

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 33/08  
ARC 54/08**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN AUCKLAND DISTRICT HEALTH  
BOARD AND 20 OTHER DISTRICT  
HEALTH BOARDS NAMED IN THE  
ATTACHED SCHEDULE  
Plaintiffs

AND NEW ZEALAND RESIDENT DOCTORS'  
ASSOCIATION INC  
Defendant

Hearing: 4-5 September 2008  
(Heard at Auckland)

Court: Chief Judge G L Colgan  
Judge A A Couch

Appearances: Hamish Kynaston and Mark Donovan, Counsel for Plaintiffs  
Bill Manning and Anna Paton, Counsel for Defendant  
Peter Cranney, Counsel for NZ Council of Trade Unions as intervener  
(by leave)  
Timothy Cleary, Counsel for business New Zealand, as intervener (by  
leave)

Judgment: 5 September 2008

Reasons: 8 September 2008

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**REASONS FOR INTERLOCUTORY JUDGMENT OF THE FULL COURT**

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[1] These are our reasons for refusing mid-trial to allow the defendant to advance two separate and additional claims for declarations of bad faith conduct against the plaintiffs.

[2] The plaintiffs opened their case and called their sole witness. He was cross-examined extensively by counsel for the defendant including on issues that, with the benefit of hindsight, relate to the two challenged causes of action. The plaintiffs closed their case towards the end of the first day of hearing and counsel for the defendant opened. At the end of this opening address Mr Manning indicated that he wished to press two separate claims of breach of s4(1A)(b) of the Employment Relations Act 2000 and relevant clauses in the s35 general code of good faith and of the specific code of good faith in the public health sector in Schedule 1A to the Act.

[3] Mr Kynaston was surprised and embarrassed, indicating that if he had known of the defendant's intention to prosecute these counterclaims, he would have both called other witnesses and adduced further evidence from the Boards' sole witness.

[4] Mr Manning relied on the defendant's amended statement of claim filed and served on 5 August 2008. This is a document that makes admissions and denials of the assertions in the statement of claim. At paragraph 21, however, it purports to seek from the Court the same remedies that it did from the Employment Relations Authority including the two challenged causes of action.

[5] As Mr Kynaston pointed out, however, the only references to these are in the form of prayers for relief. There is no assertion of material facts supporting a cause of action or even a reference in the body of the defendant's pleading to its admissions and denials relating to the statement of claim.

[6] Only on the day before the start of the trial the plaintiffs filed and served a statement of defence to the cross-challenges but omitted to address these at all.

[7] Two factors persuaded us to disallow these claims to be prosecuted. The first is that we are satisfied they were not, or at least not sufficiently, before the Employment Relations Authority as claimed by the defendant in its pleading. Examination of the union's statement of problem and the Authority's determination confirm that.

[8] Second, we were shown correspondence between Mr Manning and counsel formerly acting for the plaintiffs, Peter Chemis, in which the scope of the defendant's cross-challenge or counterclaim was the subject of quite particular cautionary inquiries by Mr Chemis. We accept that the plaintiffs' counsel was led to believe that such matters would not be pursued on the challenge and, for this reason, it has not prepared its case accordingly.

[9] Although it was possible theoretically for leave to be granted to amend pleadings and for witnesses to be recalled and new witnesses to be briefed and called, the most important issues in the case, that warranted the assembly of a full Court to hear it, deal with other issues. We are told that the parties are closer than they have ever been to settling very difficult collective employment negotiations. An early answer to the difficult legal questions raised by the case as pleaded is necessary.

[10] On balance, we considered that the interests of justice would not be served by allowing the defendant to pursue an expanded range of claims against the plaintiffs and we ruled accordingly.

GL Colgan  
Chief Judge  
for the Full Court

Judgment signed at 4 pm on Monday 8 September 2008