

**ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING
PARTICULARS OF THE PLAINTIFF**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2022] NZEmpC 58
EMPC 317/2021**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for further and better particulars
BETWEEN	GF Plaintiff
AND	COMPTROLLER OF THE NEW ZEALAND CUSTOMS SERVICE Defendant

Hearing: On the papers

Appearances: M Dew QC, S Kopu and J Hansen, counsel for plaintiff
H Kynaston and H Khan, counsel for defendant

Judgment: 30 March 2022

**INTERLOCUTORY JUDGMENT (NO 4)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for further and better particulars)**

Introduction

[1] The plaintiff has filed a statement of claim challenging a determination of the Employment Relations Authority.¹ The claim follows the plaintiff's dismissal from

¹ *GF v New Zealand Customs Service* [2021] NZERA 382 (Member Beck). An amended statement of claim was subsequently filed.

their employment. Part of the claim is that the defendant failed by its conduct to act in accordance with tikanga principles relevant to the employment relationship, including its own Whanonga Pono (values). The defendant seeks orders from the Court requiring the plaintiff to file a more explicit pleading. This judgment deals with that issue.

Framework for analysis

[2] The starting point for determining the adequacy of a pleading is reg 11 of the Employment Court Regulations 2000 (the Regulations) which provides:

Statement of claim

- (1) Every statement of claim filed under regulation 7 or regulation 8 must specify, in consecutively numbered paragraphs,—
 - (a) the general nature of the claim:
 - (b) the facts (but not the evidence of the facts) upon which the claim is based:
 - (c) any relevant employment agreement or employment contract or legislation and any provisions of the agreement or the contract or the legislation that are relied upon:
 - (d) the relief sought, including, in the case of money, the method by which the claim is calculated:
 - (e) the grounds of the claim:
 - (f) any claim for interest, including the method by which the interest is to be calculated:

...
- (2) The matters listed in subclause (1) must be specified with such reasonable particularity as to fully, fairly, and clearly inform the court and the defendant of—
 - (a) the nature and details of the claim; and
 - (b) the relief sought; and
 - (c) the grounds upon which it is sought.

...

[3] While the Regulations set out the requirements for a statement of claim, they do not set out a procedure for dealing with a deficiency in pleadings. Regulation 6(2)(a)(ii), however, provides that in any case where no procedure has been provided for, the Court must dispose of the case as nearly as may be practicable in accordance with the provisions of the High Court Rules 2016. One of the procedural mechanisms for dealing with pleading deficiencies is by way of notice requiring further particulars or a more explicit pleading, under r 5.21 of the High Court Rules. It provides that a party may, by notice, require another party to give any further particulars that may be necessary to give fair notice of:

- (a) The cause of action or ground of defence; or
- (b) The particulars required by the High Court Rules (set out in r 5.26).

[4] Where a party neglects or refuses to comply with a notice within five working days after its service, the Court may, if it considers that the pleading objected to is defective or does not give particulars properly required by the notice, order a more explicit pleading to be filed and served.²

[5] It should be noted that the requirements for a statement of claim reflected in the High Court Rules (r 5.26) differ in some respects from those set out in reg 11 of the Regulations. The procedure adopted in this Court must be appropriate for achieving the ends specified in this Court's regulatory framework. Caselaw under the High Court Rules must be read, and applied, with this in mind.

The pleading in issue

[6] The pleading which the defendant takes issue with is set out at [9.5] of the plaintiff's amended statement of claim. It provides that:

The defendant failed by its conduct as pleaded above to act in accordance with its own Whanonga Pono (Values) as outlined in the defendant's employment agreement with the plaintiff and failed to act in accordance with other tikanga principles relevant to the employment relationship between the parties.

² Rule 5.21(3).

[7] The plaintiff provided further particulars on 25 March 2022. The defendant is not satisfied with the adequacy of the original pleadings or the further particulars and seeks orders from the Court. In particular the defendant says that it does not know what “other tikanga principles” the plaintiff contends were relevant and which it is alleged to have breached. Particularisation is necessary, it is submitted, to enable the defendant to be fully and fairly informed of the case it has to meet.

[8] I agree with Mr Kynaston, counsel for the defendant, that the amended statement of claim does not contain adequate particulars. The question is whether the further particulars provided by the plaintiff address the issues that otherwise arise. The answer to that question requires a focus on reg 11.

[9] The general nature of the claim is clearly articulated in the current pleading, namely a claim of unjustified disadvantage and dismissal.³ As counsel for the plaintiff point out, tikanga principles relevant to the employment relationship are an additional factual and legal layer that forms part of the claim. The point is relevant because particulars are focussed on facts, not evidence or law. In my view the request for further particulars as to what the defendant was *required* to do, as opposed to particulars of the alleged breach, strays into “would be helpful to know” rather than “need to know” territory.

[10] Breach of the employment agreement lies at the heart of the plaintiff’s claim, and is currently pleaded. As reg 11(1)(c) makes clear, a statement of claim must specify any provisions of an employment agreement relied on. The further particulars set out each of the references within the employment agreement relied on, within two categories – Whanonga Pono (values) and Te Pou Tokomanawa (foundations). The “other tikanga principles” referred to within the amended statement of claim have also been specified. They are said to include mana; tapu; hara; and ea.

[11] The facts on which the pleading in [9.5] is based have been further particularised.⁴ In this regard it is alleged that the defendant failed to consider how tikanga should guide its conduct in the management of the employment relationship

³ Regulation 11(1)(a).

⁴ Regulation 11(1)(b).

with the plaintiff; failed to conduct itself in a manner consistent with its employment agreement with the plaintiff; failed to consider the plaintiff's mana in the consultation and termination process; failed to enter into mediation when it was offered by the plaintiff; and failed to enter into further consultation on the applicability and interpretation of the relevant COVID-19 Public Health Response (Vaccinations) Order.

[12] Counsel for the defendant cites *Smith v Attorney-General* in support of a submission that, in cases involving a novel duty claim, the defendant and the Court are entitled to expect the plaintiff to explain the proposed basis for and nature of the duty in more detail than might ordinarily be expected.⁵ I do not disagree with that as a general proposition. Having a clear picture enables the opposing party to prepare, and avoids the likelihood that they will be taken by surprise, in respect of the evidence that it might wish to call or the legal submissions it might wish to advance.

[13] Unlike *Smith*, this claim centres on an individual, and whether the plaintiff was unjustifiably disadvantaged and dismissed. Its relative novelty lies in the extent to which tikanga informs and shapes the processes which led to the alleged disadvantage and dismissal, and the obligations that the defendant (a government agency) assumed when entering into the employment agreement with the plaintiff.

[14] In *Benge v Air New Zealand Ltd*, former Chief Judge Colgan emphasised that the overall objective of particulars is to inform the other party and the Court of the nature of the case as distinguished from the mode in which it will be proved, to prevent surprise, to limit and define issues. There is, as his Honour noted, a dividing line between “proper particulars (permitted) and probing for evidence (not permitted)”.⁶

[15] And the fact remains that it is the defendant who is obliged to justify the dismissal having regard to what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal, in accordance with s 103A of the Employment Relations Act 2000.

⁵ *Smith v Attorney-General* [2020] NZHC 836.

⁶ *Benge v Air New Zealand Ltd* [2011] NZEmpC 26 at [16]-[18].

[16] I return to principle, as enjoined to do by the Court of Appeal in *Price Waterhouse v Fortex Group Ltd*:⁷

In marginal cases, it is better to avoid generalities and rules of thumb, and to return to principle. The pleader and the Court simply ask “in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the case to be met.

...

What is required is an assessment based on the principle that a pleading must, in the individual circumstances of the case, state the issue and inform the opposite party of the case to be met. As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not in the area for mechanical approaches or pedantry.

[17] There is a degree of amorphousness about the claim, but that is hardly surprising given its nature. It is also notable that it is concepts and terms within the defendant’s own employment agreement which are in issue, in respect of their meaning and application. It might be expected that the defendant would have an understanding (although it may differ from the plaintiff’s) of what these terms and concepts mean in practice and within the context of employment relationships it is party to under the agreement. No doubt that understanding will be part of its defence to the claim. I agree with counsel for the plaintiff that particularisation of what the plaintiff says the defendant was required to do to avoid a breach of specified tikanga principles is not required.

Conclusion

[18] I am satisfied that:⁸

- sufficient information has been provided to inform the defendant of the case to enable them to take steps to respond;
- there is no real risk that the defendant may face a trial by ambush if further particulars are not provided;
- the request, if granted, would place an unreasonable burden on the plaintiff.

⁷ *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 19.

⁸ See *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153 at [23]; *Body Corporate 74246 v QBE Insurance (International) Ltd* [2015] NZHC 1360 at [18](h).

[19] The application is declined.

[20] The plaintiff is entitled to costs, the quantum of which is reserved.

Christina Inglis
Chief Judge

Judgment signed at 4pm on 30 March 2022