IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 16
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 19 September, 24 September and 4 October 2013.

Appearances: plaintiff in person
Andrew Shaw, counsel fot the defendant

Judgment: 12 February 2014

SECOND INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

---

[1] The history of this matter is summarised in my first interlocutory judgment dated 29 August 2013.[1] In that decision, I made an order striking out parts of the second amended statement of claim but refused an application for security for costs. I also gave the plaintiff an opportunity to file and serve a final amended statement of claim.

[2] The plaintiff took that opportunity by filing a third amended statement of claim on 17 September 2013. The defendant very quickly responded with an application to strike out parts of that statement. It is that application to strike out which is decided in this judgment.

---

[1] [2013] NZEmpC 158

Background

[3] In order to understand the issues underlying this application, it is necessary to reiterate what appears to be the background to the plaintiff's claims. I set this out in my earlier decision as follows:

> [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.

Pleadings

[4] In his claim before the Authority, the plaintiff alleged that the actions of the defendant were in breach of clause 6 of the settlement agreement and in breach of a duty of good faith. He sought damages and the imposition of a penalty. The Authority dismissed those claims.[2]

[5] In his original statement of claim, the plaintiff largely repeated the claims made in the Authority but limited the remedy sought to a penalty.

[6] In his first amended statement of claim, the plaintiff relied on the same causes of action but sought compensatory and exemplary damages as well as a penalty. He also expanded the allegations of fact relied on.

[7] In the second amended statement of claim, the plaintiff attempted to change the basis of his claims for damages from breach of contract to causes of action said to be under the Health and Safety in Employment Act 1992 and the Limitation Act 2010. It was those causes of action which were struck out.

---

[2] [2012] NZERA Christchurch 115.

[8] In the third amended statement of claim, the issues raised by the plaintiff and the manner in which he seeks to have them resolved are set out in the following paragraphs of the statement:

> [3] The issues which the plaintiff wish the Court to resolve is:
>
> (a) Did the defendant breached clause 6 of the agreed terms of settlement to which the Employment Relations Act 2000 section 149 applies?
>
> (b) Was the breached of sufficient seriousness to cause damages to plaintiff's well-being and quality of life?
>
> (c) Is the defendant liable to penalty for the breach of the agreed terms of settlement?
>
> (d) Did the defendant's unjustifiable action in providing false and misleading documentary evidence to ACC affected to the plaintiff's disadvantage, prejudice his claim for treatment and cover resulting to its denial?
>
> (e) Is the plaintiff entitled to reimbursement for loss of income and other compensation due to the defendant's unjustifiable actions?
>
> …
>
> [78] The plaintiff pleads that the issues be resolved in the following way:
>
> (a) For the breach of the agreed terms of settlement, penalty imposed under section 149 (4) of the Employment Relations Act 2000 (the ACT)
>
> (b) For unjustifiable actions resulting to the denial of his ACC claim, award for damages in the amount of $50,000 pursuant to Section 123(1)(c) of the ACT due to significant injury to feelings, significant pain and suffering, humiliation, loss of dignity and loss of benefits which the employee might reasonably have been expected to obtain.
>
> (c) Reimbursement to the plaintiff in accordance with Section 123(1)(b) of the ACT of a sum equal to the whole or any part of the wages or other money lost as a result of defendant's unjustifiable actions. This equates to the plaintiffs average earnings in the previous three years:
>
> | | |
> |---|---|
> | 01 Apr 2009 - 31 Mar 2010 | $71,751.00 |
> | 01 Apr 2010 - 31 Mar 2011 | 74,426.00 |
> | 01 Apr 2011 - 31 Mal' 2012 | 83,442.00 |
>
> 3.4 Punitive or exemplary damages due to the defendant's wrong doing, flagrant and malicious disregard for the plaintiff's rights and interest.

[9] In alleging that the defendant's conduct comprised "unjustifiable actions" and by seeking remedies under s 123(1) of the Employment Relations Act 2000 (the

Act), it is clear that the plaintiff now seeks to advance some of his claims as personal grievances. This is confirmed by the headings used in the statement to describe each cause of action.

The application

[10] The defendant objects to the causes of action founded on the issues set out in sub paragraphs (b), (d) and (e) of paragraph [3] above. The defendant also says that the plaintiff cannot possibly succeed in his claims for the remedies set out in sub paragraphs (b), (c) and 3.4 of paragraph [78] above. The broad grounds on which these objections are raised are:

(a) The claims have been settled by the terms of settlement agreed on 20 December 2011.

(b) The claims were not before the Authority and cannot be the subject of a challenge under s 179 of the Act.

(c) The personal grievance claims have not been raised within the 90 day period prescribed by s 114 of the Act and the defendant does not consent to them being raised out of time.

Were the claims settled?

[11] The settlement agreement declared that its terms were in “full and final settlement of all matter between [the parties] arising out of the employment relationship and its termination”. The plaintiff submits that this must be taken literally and that it effectively prevents the plaintiff from pursuing any of his claims other than the original allegation of breach of the terms of settlement.

[12] To the extent that the plaintiff’s claims are based on events he was aware of at the time of settlement, I am satisfied that this construction is correct. It appears the plaintiff accepts that.

[13] Several of the plaintiff's claims rely on the alleged failure by the defendant to respond promptly to the questionnaire from ACC sent to the defendant on or about 7 December 2011. The plaintiff also alleges that, when the defendant did respond to that questionnaire, it did so inaccurately and without informing him of what was said. He says that he only became aware of this conduct after the settlement was concluded on 20 December 2011 and that he cannot be taken to have settled claims based on circumstances he was unaware of.

[14] While the plaintiff may face considerable difficulty advancing this argument, it cannot be said at this point that it cannot possibly succeed.[3] It may also turn on findings of fact which cannot now be made. To the extent that the plaintiff's claims rely on events prior to settlement which he says did not come to his attention until after settlement, I decline the application to strike them out on the grounds that they are settled.

Section 179

[15] The proceeding currently before the Court was commenced under s 179(1) of the Employment Relations Act 2000 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.

[16] The defendant says that several of the causes of action included in the third amended statement of claim were not before the Authority and therefore cannot now be pursued in a challenge to the Authority's determination. That relies on a very narrow interpretation of the word "matter" in s 179(1). What the scope of that term is in this context has been the subject of considerable judicial attention.

[17] In *Sibly v Christchurch City Council*,[4] the full Court adopted a broad construction. It said:[5]

---

[3] See the discussion in *Employment Law* (looseleaf ed. Brookers) at ER149.04.
[4] [200] 1 ERNZ 476.
[5] At [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.

[18] The breadth of this interpretation was reduced somewhat by the full Court in *Abernethy v Dynea New Zealand Limited*[6] which concluded that the plaintiff in a challenge could rely on a cause of action which had not been before the Authority but only if it arose out of the employment relationship problem which had been before the Authority. I take that approach in this case.

[19] Annexed to his affidavit in opposition, the plaintiff provided a copy of the statement of problem he lodged with the Authority on 19 January 2012. It was this problem which was investigated by the Authority and which resulted in the determination now under challenge. The problem described in that statement is the plaintiff's claim that the defendant failed to respond promptly and appropriately to the ACC questionnaire. The particular cause of action relied on in the statement and throughout the Authority's investigation was that the defendant's conduct breached the obligation imposed by the terms of settlement to speak of him "in positive or neutral terms".

[20] In the third amended statement of claim, the plaintiff still relies on that cause of action. In addition, he now seeks to pursue three personal grievances:

(a) That the defendant provided ACC with a false and misleading workplace assessment report in response to the questionnaire.

(b) That the defendant failed to disclose that assessment report to the plaintiff when it was provided to ACC.

(c) That the defendant's response to the ACC questionnaire included an outdated and misleading ergonomic risk assessment.

[21] In addition, the plaintiff questions whether the alleged breach of the terms of settlement can give rise to a personal grievance and, if so, seeks to pursue it.

[6] [2007] ERNZ 271.

[22] All of these causes of action described as personal grievances are based on aspects of the defendant's conduct in response to the ACC questionnaire. It follows that they arise out of the employment relationship problem described in the original statement of problem and which was before the Authority. Applying the interpretation of s 179(1) provided in *Abernethy*, I cannot conclude that they are outside the scope of the present challenge.

Section 114

[23] Section 114 of the Act prescribes a 90 day time period within which any personal grievance must be raised. Whether the personal grievances the plaintiff now wishes to pursue were raised with the defendant in time, or at all, are matters of fact which will have to be established. In her affidavit in support of the application to strike out, Ms Cameron asserts that the plaintiff did not raise any personal grievances after the terms of settlement were agreed. While I accept her statement in the sense that the plaintiff did not use the term "personal grievance", that is not essential to raise a grievance. Whether a personal grievance has been raised is a matter of fact to be assessed objectively.[7] The Court is not currently in a position to say with certainty that the plaintiff did not raise one or more of the personal grievances he now wishes to pursue within the statutory 90 day time limit.

Breach of good faith

[24] One of the causes of action the defendant asks to be struck out is a claim that the defendant breached its duty of good faith to him. This is included in the third statement of claim in the form of a question whether the settlement agreement imposed a duty of good faith on the parties.

[25] The manner in which this supposed cause of action is pleaded is effectively meaningless. The plaintiff acknowledges that the statutory duty of good faith imposed by s 4 of the Act ceased to apply when the employment relationship ended on 21 December 2011 but questions whether some other duty of good faith might apply. Causes of action cannot properly be pleaded in the form of questions. In any

[7] See *Clark v Nelson Marlborough Institute of Technology* CC 12/08.

event, given that the statutory duty of good faith does not apply, so the statutory remedies for breach of that duty are not available. This part of the third amended statement of claim serves no purpose and should be struck out.

Remedies

[26] The plaintiff has specifically framed a large part of his claim for remedies in terms of the personal grievance provisions of the Act. In doing so, he faces the possibility that, if he has no basis on which to pursue his personal grievances or they are not sustained, he will be left with only his claims for a penalty and for exemplary damages.

[27] I doubt that the plaintiff intended this to be so and it would be unfair for him to end up in that position inadvertently. I therefore grant the plaintiff leave to amend his claim for remedies.

Conclusion

[28] Paragraphs [63] to [67] of the third amended statement of claim are struck out.

[29] The plaintiff is granted leave to amend the remedies sought in the third amended statement of claim. That should be done by filing and serving within 15 days after the date of this decision a further amended statement of claim omitting the current paragraphs [63] to [67] and including the amended claim for remedies.

Comment

[30] The plaintiff should be careful to understand clearly the significance of this decision. The fact that I have not struck out certain claims is not an indication that those claims have substance and may succeed. Many of them are tenuous at best. The only conclusion to be drawn from this decision is that it cannot be said at present that those claims are entirely untenable.

[31] The plaintiff must now decide whether he wishes to pursue his remaining causes of action. It is his right to do so but he must proceed in the knowledge that, if he is unsuccessful, this will almost inevitably be reflected in an award of costs against him.

Costs

[32] Costs are reserved.

A A Couch
Judge

Signed at 4.00 pm on 12 February 2014.