IN THE EMPLOYMENT COURT
AUCKLAND

AC 18/08
ARC 1/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for leave to file an amended statement of claim
BETWEEN	ERIC NELSON Plaintiff
AND	FLETCHER STEEL LIMITED Defendant

Hearing: 26 May 2008
(Heard at Auckland (in Chambers))

Appearances: Ken Nicholson, Counsel for Plaintiff
Carl Blake, Counsel for Defendant

Judgment: 26 May 2008

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question now for decision is whether Eric Nelson should have leave to amend his statement of claim challenging the determination of the Employment Relations Authority. Originally, Mr Nelson filed that challenge electing a hearing other than de novo. He now wishes to change that election to one by hearing de novo, that is of all of the issues that were before the Employment Relations Authority. The Court's Practice Note [2005] ERNZ 60 (paras [8]-[10]) requires such a variation to be by leave of the Court.

[2] Since Mr Nelson filed his original statement of claim, the Authority has issued a determination on costs that he also wishes to challenge. There is no difficulty in that course: the costs determination is supplementary to the Authority's substantive determination and Mr Nelson does not require leave to challenge it.

[3] I should say something first about the tests applicable to an application such as this. Initially both counsel appeared to rely on the line of cases and the tests set out in them where applications to appeal or to challenge out of time are made. When I suggested that this might not be the appropriate analogy, not surprisingly Mr Nicholson retreated from that line somewhat but Mr Blake maintained that the tests were essentially the same.

[4] I do not think that the tests applied by courts (including this Court) for leave to appeal or challenge out of time where no appeal within time has been brought, are entirely apposite. Here, an appeal or challenge has been brought within time. What is sought is leave to alter by addition the nature of the challenge. A better analogy would be to the line of cases where a party seeks to add a cause of action before trial to an existing proceeding where of course that cause of action is within time. But even if there is an analogy with the leave to appeal out of time cases, the essential test to be applied by the Court is the same, that is whether the justice of the case warrants the grant of leave or not.

[5] To determine this application for leave, a little needs to be said of the background to it.

[6] Mr Nelson issued proceedings in the Employment Relations Authority that were investigated on 4 days in June and July 2007. Following the receipt of submissions on dates in July and August 2007, the Authority issued its determination on 10 December 2007.

[7] This was a lengthy determination as these things go, at 51 numbered paragraphs over 33 pages. That reflected the multi-faceted and complex nature of Mr Nelson's claims in which he was partly successful and partly unsuccessful. Although the Authority was not satisfied that breaches of statutory and contractual

obligations by the employer caused Mr Nelson's heart disease that led to the termination of his employment, his dismissal by Fletcher Steel Limited was nevertheless unjustified. The Authority directed Fletcher Steel to pay Mr Nelson one-half of one month's salary as compensation for lost remuneration together with the sum of $7,500 for hurt and humiliation under s123(1)(c)(i) of the Employment Relations Act 2000 ("the Act"). The Authority reserved costs. The parties having been unable to settle these, the Authority issued a further determination on costs on 27 March 2008. Taking into account principally the shared successes and losses before it, it declined to make any award of costs.

[8] Although Mr Nelson had been represented by Mr Nicholson in the Authority, his remarkably brief statement of claim challenging the Authority's determination was filed by a lay advocate, Mark Nutsford of the firm Employment Relations Consultants. As was required to be indicated, it clearly did not elect a challenge de novo. It sought only to challenge paragraphs [48] and [49] of the Authority's determination under the heading *"Recovery of wages"*. In other words, Mr Nelson did not challenge the findings of the Authority that had been adverse to him on the question of whether he had been unjustifiably disadvantaged in employment by breaches by his employer of statutory and contractual obligations. Mr Nelson initially accepted the Authority's finding that he had been unjustifiably dismissed and sought to challenge only the remedies for lost remuneration. In his original statement of claim Mr Nelson quantified his loss as being $31,162.30 although it is unclear whether this included or excluded the Authority's award, which was effectively of a fortnight's remuneration.

[9] Mr Nelson's challenge was filed on 11 January 2008, right at the limit of the 28-day period allowed by s179 for doing so. The defendant filed its statement of defence on 8 February addressing comprehensively the claims in the statement of claim.

[10] The next event on the file was Mr Nelson's application for leave to file an amended statement of claim which was itself filed on 11 April, apparently after some informal attempts had been made by Mr Nelson to do so. It seems that by this stage Mr Nutsford was not representing Mr Nelson and the plaintiff was acting for

himself. As was appropriate, Mr Nelson also filed an affidavit setting out his reasons for leave and a draft amended statement of claim.

[11] Even allowing for the fact that the affidavit was prepared by Mr Nelson as a clearly dissatisfied litigant in person, it is difficult to see how some of the grounds he sets out are relevant to the grant of leave to alter the nature of his challenge by expanding it.

[12] Mr Nelson's intended amended statement of claim has also been drawn by him and due allowance must of course be made for that. The changes intended include:

- expanding the challenge to the whole of the Authority's determination;
- dealing with what are described as "*updates*" and "*more recent evidence*";
- alleging that he was unjustifiably disadvantaged and unjustifiably dismissed;
- alleging that his employer was in breach of contract and was guilty of misrepresentation; and
- alleging that his employer was guilty of breach of good faith and of a duty of care including to eliminate workplace stress.

[13] Claims to lost remuneration are set at $58,903.10 to the end of August 2006 and thereafter at the rate of $7,083.33 per month less what is described as "*residual plaintiff income*".

[14] Mr Nelson seeks:

- compensation for hurt and humiliation for unjustified dismissal of $10,000;

- compensation for damage to his career;

- compensation for other unjustified disadvantages in the sum of $10,000;

- damages for physical and emotional harm caused by the employer's breaches of statutory and contractual duties of care, being $25,000; and

- an incentive payment lost to him of $15,000.

[15] Mr Nelson seeks legal costs of $44,178.52.

[16] Finally, Mr Nelson claims interest on these sums at the rate of 10 percent per annum.

[17] The defendant opposes the grant of leave sought by Mr Nelson. Fletcher Steel says that if leave were granted, this would cause significant delay in finalising the proceeding and would extend the time required for hearing. These consequences are said to prejudice significantly the defendant. It says that Mr Nelson pursued *"an extraordinarily wide"* number of causes of action in the Employment Relations Authority that it determined lacked merit. The defendant says that if granted leave, Mr Nelson will now reopen and re-litigate that multitude of claims in which he had previously failed. It is concerned that complicated and protracted proceedings will add significantly to its costs. The defendant points out that the Authority's investigation meeting lasted 4 days although the equivalent of less than one of these was taken to investigate Mr Nelson's unjustified dismissal claims. The defendant fears that if leave is granted, what would now be a 1 to 2-day hearing in this Court will expand to one of up to or even more than 2 weeks' duration. The company was concerned that Mr Nelson will be unrepresented and so would incur no additional costs despite its own costs escalating considerably. However, Mr Nicholson has reappeared on the scene and there is no suggestion at this stage anyway that Mr Nelson will continue to represent himself in what is, by any account, difficult and perhaps even complex litigation.

[18] For these reasons, the defendant invites the Court to exercise its discretion against the application.

[19] I think the application should and will be granted for three particular reasons all going to the interests of justice of the case.

[20] The first relates to the changing and unfortunate nature of Mr Nelson's representation. I have already outlined the changes in representatives but it is not insignificant that a lay advocate assumed responsibility for the drafting of the challenge filed in January and since then Mr Nelson has attempted to do so himself. As I have mentioned, the causes of action that he put forward in the Authority, and that he wishes to now pursue, are complex and to an extent at least, legally technical. I think it would be unjust to leave Mr Nelson with the position that a temporary lay advocate took for him at the crucial time of deciding not only to challenge but also the nature of the challenge to be brought.

[21] The second ground for granting leave relates to the unique jurisdiction in which these sorts of cases are heard. This is not an appeal but a challenge. The Employment Relations Authority, to which Mr Nelson was obliged to bring his claims, is a low level informal investigative body which is required to determine employment relationship problems with a minimal emphasis on what are described in the Act as legal technicalities and without great emphasis on providing reasons for its decision. There is provision under s178 of the Employment Relations Act 2000 for proceedings to be removed to the Court for hearing at first instance on a number of statutory grounds. Counsel tell me that although consideration was apparently given, perhaps by Mr Nelson, to such an application in the Authority, that was not pursued.

[22] The parties must be on notice that if a proceeding such as this is not removed to the Court, the statutory scheme provides that in the event that either or both parties are dissatisfied with the result in the Authority, they can elect to start again from scratch as it were by what the law terms a challenge by hearing de novo. That is a statutory consequence of the Authority's regime. Parties are entitled to adversarial litigation to decide their disputes if those cannot be resolved by the Authority's

investigative proceeding. So it cannot come as a complete surprise to the defendant that after what was no doubt a difficult hearing in the Authority, Mr Nelson was entitled, within the statutory period, to elect to start again.

[23] The third ground for granting leave is the lack of prejudice to the defendant. It is, through counsel, perhaps understandably upset (to the extent that a statutory corporation can be upset), that it now faces the prospect of re-litigating with Mr Nelson. There is really no prejudice to which it is now put that would not have affected it had Mr Nelson challenged by hearing de novo on 11 January. Indeed, responsibly, Mr Blake has not advanced an argument of prejudice as such. Rather, he has emphasised the inconvenience and cost to the defendant, both of which considerations are real but regrettably are inevitable in a system that allows not only for appeals but indeed here to start again by hearing de novo.

[24] For those reasons I am satisfied that the interests of justice should allow Mr Nelson to change the nature of his challenge by now electing a hearing de novo. He will have to file and serve a further amended statement of claim. The draft amended statement of claim filed does not meet the requirements of the Employment Court Rules and a further amended statement of claim meeting those requirements must be filed and served within 21 days of the date of this judgment. The defendant will then have the usual period of 30 days within which to file and serve a statement of defence to that amended statement of claim.

[25] The defendant also raises what it says are improper references in Mr Nelson's amended statement of claim to privileged discussions. These are said to include references to the parties' positions at mediation. I have indicated a view, having glanced at the particular paragraphs, that they are inappropriate in formal pleadings although perhaps understandably included there by Mr Nelson as a clearly frustrated lay person. Nevertheless the pleadings should not include them and I have made clear to Mr Nicholson, who will now be responsible for and in control of the pleadings, that the amended statement of claim should not include reference to them or like privileged matters.

[26] Although the defendant has also sought a direction that Mr Nelson's draft amended statement of claim and accompanying affidavit be withdrawn from the court file, I think this is neither warranted nor appropriate. Their contents have been relevant to my determination of the application for leave and I have already indicated that a further statement of claim will be necessary. There should be no reason for the trial Judge to either see or recall what may have been in an earlier pleading.

[27] In the circumstances the fairest course is to let costs lie where they fall and I make no order for costs on this application.

GL Colgan
Chief Judge

Judgment delivered orally at 3 pm on Monday 26 May 2008