *Abernethy* would not preclude the plaintiff (who is now representing himself) from arguing before the Court that they did, in fact, in some way constitute disadvantage grievances.

[24] In this regard, it may not be without significance in relation to the forged signature issue, that the allegation is that the plaintiff's co-worker, Aman, was told by his manager to forge Mr Patel's signature. As an aside, Aman was also the

co-worker involved in the incident resulting in Mr Patel's dismissal. Adopting the approach of the Chief Judge in *Clark*, if it is established that Aman had been directed by his manager to forge these signatures, Mr Patel may be able to allege that the incident displayed a lack of good faith on the part of the defendant which is not what one would expect from a fair and reasonable employer.

[25] In relation to the health and safety issue, the complaint made by Mr Patel about his manager was very detailed and Mr Patel may allege and be able to persuade the Court that he was disadvantaged because the defendant failed to adhere to its own health and safety policy. In this regard, it may be significant that attached to one of the letters Mr Patel wrote to the Authority, is a copy of the page from his employment contract dealing with "Serious Misconduct" which describes breaching health and safety procedure as serious misconduct which may lead to immediate dismissal. It would appear, therefore, that the defendant takes its health and safety obligations very seriously. Mr Patel may allege that on the occasion in question his manager breached the company's health and safety policy resulting in his suffering unjustifiable stress or other like consequences that are remedial under s 123 of the Act. On the limited documentation before the Court, it does not appear that either of Mr Patel's complaints was ever investigated by the defendant.

[26] Both incidents occurred at the same time or in close proximity to the events giving rise to and surrounding Mr Patel's dismissal and, on the facts, Mr Patel is entitled to allege in his pleadings that they are all part of the employment relationship problem that he now wants considered in his de novo challenge. In *Sibley* the full Court concluded:[7]

> Whilst it is understandable that the Authority ... did not address the exercise of the discretion because it did not receive any express submissions on the point, it still was under a statutory obligation to determine the matter according to its substantial merits. If it is arguable that it did not do so, that can form the proper basis for a challenge of the determination of a matter which ... had been placed before the Authority for investigation and determination.

[27] Upon consideration of all the evidence presented in relation to the challenge, the Court, of course, might simply conclude that the Authority acted correctly in

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[7] At [57].

treating the two complaints in the way that it did. In that event, Mr Patel would fail on both alleged causes of action. The fact of the matter, however, is that the Authority referred to each incident in its determination (devoting a paragraph to each) and the incidents were, therefore, clearly matters before the Authority. If the defendant's application is to succeed and an order is made at this stage deleting those alleged causes of action from the statement of claim, it effectively means that the Court will not be considering those two issues afresh but simply endorsing the conclusions reached by the Authority in its determination. That is an approach which runs counter to the concept of a de novo hearing. A de novo hearing involves the Court conducting a full hearing of the entire matter. For these reasons, the strike out application is declined.

[28] The defendant is on stronger grounds in seeking an order striking out those parts of the statement of claim where the plaintiff asserts dishonesty on the part of the Authority Member. Under s 176 of the Act members of the Authority enjoy special protection in the performance of their duties and the proceedings of the Authority are declared judicial proceedings. It is not appropriate, therefore, for a plaintiff to make allegations to this Court of dishonesty on the part of an Authority Member. The plaintiff is, therefore, to file an amended statement of claim within 21 days deleting paragraphs 15, 17, 19, second bullet point in paragraph 25 and paragraphs 26, 35, 36, 43, 44, bullet points two and three in paragraph 45, and paragraphs 46, 49, 75 and 80. He should also take the opportunity of explaining in his pleadings relating to the health and safety and forged signature causes of action precisely how he claims to have been disadvantaged. Unless he is able to establish such disadvantage at the hearing, he will not succeed on those parts of his claim.

[29] There are numerous other criticisms which can properly be levelled at the statement of claim particularly in relation to matters of syntax and grammar. It is also verbose, meandering and repetitive and it includes references to evidentiary matters as well as legal principles, which should properly be the subject of submissions at a later date.

[30] One of the difficulties, however, is that many of the unsatisfactory aspects of the statement of claim are inextricably interwoven with unobjectionable pleadings

and, short of carrying out the re-drafting exercise, it would require a complicated order to regularise the situation. Even then I could not be certain that the Court's directions would be fully understood. I suspect the reality is that, unless the plaintiff is able to retain a pro bono lawyer or advocate, the pleading he has filed is likely to be, in colloquial terms, "as good as it gets".

[31] As I noted in the opening paragraph of this judgment, Mr Patel is a self litigant and English is his second language. In such circumstances if, despite inadequate pleadings, an issue is clearly raised and is understood by the opposing party to be raised, it should not be excluded because of technicalities in relation to the pleadings. I am satisfied from various exchanges during the interlocutory hearing that counsel for the defendant is fully aware of the issues raised and I do not consider that the defendant will be prejudiced in any way because of the inadequacies I have referred to in the pleadings. In these circumstances, I decline to order any other amendments to the statement of claim apart from those mentioned in [28]. I again urge the plaintiff however, to attempt to obtain legal representation.

[32] Costs are reserved.

A D Ford
Judge

Judgment signed at 2.15 pm on 13 October 2011