IN THE EMPLOYMENT COURT
AUCKLAND

AC 28/08
ARC 64/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BAY OF PLENTY DISTRICT HEALTH BOARD Plaintiff
AND	IAN LINDSAY BREEZE Defendant

Hearing: 29 August 2008 (in Chambers by teleconference)

Appearances: Shima Grice, Counsel for Plaintiff
Philip Bartlett, Counsel for Defendant

Judgment: 29 August 2008

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The defendant seeks directions:

- that he be excused filing a statement of defence to the plaintiff's ("the DHB's") statement of claim in the circumstances of the very limited compass of the issue to be determined on the challenge;

- that the plaintiff's challenge be dealt with on the papers and by reference to the same range of documentary and affidavit material that was before the Employment Relations Authority on this issue;

- that urgency be accorded to the hearing of the challenge because the Authority has scheduled an investigation meeting to deal with the

defendant's substantive claims in that jurisdiction between 16 and 19 September 2008.

[2] The substance of Dr Breeze's case in the Authority may be summarised as follows. Following professional medical and employment processes, Dr Breeze claims that he is entitled to resume medical practice as a general surgeon at the plaintiff's hospital. He complains that he is entitled to an eight-tenths general surgical position as opposed to the five-tenths basis that the plaintiff is prepared to offer him. The range of surgery that Dr Breeze may be entitled to perform is also the subject of dispute. Dr Breeze says that the DHB's refusal to comply with his contractual and other rights constitutes an unjustified disadvantage personal grievance that he wishes to have heard and determined in the Employment Relations Authority.

[3] The Authority elected to deal with the DHB's application to strike out Dr Breeze's proceedings as a preliminary matter but its scheduled investigation into his substantive grievance has been in place for the last 3 or 4 months. There is nothing of which the parties are aware to suggest that it will not proceed as scheduled.

[4] The Authority issued its determination, that is now the subject of challenge, on 18 July 2008. That was a preliminary determination in the sense that it dealt with the DHB's application to strike out Dr Breeze's personal grievance on grounds including that this had not been raised with the DHB, as his employer within the requisite 90 days. The Authority declined to strike out the proceedings. It found that Dr Breeze's grievances were raised within 90 days of the employer's actions or omissions, alleged to have affected his employment adversely, coming to Dr Breeze's notice.

[5] The DHB has challenged that determination by a comprehensive statement of claim filed in this Court on 15 August 2008. It is a challenge other than by hearing de novo in that it claims to relate to only the part of the Authority's determination that Dr Breeze raised his grievance within time. The statement of claim asserts that the Authority erred in fact and in law in finding as it did. The DHB says that the

time for raising any grievance that Dr Breeze may have had should have been calculated from the date of receipt of its letter of 25 January 2006 which crystallised his claim to disadvantage in employment. The DHB says that time did not begin to run from a later date when Dr Breeze tested its earlier decision. It does not appear that Dr Breeze has applied for leave to extend the time within which to raise his grievance if he is determined to have done so out of time.

[6] I agree with the defendant's contention that the DHB's statement of claim is discursive. It not only sets out all of the background to the substantive complaints that are still before the Authority, but that it also pleads evidence rather than relevant allegations of fact. Although such a statement of claim may be appropriate for substantive grievance proceedings in the Authority, it does not meet the requirements of conciseness for this Court. It is also largely irrelevant to the issue to be determined on the plaintiff's challenge, namely whether a personal grievance or personal grievances were raised within time.

[7] In these circumstances I consider it would be unduly onerous to require Dr Breeze to plead comprehensively to the statement of claim as filed. The issues before the Court are very simple and encapsulated in the Authority's determination. The DHB says that the grievances were not raised within time and Dr Breeze says that they were. There will be some limited relevant evidence including background, but certainly not to the very detailed extent now pleaded by the plaintiff.

[8] The plaintiff opposes urgency or priority in the hearing of the challenge. It says that Dr Breeze has not been anxious to prosecute his grievance until now.

[9] Whatever Dr Breeze may or may not have done, the fact now is that the Authority's process is under its control and it has scheduled an investigation meeting to take place within the next 3 weeks or so. No application has been made to the Authority to postpone its investigation meeting while the DHB's challenge is determined. Although, theoretically, that investigation meeting could proceed before the challenge is heard, this might be a considerable waste of time and expenditure if the plaintiff is now successful on that challenge.

[10] The plaintiff says that the Authority cannot hear Dr Breeze's substantive grievance until the 90-day issue is determined and I consider that to be correct in a practical sense although not in a theoretical legal sense. It is therefore desirable, in view of the Authority's allocation of an early investigation meeting, that the discrete issue of limitations be heard and disposed of promptly.

[11] The plaintiff then says that the judgment of this Court in *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 means that Dr Breeze's substantive proceeding should now be heard and determined in this Court. That is not a correct statement of the proposition for which *Abernethy* is authority. It is only if the Authority's determination has disposed of the proceedings finally by preliminary application in that forum, and there is a successful challenge, that the statute provides that all matters are thereafter in the Court and not the Authority. That is not the position here: the Authority's determination did not dispose of the proceeding in that forum.

[12] Finally, the DHB has signalled that if the outcome of the challenge is that the grievance or grievances remain with the Authority, it proposes to seek to have the case removed to the Court for hearing under s178(2)(c) of the Employment Relations Act 2000. This is said to be on the basis that the Court already has before it proceedings between the same parties involving the same or similar issues, being the challenge. It would be inappropriate for me to comment on an application that has not yet been made and that may indeed be the subject of either a challenge itself or an application for special leave for removal to this Court.

[13] There is, of course, now only very limited time for the challenge to be heard, even on the papers, and a decision given before the scheduled start of the Authority's investigation.

[14] I decline to direct that the challenge be considered on the papers. The plaintiff is entitled to call witnesses to give evidence in support of its challenge and it would not be just to deprive it of that opportunity. The plaintiff can agree to an alternative means of hearing, as it evidently did in the Employment Relations Authority. But if it insists, as it does, upon its right to call viva voce evidence, then it will have to adhere to the timetable to a hearing of that sort. While the defendant

complains that it is unnecessary for viva voce evidence to be heard by the Court, if that is proved to be correct, it may sound in costs but should not deprive the plaintiff of its statutory rights.

[15] Accordingly, I confirm the following directions made during the teleconference earlier today.

(a) The defendant is excused from his usual obligation to file and serve a statement of defence to the statement of claim.

(b) Briefs of the intended evidence of the plaintiff's witnesses, together with a bundle of relevant documents that the plaintiff intends to put before the Court, must be filed and served no later than 12 noon on Monday 8 September 2008. In the case of the briefs of evidence at least and, if possible also in the case of the documents, these should be filed and served electronically.

(c) The defendant must do likewise in respect of his intended witnesses and for documents no later than 4 pm on Wednesday 10 September 2008.

(d) The hearing of the challenge will be in the Employment Court at Auckland beginning at 9.30 am on Thursday 11 September 2008.

(e) The plaintiff will present its case first followed by the defendant.

(f) Leave is reserved to either party to apply on reasonable notice for further or amended directions.

[16] I reserve questions of costs on the teleconference hearing earlier today that occupied 30 minutes.

GL Colgan
Chief Judge

Judgment signed at 10.45 am on Friday 29 August 2008