IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 194
ARC 79/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for leave to adduce further evidence
BETWEEN	WEERAPHONG HARRIS Plaintiff
AND	TSNZ PULP & PAPER MAINTENANCE LIMITED Defendant

Hearing: By telephone conference call, 15 October 2013

Appearances: Lou Yukich, advocate for plaintiff
Gillian Service, counsel for defendant

Judgment: 21 October 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] Having closed its case, and the Court having reserved, but not yet delivered, judgment, the defendant applies for leave to adduce further evidence in this challenge to a determination of the Employment Relations Authority.[1] That application for leave is opposed by the plaintiff. This judgment determines whether the defendant should have leave to adduce the evidence of Stephen John Webster about matters at issue in the proceeding.

[2] The plaintiff's challenge by hearing de novo addresses the interpretation and application of relevant provisions of an employment agreement affecting holiday pay. The plaintiff's case is that the defendant should be bound by both pre-

[1] [2012] NZERA Auckland 379.

contractual and post-contractual representations made by its representatives including, in respect of alleged oral representations, by its General Manager – Electrical Services, Mr Webster.

[3] The plaintiff's case was set out in a statement of claim. This does not plead expressly the plaintiff's reliance on oral representations made by Mr Webster before Mr Harris accepted employment with the defendant. The closest that the statement of claim comes to particularising representations is at para 9 as follows: "The terms of offer of employment were included in personal letters and three communications by letter from TSNZPPN to the Eastern Bay Independent Industrial Workers Union Inc."

[4] The case was the subject of the usual directions conference conducted by the Court. The pre-trial directions included the filing and exchange of briefs of evidence of intended witnesses so that each party would be aware of the nature of the evidence to be relied on.

[5] The only reference to any oral representation by TSNZ was set out at para 17 of the brief of intended evidence of Marc Butler filed on 18 July 2013. There, Mr Butler stated:

> 17. On the basis of the assurances we were given by TSNZ in letters and at various presentations prior to their taking over the maintenance contract …

[6] There was no detail about what such "various presentations" consisted of or when or by whom they were given.

[7] On 17 August 2013 Mr Yukich supplied to the defendant's solicitors a brief of evidence of Immo Beijerling. This was received eight working days before the start of the hearing and had not been allowed for in the Court's timetable set out in its minute of 11 February 2013. No leave was sought or granted to rely on this evidence but, equally, no objection was taken by the defendant to the plaintiff's intention to lead this evidence.

[8] Paragraph 21 of Mr Beijerling's brief stated: "We did attend at least two presentations conducted by TSNZ at which Steve Webster absolutely assured us that we would not be disadvantaged in any regard by accepting employment with TSNZ."

[9] TSNZ's solicitors attempted to contact Mr Webster in relation to Mr Beijerling's intended evidence but Mr Webster was on annual leave and not contactable. In the event, also, Mr Beijerling did not attend at the hearing and so his intended evidence was not presented as part of the plaintiff's case.

[10] Detail of the alleged oral representations did, however, emerge when Mr Yukich led the evidence of Mr Butler, and another witness, Jon Gebert. Adding to his written brief, Mr Gebert told the Court in evidence-in-chief that Mr Webster, in the course of an otherwise unparticularised presentation at which he was present, said that: "TSNZ were … in receipt of … payroll information from ABB and that they would do whatever they required to make things work … and ensure that there was a smooth transition … without interruption or … yeah, along those lines." Mr Butler similarly added to his brief of evidence when asked by Mr Yukich whether he had attended "any presentations prior to the takeover by TSNZ". Mr Butler said that he went to one at which "most of the talking was done by … Steve Webster …" and that Mr Webster told those present, including Mr Butler: "… look just trust us, it's all gonna transfer over you're going to – we're – nothing's going to change for you people." Mr Butler's evidence was that Mr Webster was questioned closely about how TSNZ was going to implement exactly the same terms and conditions and that he responded:

> … basically, we have got the information from ABB, we need to work through it we understand there will be some errors, but categorically if there is a problem and you come to us, we will make it to the same as you've always had it. He – they – he basically said that we had to trust him in some respects because the superannuation and the health care wasn't at that stage … totally seamless transfer there was still some work to be done, but he did say that there will be no difference in your employment in the future. It will be on the same terms and conditions and he got beat up quite a bit about that, because there were some quite vocal people in there, saying, how, how can you assure this. But he basically said any, anything in the future that you bring up we will make sure it was the same as what you've always had.

[11] In cross-examination, Mr Butler said:

> Steve Webster told us that ABB, they had ABB information and that if there was any issues, they would work with us to fix it up and no one [ever] came and asked me for any information. We assumed that they had that information and that's how they were paying us.

[12] In re-examination, Mr Butler told the Court:

> Steve Webster had already told us that he had all the information from ABB during his presentations. Steve Webster committed that they would do whatever it took to find out how we used to be paid, all our terms and conditions and that they would remain the same.

[13] Finally, Mr Butler told the Court that he had been told by Mr Webster:

> Further down the track they're going to add some KPIs but at this stage we're not in the process of changing your conditions, they are not asking us to change your conditions, we just want a seamless transfer on the same terms and conditions and we want to add our expertise to make this business run better.

[14] In his closing submissions to the Court on 30 August 2013, Mr Yukich relied on what he said were the oral representations made by Mr Webster to employees as outlined above.

[15] The defendant's case is that it was unfairly disadvantaged, in not adducing evidence from Mr Webster, by the plaintiff's unheralded reliance on this evidence in support of its submission that oral pre-contractual representations by Mr Webster should be taken into account by the Court. Mr Yukich has confirmed that he relies, for the plaintiff, on both written and oral pre-contractual representations with those allegedly made orally by Mr Webster reinforcing the defendant's relevant written communications.

[16] As to the power of the Court to allow further evidence to be adduced, the plaintiff relies on the Court's general power under s 189(2) of the Employment Relations Act 2000 and, by analogy, on s 98 of the Evidence Act 2006 which, although it does not govern proceedings in this Court, is nevertheless a useful indicator as to how this application should be decided.

[17] Section 189(2) of the Employment Relations Act provides that "The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not".

[18] Section 98 of the Evidence Act prohibits a party offering further evidence after the close of that party's case except with the permission of the Judge. The test for granting such permission in civil proceedings is, under s 98(2), "if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both." Subsection (5)(b) provides that such permission may be granted in judge-alone proceedings "at any time until judgment is delivered".

[19] Ms Service acknowledged the import of s 8 of the Evidence Act which provides that a Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding or have an unfairly prejudicial effect on it.

[20] In exercising the Court's jurisdiction under s 189(2) of the Employment Relations Act, ss 8 and 98 of the Evidence Act provide a helpful, albeit non-binding, indication of the way in which the Court should approach this question.

[21] If leave is granted, the plaintiff does not accept the accuracy of what Mr Webster proposes to say about his presentations to employees so that it will be necessary for the Court to hear contradictory evidence from the parties and determine where the probabilities lie about what was said. That will, in turn, prolong the proceeding (depending on when the evidence can be heard). It will not, however, do so needlessly because such alleged representations by Mr Webster are an important part of the plaintiff's case and an important part of the defendant's defence to it.

[22] As against the desirability of an orderly and prompt disposition of the case, the Court must ensure that it has the best evidence about relevant matters on which to make a decision. Balancing those arguably competing aims of efficiency and sufficiency, I have concluded that the ends of justice will be served by receiving

additional evidence about oral pre-contractual representations. I do not consider that the defendant's failure to adduce Mr Webster's evidence at the hearing in August 2013 should count against it: as I have outlined, the defendant could not reasonably have expected that evidence to emerge or its significance from either the plaintiff's pleadings or from the advance exchange of briefs of evidence.

[23] As to the scope of the additional evidence, Ms Service accepts that this should be confined to Mr Webster's evidence of a presentation or presentations at which he spoke and on the subject of what may or may not have been said by Mr Webster on those occasions about the prospective employment by the defendant of the plaintiff and his colleagues.

[24] Mr Webster has filed an affidavit in which he sets out the evidence that he intends to give. I should not be taken to accept the admissibility of all of that intended evidence. For example, Mr Webster's statements about what he understood the phrase "terms and conditions of employment" to mean, and what he may have believed others to have understood to be the meaning of that phrase, may be inadmissible although I would need to hear argument on the point before so determining.

[25] In these circumstances, also, Mr Yukich is entitled to call or recall a witness or witnesses to rebut Mr Webster's intended evidence.

[26] Given the sharp disagreement between the parties on these issues, it is simply impracticable and would be unjust to attempt to resolve this issue on conflicting affidavits. The Court will need to see and hear the witnesses, including their cross-examination, and perhaps having relevant documents referred to them.

[27] Leave is granted accordingly to the plaintiff to adduce the additional evidence of Mr Webster and any evidence in reply. The parties' representatives should liaise with the Registrar about where and when this will be able to be achieved. There is a possibility which has been discussed with the parties' representatives that this may be able to be in Tauranga in mid-November, but this would have to be a back-up arrangement dependent on another fixture not proceeding.

[28] I reserve costs on the plaintiff's application.

GL Colgan
Chief Judge

Judgment signed at 10 am on Monday 21 October 2013