IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2013] NZEmpC 158
CRC 22/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROSAURO GAPUZAN Plaintiff
AND	PRATT & WHITNEY AIR NEW ZEALAND SERVICES trading as CHRISTCHURCH ENGINE CENTRE Defendant

Hearing:	on the papers - documents received 26 April, 29 April, 24 May, 4 June, 11 June and 27 June 2013
Appearances:	plaintiff in person Andrew Shaw, counsel for the defendant
Judgment:	29 August 2013

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

---

[1] This judgment decides two interlocutory applications made by the defendant. The first is an application for security for costs. The second seeks an order striking out the second amended statement of claim.

[2] These applications have been made in the course of proceedings which have been before the Court since 9 July 2012. In the 13 months since they were commenced, the proceedings have involved numerous interlocutory applications, three directions conferences and an unsuccessful judicial settlement conference. Broad directions have been given for a substantive hearing but a fixture cannot be allocated until the scope of the plaintiff's claims are settled by deciding the application to strike out many of them.

Background

[3] From the material currently before the Court, the following background summary of events can be distilled. As it is derived from untested evidence, however, it does not comprise final findings of fact. Rather, its purpose is to put the arguments advanced in relation to the interlocutory applications into context. It may well be that, following a substantive hearing, a different view of events may emerge.

[4] The plaintiff is an aircraft engineer. The defendant is a joint venture between Pratt & Whitney and Air New Zealand to service aircraft engines. The plaintiff was employed by the defendant in its facility at Christchurch Airport. That employment began in January 2006.

[5] From 2008, the plaintiff had complained of pain in his left elbow which was diagnosed as epicondylitis. In early 2011, the plaintiff began working in what is known as the CX area. Before he did so, an assessment of the work involved was carried out and it was agreed that the work involved little or no risk of aggravating his condition.

[6] Beginning in early 2011, the plaintiff began to experience pain in his right elbow. The plaintiff believed his symptoms were related to his work and, in about October 2011, raised a personal grievance alleging that the defendant had failed to provide him with a safe workplace.

[7] On 5 December 2011, the plaintiff made a claim for accident compensation in relation to his right elbow. In response to that claim, the Accident Compensation Corporation (ACC) provided a standard form questionnaire for the defendant to complete as the plaintiff's employer. It appears the form was given to the plaintiff on or about 7 December 2011 but he did not pass it on to the defendant until some time later.

[8] On 14 December 2011, the plaintiff was examined by an occupational medicine specialist, Dr Souter, who provided a report to the defendant. The plaintiff's immediate manager, Brett Crackett, then completed the ACC

questionnaire on 19 December 2011. In answer to one of the questions, Mr Crackett ticked a box to indicate that he did not agree that that the plaintiff's injury was caused by his work.

[9] On 20 December 2011, the parties met with a mediator from the then Department of Labour. At that meeting, they agreed terms of settlement which were signed by them and by the mediator pursuant to s 149(3) of the Employment Relations Act 2000 (the Act). The terms of settlement provided that the plaintiff would resign the following day, that he would receive substantial payments from the defendant and included the following terms:

> 6. Having attended mediation and resolved their employment relationship problem, Rosauro and CEC undertake that when speaking of each other to third parties they will do so in positive or neutral terms.
>
> …
>
> 8. This is the full and final settlement of all matters between CEC and Rosauro arising out of their employment relationship and its termination including but not limited to all or any statutory entitlements except as herein provided.

[10] The plaintiff duly resigned on 21 December 2011 and the payments provided for in the terms of settlement were made.

[11] Although he had completed the ACC questionnaire on 19 December 2011, Mr Crackett did not send it to ACC immediately. It is suggested that this was because he believed that the plaintiff's resignation meant that no further action was required.

[12] On 9 January 2012, ACC declined the plaintiff's claim and the plaintiff became aware that the defendant had not returned the employer questionnaire to ACC. He contacted the mediator who contacted the defendant's Human Resources Manager on 10 January 2012. She arranged for the questionnaire to be sent to ACC that day. ACC then reviewed the plaintiff's claim in light of the answers given in the questionnaire and confirmed its decision to decline the claim.

Proceedings

[13] On January 19 2012, the plaintiff commenced proceedings in the Employment Relations Authority by lodging a statement of problem. Those proceedings were based on the proposition that the defendant's failure to promptly return the completed questionnaire to ACC and the indication by Mr Crackett that he did not think the plaintiff's injury was work related were breaches of cl 6 of the settlement agreement. On this basis, the plaintiff sought "enforcement of the agreed terms of settlement pursuant to section 149(3)" of the Act, a penalty pursuant to s 149(4) and damages.

[14] The plaintiff's claim was investigated by the Authority which dismissed all aspects of it[1].

[15] The plaintiff challenged the whole of that determination and sought a hearing de novo in the Court. In the original statement of claim dated 9 July 2012, the plaintiff made essentially the same allegations that had been before the Authority but sought only the imposition of a penalty for breach of the settlement agreement.

[16] On 16 July 2012, the Authority issued a costs determination[2] in which it ordered the plaintiff to pay the defendant $2,000 for costs. This formed the basis of an application by the defendant in September 2012 to stay proceedings until those costs were paid. That application was the subject of extensive documentation and submissions but was resolved by an agreement that the plaintiff would pay $2,000 into Court no later than two months prior to the substantive hearing. Although that hearing has yet to be scheduled, the plaintiff paid the money on 11 April 2013.

[17] On 22 October 2012, the plaintiff filed an amended statement of claim. This was confined to the same cause of action as the original statement of claim but sought a wider range of remedies comprising a penalty, damages for distress, damages for loss of income and exemplary damages.

---

[1] [2012] NZERA Christchurch 115.
[2] [2012] NZERA Christchurch 146.

[18] There followed a series of interlocutory applications by the plaintiff filed in November 2012 relating to interrogatories, admissibility of evidence and disclosure of documents. Again, these were the subject of extensive documentation and submissions but were eventually withdrawn in May 2013.

[19] In March 2013, the parties participated in a judicial settlement conference. Because the plaintiff was then in Perth, Australia, the conference was conducted by telephone. It was unsuccessful.

[20] On 4 April 2013, the plaintiff filed a second amended statement of claim. It begins as follows:

> 1 The issues which the plaintiff wish the Court to resolve is:
>
> 1.1 Did the defendant failed to take all practicable steps to ensure safety of the plaintiff while at work (Section 6 Health and Safety in Employment (H&SE) Act 1992)?
>
> 1.2 Did the defendant failed to regularly assess the identified hazard or placed effective method to isolate, minimize or eliminate the significant hazard to the plaintiff at work? (Section 7 to 10 H&SE Act 1992)
>
> 1.3 Did the defendant failed to provide the results of monitoring (Section 11 H&SE Act 1992) or provide information about identified hazards to which the plaintiff was exposed (Section 12 H&SE Act 1992)?
>
> 1.4 Is the defendant liable for the offences and penalties pursuant to Section 49 and 50 of H&SE Act 1992?
>
> 1.5 Is the defendant liable for damages to the plaintiff pursuant to Section 17 of the Limitation Act 2010?
>
> 1.6 Did the defendant breached the agreed terms of settlement to which the Employment Relations Act 2000 Section 149 applies?
>
> 1.7 Is the defendant liable to penalties and damages for the breach of the agreed terms of settlement?

[21] The remedies sought in this latest statement of claim comprise fines and penalties under the Health and Safety in Employment Act 1992, damages of $140,000 under the Limitation Act 2010 and a penalty under s 149(4) of the Act.

[22] On 26 April 2013, the defendant filed an application for an order requiring the plaintiff to provide security for costs. On 24 May 2013, the defendant filed an application to strike out the second amended statement of claim.

Application to strike out

[23] The general principles applicable to applications to strike out are settled and well known. The power to strike out a proceeding or parts of it without a hearing is one which should be exercised sparingly and only where it is clear from the pleadings that a particular claim cannot possibly succeed.

[24] As filed, the defendant seeks an order striking out the whole of the second amended statement of claim. Mr Shaw's submissions, however, are directed at the new causes of action included in that statement and there is no challenge to the plaintiff's right to pursue his original claim that the defendant's conduct constituted a breach of cl 6 the settlement agreement. That is proper. I therefore consider in turn the viability of each of the new causes of action.

Health & Safety in Employment Act 1992

[25] The plaintiff makes three claims based on the alleged failure of the defendant to discharge its obligations under ss 6, 7 to 10 and 12 of the Health and Safety in Employment Act 1992. In respect of these claims, the plaintiff seeks the imposition on the defendant of "penalties and fines" in accordance with ss 49 and 50 of that Act. Those sections create criminal offences punishable by fine or imprisonment.

[26] This Court has no jurisdiction to hear and decide such claims. The Court's jurisdiction is defined in s 187(1) of the Act. All but the last paragraph of that subsection refer to provisions of the Act and are clearly inapplicable. Paragraph (l) permits the Court to exercise its powers in relation to offences but only offences "against this Act"[3]. The final paragraph (m) empowers the Court "to exercise such other functions and powers as are conferred on it by this or any other Act". For a power under "any other Act" to be available to the Court, that statute must clearly confer that power on this Court by express words or necessary inference.

[27] There is no reference to the Employment Court in the Health and Safety in Employment Act 1992. Nor can any inference be drawn that Parliament intended

[3] Which appear to comprise ss 30, 195, 196(2) and 235.

this Court to have any jurisdiction under that Act. Section 54A of the Health and Safety in Employment Act 1992 requires any proceeding alleging an offence to be commenced by a charging document. That is undoubtedly a reference to a charging document as provided for in the Criminal Procedure Act 2011[4]. That Act confers jurisdiction on the District Court to deal with all such matters in the first instance and confers no jurisdiction of any kind on the Employment Court.

Limitation Act 2010

[28] The plaintiff seeks damages under s 17 of the Limitation Act 2010. That section provides:

> **17 Discretion to allow relief for claim of abuse of minor or of gradual process, disease, or infection injury**
>
> (1) This section applies to a claim—
>
> (a) of a kind specified in subsection (2) or (4); and
>
> (b) made in a civil proceeding commenced in a specified court or tribunal; and
>
> (c) against which the defendant could establish, or has established, a defence under this Part.
>
> (2) Subsection (1)(a) applies to a claim in respect of abuse of the claimant (A) when he or she was aged under 18 years, and that is wholly or partly sexual abuse of A by any 1 or more persons, or is wholly non-sexual abuse of A by 1 or more persons who are or include—
>
> (a) a person who is, or has at any time been, a parent, step-parent, or legal guardian of A (B); or
>
> (b) a person who is, or has at any time been, a close relative or close associate of B (C).
>
> (3) Abuse, in the expressions "sexual abuse" and "non-sexual abuse" in subsection (2), means physical abuse, psychological abuse, or a combination of both.
>
> (4) Subsection (1)(a) also applies to a claim in respect of a personal injury—
>
> (a) of the claimant (A) when he or she was of any age; and
>
> (b) caused by a gradual process, disease, or infection.
>
> (5) Personal injury, in subsection (4), means any physical, mental, or physical and mental injury (even if it causes the death), of the claimant.
>
> (6) The specified court or tribunal may, if it thinks it just to do so on an application made to it for the purpose, order that monetary relief may be granted in respect of the claim as if no defence under this Part applies to it.

[4] See the reference to the Criminal Procedure Act 2011 in s 54B of the Health and Safety in Employment Act 1992.

> (7) The application for the order may be made before or after the court or tribunal has decided whether the defendant has established a defence under this Part against the claim.

[29] The "Part" of the Limitation Act 2010 referred to in this section is Part 2 which is headed "Defence to money claims" and provides that it shall be a defence to a claim for money if it is commenced outside specified time periods. Those periods vary according to the nature of the claim.

[30] In this context, it is clear that the purpose of s 17 is not to confer jurisdiction on any court to grant relief for claims based on personal injury caused by gradual process, disease or infection. Rather, the purpose of s 17 is to negative a defence based on the time which has elapsed between the events giving rise to the cause of action and the commencement of proceedings in respect of such claims. If a plaintiff wishes to pursue such a claim, he or she must still establish that the court in which proceedings are commenced has jurisdiction to decide claims of that nature.

[31] The plaintiff does not specify the cause of action relied on for these claims. Realistically, however, it could only be a claim in tort. Other than as provided for in s 99, which relates to torts associated with a strike or lockout, the Court has no jurisdiction to decide claims in tort[5]. It follows that the Court has no jurisdiction to hear the plaintiff's claims based on personal injury.

Discretion

[32] Where grounds for striking out a claim are established, the Court has a residual discretion whether or not to make the order sought. In this case, there is no good reason to allow the claims in question to proceed. To do so would only involve both parties in a greatly extended hearing, with associated costs, for no purpose.

Order

[33] The plaintiff's claims set out in paras 7 to 20 and 42.1 to 42.4 of the second amended statement of claim are struck out.

---

[5] See *Conference of the Methodist Church of New Zealand v Gray* [1996] 2 NZLR 554 (CA).

Finalising issues for trial

[34] As noted earlier, the first amended statement of claim was based on the single cause of action which had been before the Authority, that is the claim that the defendant's conduct breached cl 6 of the terms of settlement. In respect of that claim, the plaintiff sought compensatory damages, exemplary damages and the imposition of a penalty. In the second amended statement of claim, the plaintiff maintained this cause of action but sought only a penalty in respect of it. He transferred his claims for damages to the other causes of action which I have now decided cannot possibly succeed in this Court. The effect of the order set out above therefore is that the remedies sought by the plaintiff are reduced to just a claim for penalty under s 149(4).

[35] It may be that, in light of my decision, the plaintiff may wish to reinstate some of his earlier claims for other remedies. It is just that he be permitted to do so but it is also important that the issues for trial now be finalised. The plaintiff has 20 working days after the date of this judgment in which to file and serve any further statement of claim. After that time, any amendments may only be made with leave of the Court.

Security for costs

[36] The defendant seeks an order that the plaintiff provide security for costs and that the amount ordered be paid into Court two months prior to the substantive hearing. The grounds on which the application is made are said to be:

(a) The plaintiff is resident outside New Zealand;
(b) The plaintiff is impecunious; and
(c) The plaintiff's claim has limited prospects of success.

[37] Mr Shaw submits that, as this Court is not expressly empowered by the Act to order security for costs, it must do so in accordance with the relevant High Court Rules. He relies on reg 6 of the Employment Court Regulations which provides that, where "no form of procedure has been provided by the Act or these regulations" the Court must dispose of the case "as nearly as may be practicable in accordance with

the provisions of the High Court Rules affecting any similar case". Mr Shaw also relies on the decision of Judge Inglis in *Liu v South Pacific Timber (1990) Ltd*[6] While I have reservations about the proposition that the High Court Rules can be a source of jurisdiction for this Court except where expressly provided for in the Act[7], I accept that the Court does have the jurisdiction to make the orders sought and that the High Court Rules provide useful guidance.

[38] Taking this approach, the general principles applicable to applications for security for costs were conveniently summarised by Judge Inglis in *Liu*:

> [10] In exercising its broad discretion the Court must have regard to the overall justice of the case, and the respective interests of both parties are to be carefully weighed. The balancing exercise was summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd*[8] as follows:
>
> > The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
> >
> > Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.
>
> [11] The merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.
>
> [12] Concerns relating to access to justice apply across all courts. As the Chief Judge observed in *Mackenzie v Bayleys Real Estate Ltd*[9]: "ultimately, the particular decision must be on its own merits and the justice of the case."

[39] What is described as the first "threshold test" in cases decided under the High Court Rules is whether the plaintiff is resident overseas. In this case, the plaintiff is currently living and working in Western Australia and has done so for a year or more. On the other hand, he is a New Zealand citizen, his wife and three children

---

[6] [2012] NZEmpC 129.
[7] See, for example, s 212(2).
[8] (2002) 16 PRNZ 747 at [15]-[16].
[9] AC 18/04, 22 March 2004 at [11].

live in Christchurch and he visits them from time to time. I find that the plaintiff is currently resident out of New Zealand.

[40] Addressing the second "threshold test", Mr Shaw's submission that the plaintiff is impecunious is based on statements he has made in the course of the proceedings before the Authority and the Court. These are recorded in three documents:

(a) In its costs determination dated 16 July 2012, the Authority recorded that the plaintiff had written to it in June 1012 saying that he could not contribute towards the defendant's costs because he had "financial difficulties" and was in debt.

(b) In a memorandum to the Court dated 29 November 2012, the plaintiff said that he had been working on a casual basis in Perth. He said that he had worked for three employers in four months and had been without work for three weeks during that period.

(c) In a further memorandum to the Court dated 7 December 2012, the plaintiff said that he had an overdraft of $1,800 and a credit card debt of $3,600.

[41] On the other hand:

(a) The plaintiff has paid $2,000 into Court on account of the Authority's costs order and he has done so earlier than required.

(b) In response to the present application, the plaintiff has provided evidence that he and his wife own a residential property in Christchurch. It has a rateable value of $313,000 although, as Mr Shaw correctly notes, the plaintiff has not said how much equity he and his wife have in that property.

(c) The plaintiff says that he now has continuing work on a mining project in Pilbara in the north of Western Australia and has provided a

copy of the offer of that employment. He does not, however, say how much income he receives from that work.

(d) The plaintiff has provided bank statements showing that his account is no longer in overdraft and that he has earned interest on some investments.

[42] It would have been far more satisfactory if the plaintiff had provided a full statement of his income, expenditure, assets and liabilities. Although Mr Shaw fairly criticises has failure to do so, I take into account that he is a litigant in person and unlikely to be familiar with the usual means of rebutting a suggestion of impecuniosity. With some reservation, therefore, I take into account the information the plaintiff has provided and find that his financial position has improved significantly since he made the statements relied on by the defendant.

[43] Without the benefit of all the evidence which may be adduced at trial, it is difficult to express any firm view about the merits of the plaintiff's remaining cause of action. As a bare statement, however, the proposition that the answers provided by the defendant to the ACC questionnaire were in breach of cl 6 of the terms of settlement appears difficult for the plaintiff to establish. Equally, if the plaintiff reinstates a claim for damages for such a breach, he may need to persuade the Judge who hears the matter to depart from the full Court decision in *South Tranz Ltd v Strait Freight Ltd*[10].

[44] The defendant's application for security for costs was made on 26 April 2013. Although that was more than nine months after the current proceeding was commenced in the Court, Mr Shaw submits that there was no delay in making the application. He submits that it was appropriate for the defendant to wait until it became clear that the matter would proceed to a full hearing and that point was not reached until after the unsuccessful judicial settlement conference on 6 March 2013. I do not accept that proposition. The defendant was clearly concerned about the plaintiff's ability to pay when it sought an order for stay pending payment of the costs awarded by the Authority. That application was made on 11 September 2012.

[10] [2007] ERNZ 704.

In the months which followed, there was a great deal of interlocutory activity which must have caused the defendant to incur significant costs. Even after the settlement conference, the defendant did not make the application for nearly two months.

[45] Overall, I find that it would not be in the interests of justice to require the plaintiff to provide security for costs. Following the order I have made striking out two of the plaintiff's causes of action, the scope of the proceeding is now relatively narrow. The plaintiff has strong links to New Zealand and has a financial interest in substantial property in this country. By paying $2,000 into Court on account of costs in the Authority, the plaintiff has demonstrated that he is willing and able to meet a significant order for payment. That is consistent with his evidence that he now has regular income. The fact that the plaintiff is currently living in Australia rather than any other country is also of some significance as New Zealand has reciprocal arrangements with Australia for the enforcement of judgments.

[46] The application for an order for security for costs is dismissed.

Summary of orders made

[47] I have made the following orders:

(a) The claims made in paras 7 to 20 and 42.1 to 42.4 of the second amended statement of claim are struck out.

(b) The plaintiff has 20 working days after the date of this judgment in which to file and serve any further statement of claim. After that time, any amendments may only be made with leave of the Court.

(c) The application for an order for security for costs is dismissed.

[48] Costs are reserved.

A A Couch
Judge

Signed at 10.15 am on 29 August 2013.