IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 105
EMPC 67/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to include evidence
AND IN THE MATTER OF	an application to exclude evidence
BETWEEN	CHIEF EXECUTIVE OF MANUKAU INSTITUTE OF TECHNOLOGY Plaintiff
AND	ALEKSANDAR ZIVALJEVIC Defendant

Hearing:	19 August 2019 (Heard at Auckland)
Appearances:	Merepaia King and M Cassaidy, counsel for plaintiff A Zivaljevic, defendant in person
Judgment:	21 August 2019

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application to include evidence)
(Application to exclude evidence)

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[1] The Chief Executive of Manukau Institute of Technology (MIT) has brought a non-de novo challenge to a preliminary determination of Employment Relations Authority (the Authority).[1]

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1 *Zivaljevic v Chief Executive of Manukau Institute of Technology* [2019] NZERA 77.

[2] The issues in the challenge are:

(a) Whether Mr Zivaljevic's communications with the MIT raised an unjustifiable dismissal personal grievance within the prescribed 90 days. Those communications largely comprise the ones made in January 2018 but could also include communications in early February 2018.

(b) Whether Mr Zivaljevic's employment agreement contains the explanation required by s 65(2)(a)(vi) of the Employment Relations Act 2000 (the Act), bearing in mind that, if that provision is not satisfied, Mr Zivaljevic will argue that s 115(c) of the Act applies.

[3] First, Mr Zivaljevic has applied to include the Academic Review Outcome Document dated 29 November 2017 in the common bundle. No objection was taken by MIT to that application and it is granted.

[4] Second, Mr Zivaljevic has applied to exclude evidence. He objects to the evidence proposed to be given by Ms Kirsten Sargent, who is MIT's Head of Human Resources, People and Culture, in its entirety. He also objects to four documents that are currently included in the common bundle. These documents comprise email threads between Mr Zivaljevic and MIT after the termination of his employment.

[5] MIT opposes the application. The remainder of this judgment deals with that application.

[6] The grounds Mr Zivaljevic relies on to exclude evidence are:

(a) the hearing is non-de novo and the evidence challenged is on matters that are outside the agreed scope, thus not relevant and will needlessly prolong the case;

(b) the evidence provided by Ms Sargent is on matters that are outside the agreed scope of the current non-de novo case and will just prolong the case; and

(c) Ms Sargent has not been a party in the communication that the Authority considered when making its determination.

[7] Mr Zivaljevic says the email threads are not relevant because:

(a) they were not considered by the Authority;

(b) the communications do not contain information relevant to the second issue; and

(c) in relation to three of the email discussions, these occurred outside the period being considered in relation to the first issue.

[8] Similarly, Mr Zivaljevic says the evidence proposed to be given by Ms Sargent was not considered by the Authority and does not relate to the issues and/or timeframes this case concerns.

[9] MIT acknowledges that the hearing in the Court is limited to the two issues identified but says the evidence is admissible and relevant to the first issue and ought to be allowed.

Court can consider additional evidence

[10] In considering the issues before it, the Court is not confined to considering only the evidence that the Authority had before it. There may be further evidence relevant to the matters at issue in the non-de novo challenge.[2] Even though this is a non-de novo challenge, the Court must make its own decision on the issues before it.[3]

[11] In any event, MIT says that the evidence was before the Authority, and Mr Zivaljevic now appears to acknowledge that to be so.

[12] As MIT submits, the issue set out in [2](a) above, simply pinpoints the specific communications in which Mr Zivaljevic argues, and the Authority accepted, he raised

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2 *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [16](c).
3 Employment Relations Act 2000, s 183(1).

his personal grievance. There may be other evidence that either party wishes to rely upon in order to show that those specific communications did or did not amount to the raising of a personal grievance.

[13] MIT says the evidence Mr Zivaljevic seeks to have excluded is highly relevant to the first issue because it forms part of the wider context of the communications between MIT and Mr Zivaljevic during the period in which he claims to have raised his personal grievance and illustrates the understanding both MIT and Mr Zivaljevic had in relation to the position.

Evidence to be admitted

[14] Section 189 of the Act confers a broad discretion on the Court to accept, admit and call for such evidence and information as in equity and good conscience it thinks fit. Relevance is a key issue the Court will consider in exercising its discretion.

[15] Evidence after the fact of either or both parties' characterisation or understanding of the communications in January and February 2018 may end up being of limited relevance to the question of whether those communications were sufficient to raise a grievance, which is answered on an objective basis. Nevertheless, it would be premature at this stage to find that the evidence is not relevant.

[16] The evidence Mr Zivaljevic objects to provides a more complete picture of the interactions between him and MIT. The email threads were included in the common bundle, and objection to them was taken at a late stage. Ms Sargent's evidence is relatively short and should not unduly prolong the hearing.

[17] Taking all these matters into account, I am not prepared to exclude the evidence.

[18] Mr Zivaljevic's position, if the evidence is to be accepted, is that there are other documents that should also be included, principally to complete the communication trails (including attachments to emails).

[19] MIT does not object to the further documents Mr Zivaljevic wishes to include being before the Court, with the exception of a statutory declaration (item 4 attached to Mr Zivaljevic's reply memorandum). Mr Zivaljevic acknowledged the statutory declaration is not relevant to the two preliminary issues.

[20] The outcome then is that the application to exclude evidence is unsuccessful, but the documents marked 1, 2, 3, 5 and 6 attached to Mr Zivaljevic's memorandum in reply are also to be included in the documents before the Court.

[21] MIT is to provide an updated common bundle including these five documents and the Academic Review Outcome document. Four copies are required for the hearing and may be provided at its commencement.

[22] Costs on the applications are reserved.

J C Holden
Judge

Judgment signed at 11.15 am on 21 August 2019