IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 140
EMPC 477/2021

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file amended pleadings
AND IN THE MATTER OF	objection to evidence
BETWEEN	SIOUXSIE WILES Plaintiff
AND	THE VICE-CHANCELLOR OF THE UNIVERSITY OF AUCKLAND Defendant

Hearing:	3 August 2022 (Heard at Auckland, via telephone)
Appearances:	C W Stewart and D Church, counsel for plaintiff P M Muir, R Judge, R Cabraal and S-J Lloyd, counsel for defendant
Judgment:	9 August 2022

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for leave to file amended pleadings; objection to evidence)

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[1] Dr Wiles has proceedings before the Court claiming unjustifiable disadvantage, breach of her employment agreement and breach of good faith by the University of Auckland (the University). There are two preliminary issues that are resolved by this judgment.

[2] First, Dr Wiles applies to file an amended statement of claim.

[3] Second, the University objects to parts of the evidence filed on behalf of Dr Wiles.

The substantive proceedings

[4] The substantive proceedings relate to alleged actions and inactions of the University in the face of Dr Wiles' safety concerns. Those safety concerns arose following public commentary by Dr Wiles on the COVID-19 pandemic.

[5] The proceedings were removed from the Employment Relations Authority (the Authority) on the grounds that: important questions of law were likely to arise other than incidentally; the case was of such nature and urgency that it was in the public interest that it be immediately removed to the Court; and the Authority was of the opinion that the Court should determine the matter.[1] The Authority described the heart of the matters before the Authority as being:[2]

- the parties' differing interpretations of the meaning of "academic freedom";
- whether providing public commentary constitutes "work" for the purposes of Dr Wiles' employment by the University; and
- the extent to which the University, as Dr Wiles' employer, was required to protect her health and safety when a risk of harm arose from her public commentary on COVID-19 matters.

Amendments sought to the statement of claim

[6] The amendments that Dr Wiles wishes to make to her statement of claim include:

(a) providing additional particulars regarding alleged non-compliance by the University of its policies, Code of Conduct, and Charter, which are referenced in Dr Wiles' employment agreement, all of which refer to the Treaty of Waitangi;

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1 *Hendy v The Vice- Chancellor of the University of Auckland* [2021] NZERA 586 at [116] (Member Larmer).

2 At [92].

(b) adding further alleged breaches of the University's Charter and Academic Standards Policy regarding the University's obligations in relation to equity, research-informed teaching, academic freedom, and its role as the critic and conscience of society;

(c) adding allegations that Dr Wiles has been singled out by the University for alleged non-compliance with the University's Outside Activities Policy and Code of Conduct.

[7] No new causes of action are added in the amended statement of claim; rather, the new paragraphs are included in the causes of action for alleged breach of contract and for alleged breach of good faith.

[8] There also are some minor date corrections that Dr Wiles seeks to make and there is no opposition to an amended statement of claim being filed making those corrections.

[9] The reason leave is needed to file the amended statement of claim is because the matter has been set down for a hearing, commencing on Monday 5 September 2022.

[10] Ms Stewart, counsel for Dr Wiles, provides three reasons for the delay in filing an amended statement of claim. First, Dr Wiles only became aware of some of the material after filing the original statement of claim on 27 January 2022. Second, some of the material only became apparent in the course of briefing witnesses. Third, some of the amendments relate to further action taken by the University that Dr Wiles says is a continuation of breaches already pleaded. Counsel asserts there is no prejudice to the University as, at the time the application was filed, there was still over seven weeks to the hearing, and the University had not yet filed its briefs of evidence. Ms Stewart submits it is in the interests of justice that the intended amended statement of claim be accepted so that all Dr Wiles' concerns can be fairly heard in the impending Court case.

[11] The University opposes the substantive amendments sought. First, the University says that Dr Wiles is now seeking penalties for alleged breaches of contract

(based on purported breaches of her employment agreement, the University's Code of Conduct, and relevant policies) and for alleged breaches of good faith (based on statements purportedly made to her by the University) outside of the 12-month statutory time limit.[3]

[12] Alternatively, the University opposes the application on the grounds that:

(a) Dr Wiles is seeking to raise new claims that were not before the Authority or in her original statement of claim in the Court.

(b) The proposed new claims are therefore not matters that have been removed to the Court, and it is too late now to seek to include them.

(c) The inclusion of the proposed new claims would have an unfair prejudicial effect on the University given the tight timeframes for the University to file its evidence and for the hearing.

(d) The proposed new claims are not relevant to the issues currently before the Court and relate to entirely new claims.

(e) The claims do not have a reasonable prospect of success.

[13] In response to the notice of opposition, Ms Stewart submits that Dr Wiles is not seeking to raise new causes of action in relation to breach of her employment agreement and/or good faith as those have already been pleaded. Rather, she is raising further particulars of such breaches. I agree with that submission.

[14] I also consider that the penalties issue is something of a red herring. Dr Wiles does not just seek penalties in relation to the alleged breaches; she also seeks declarations and damages. The availability of penalties as a remedy for any found breaches can be dealt with in submission.

[15] I acknowledge that the included particulars raise further issues that the University will need to consider, in particular about the obligations that arise from the references to the Treaty of Waitangi in the University's Charter, Code of Conduct and

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[3] Employment Relations Act 2000, s 135(5).

policies. Those issues are important, and their inclusion may affect the current timetable for dealing with Dr Wiles' claims.

[16] I do not accept that the removal constrains the Court from allowing the proposed amendment to the pleadings. Once the matter has been removed from the Authority, it is fully before the Court. The proposed amendments would not give rise to a new matter. The matter is still fundamentally the same, being as described in [1] and [4] above.

[17] The Court's discretion in considering an application to file an amended pleading out of time is wide. The Court will consider the extent of the delay, the explanation for it, and whether the delay is excusable, alongside the whole history of the matter. The overriding consideration is the justice of the case.[4]

[18] In this case, matters have moved comparatively swiftly, and the situation is continuing. Dr Wiles has provided an affidavit explaining how she came to consider that she had additional potential grounds for her claims. While ideally the original statement of claim would have included the particulars now sought to be included, I accept there are valid reasons why it did not do so.

[19] Leave is granted to Dr Wiles to file the amended statement of claim.

[20] The amended statement of claim is to be filed and served forthwith. The statement of defence to the amended statement of claim is to be filed within five working days of service of the amended statement of claim, in accordance with the Practice Directions.[5]

The University objects to evidence

[21] In this Court, the admissibility of evidence is governed by s 189 of the Employment Relations Act 2000, which allows the Court to accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether

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4 *Pacific Plastic Recyclers Ltd v Foo* [2002] 2 ERNZ 75 (EC) at [24].

5 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 10 para [2].

strictly legal evidence or not. Nevertheless, it is well established that the general rules of evidence set out in the Evidence Act 2006 provide guidance.[6]

[22] The evidence the University objects to is from:

(a) Mr Campbell, on the importance of experts for public (media) commentary;

(b) Ms Ngata, on the importance of access to science information for Māori in particular; and

(c) Professor Heinemann, principally directed to academic freedom.

[23] Both Ms Ngata and Mr Campbell link their statements to a comment made by the Vice-Chancellor in which she urged Dr Wiles to "keep any public commentary to a minimum" until the University was able to conclude its external security and safety investigation.

[24] Ms Ngata also includes three paragraphs in which she gives contested evidence of what she sees as Treaty violations by the University in its treatment of Dr Wiles.

[25] In his contested evidence, Professor Heinemann explores the relationship between academic freedom and legislation, as well as the University's policies and Code of Conduct and the applicable collective agreement.

[26] The University's objection to the evidence filed for Dr Wiles is on the basis:

(a) it is not likely to provide substantial help;

(b) it includes evidence on matters of New Zealand law, which is inadmissible;[7]

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6 *Nel v ASB Bank Ltd (No 3)* [2018] NZEmpC 59 at [20].

7 *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433 at [32]; and *Newton v Family Court at Auckland* [2022] NZCA 207 at [189]–[191].

(c) it includes opinions on construction of documents, which are inadmissible;[8]

(d) presentation of the challenged material in evidence would be an abuse of process;

(e) the challenged material includes irrelevant material;

(f) any probative value of the challenged material is outweighed by the risk that it will have an unfair prejudicial effect and needlessly prolong the proceedings;[9] and

(g) the briefs of evidence of Mr Campbell and Ms Ngata include opinions but do not comply with the Code of Conduct for expert witnesses.[10]

[27] Mr Campbell's evidence can be dealt with briefly. The University says he sets out his opinion on a letter from it to Dr Wiles. However, while the contested evidence flows from the comment in the letter from the Vice-Chancellor, it really is directed to the difficulties the media would have faced if it did not have access to expert academic commentators and, in particular, the value that Dr Wiles contributed to the media commentary. The evidence is approximately one page, and I consider the Court would be assisted by it. While undoubtedly Mr Campbell has significant experience in the media, it is not clear to me he is proposing to give evidence as an expert. In any event, if he is, he can comply with the requirements of the Evidence Act when he comes to give evidence. The objection to Mr Campbell's evidence is not upheld.

[28] The first part of Ms Ngata's evidence that is contested is in a similar category. In her case, she reflects on the impact that she says would have occurred had Dr Wiles not provided the commentary that she did, in particular on Māori. I consider that short evidence (being paragraphs [20] to [26] of Ms Ngata's brief of evidence) to be useful.

[29] As noted, Ms Ngata also includes evidence in which she provides her opinion on the effect of asking Dr Wiles to moderate or minimise her voice on COVID-19 on

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8 Hodge M Malek (ed) *Phipson on Evidence* (20th ed, Thomson Reuters, London, 2022) at [33-107].
9 Evidence Act 2006, ss 6 and 8.
10 High Court Rules 2016, sch 4.

legal obligations the University may have under the Treaty of Waitangi. They belong in submissions. The following evidence is struck out:

(a) paragraph [27] up to the sentence commencing "Siouxsie was responding to…";

(b) the first and third sentences of paragraph [28];

(c) the first and second sentences of paragraph [29].

[30] The objection to Ms Ngata's evidence otherwise is not upheld.

[31] I turn then to the evidence of Professor Heinemann, which is where the main concerns arise, particularly over the extent to which his evidence is on matters of law and/or on the construction of documents. The University objects to much of his evidence – from paragraph [49] to [116].

[32] As noted by Ms Stewart, the issue of academic freedom is central to these proceedings. Professor Heinemann has considerable experience with that topic. Although he is a scientist, as part of his activities he also has been involved with scholarship on academic freedom. I consider the Court would be assisted from hearing from him.

[33] The problems that arise with his evidence in its present form is that he has been asked to address particular questions, some of which are legal questions. That of course is not the fault of Professor Heinemann, but it does give rise to the difficulties identified by the University. The questions that seem to me to give rise to the greatest difficulty are:

…

b. Whether "within the law" exception in academic freedom can be invoked by the University to establish that [Dr Wiles'] duties under the Health and Safety at Work Act 2015 to take reasonable steps to keep herself safe, limit her academic freedom; [addressed in paragraphs [58]-[72] and [113] of Professor Heinemann's brief of evidence];

c. Whether the personnel of the University (such as the Vice-Chancellor) urging [Dr Wiles] to moderate and/or minimise her commentary is consistent with the expressed intention of the Education and Training Act 2020 relating to Auckland University that academic freedom will be "preserved and enhanced"; addressed in paragraphs [73] and [114]];

…

e. Whether Auckland University's Outside Activities Policy and the employment agreement might be in conflict with the principle of academic freedom. [Addressed in paragraphs [99] to [111] and [116].]

[34] The first part of Professor Heinemann's evidence that the University objects to covers what academic freedom means with respect to public commentary (paragraphs [49] to [57] and [112] of Professor Heinemann's evidence). The first sentence of paragraph [49] of his evidence refers to a requirement, "by law" under s 268 of the Education and Training Act 2020. However, there is no analysis of the section. It really has been inserted as a precursor to Professor Heinemann's discussion of what it means to be the critic and conscience of society. While technically the discussion might have been better introduced, substantively, in that paragraph and the paragraphs that follow, Professor Heinemann is not providing evidence on how the words of the section ought be interpreted as a matter of law. I am satisfied that paragraphs [49] to [57] and [112] can remain.

[35] Paragraphs [58] to [64], [66] to [72] and [113] are problematic as they analyse the "within the law" qualification and how it interacts with the Health and Safety at Work Act 2015. The objection to those paragraphs is upheld.

[36] Likewise, the commentary in paragraphs [73] and [114] of Professor Heinemann's evidence on the intention of the Education and Training Act are matters of law, which ought not be included in a brief of evidence. The objection to those paragraphs is upheld.

[37] In paragraphs [74] to [98] and [115] of his brief, Professor Heinemann gives evidence of his opinion as to whether the right to academic freedom includes the right to criticise the institution and its personnel. Those paragraphs combine Professor Heinemann's views on what academic freedom means with interpretation of the Education and Training Act, University policies and the collective agreement. The

evidence in its present form enters into discussions of the law, which belong in submissions. The objection to paragraphs [74] to [86], [89] to [92], [96], [97] and paragraph [115] from the words "and I believe" is upheld.

[38] Similar difficulties arise with respect to paragraphs [99] to [111] and [116] of Professor Heinemann's brief of evidence, where he gives evidence as to the meaning of and legal obligations arising out of the collective agreement and the Outside Activities Policy. Once again those matters should be in submissions rather than evidence. The objection to paragraphs [99] to [102], [104] to [111] and [116] is upheld.

[39] While objections to Professor Heinemann's evidence have been upheld, I acknowledge that there may be aspects of the excluded evidence that can be reframed and included. Leave is therefore granted for Dr Wiles to have Professor Heinemann amend and refile his brief, taking account of the comments made. If she wishes to do this, the amended brief is to be filed within five working days of this judgment.

Where to from here

[40] As these matters may impact on the current timetable, including the fixture dates, the Registrar is to arrange a telephone directions conference as soon as practicable to discuss and resolve those matters.

[41] Costs are reserved.

J C Holden
Judge

Judgment signed at 12.45 pm on 9 August 2022