IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 18
ARC 55/2013
ARC 79/2013
ARC 48/2014
ARC 25/2014

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER	of proceedings removed
AND IN THE MATTER	of an application for special leave to raise a personal grievance out of time
AND IN THE MATTER	of an application as to admissibility of evidence
BETWEEN	KATHLEEN CRONIN-LAMPE First Plaintiff
AND	RONALD CRONIN-LAMPE Second Plaintiff
AND	THE BOARD OF TRUSTEES OF MELVILLE HIGH SCHOOL Defendant
AND	ACCIDENT COMPENSATION CORPORATION Intervener

Hearing: 20 February 2023
(Heard at Hamilton)

Appearances: T Braun and E Anderson, counsel for plaintiffs
P N White and L Fernandez, counsel for defendant
No appearance for Intervener, by leave

Judgment: 21 February 2023

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B A CORKILL
(Application as to admissibility of evidence)

Introduction

[1] This judgment relates to objections raised by the defendant about multiple paragraphs in nine reply briefs of evidence filed for the plaintiffs. Many of the objections are opposed by the plaintiffs.

[2] Mr and Mrs Cronin-Lampe, the plaintiffs, were employed as Guidance Counsellors by the defendant, the Board of Trustees of Melville High School (the Board). Mrs Cronin-Lampe worked at the school between 1996 and 2012; Mr Cronin-Lampe worked at the school between 1997 and 2012. They claim the Board failed to meet its health and safety obligations and, as a consequence, they suffered harm in various respects, including post-traumatic stress disorder from dealing with multiple student suicides and other circumstances they say were very challenging. The Board strongly opposes all Mr and Mrs Cronin-Lampe's claims.

[3] More particular details of the claims, defences, and a counter-claim are outlined in the pleadings. Counsel have agreed on a statement of issues with which the Court largely agreed. In my minute of 10 June 2021, I confirmed that the key issues are:[1]

> ...
>
> (a) Whether the plaintiffs are entitled to raise their disadvantage grievances outside the 90-day time limit due to the impact of exceptional circumstances.
>
> (b) If the plaintiffs are entitled to raise their alleged personal grievances outside the 90-day time limit, whether the defendant has unjustifiably disadvantaged them.
>
> (c) Whether the defendant breached contractual duties owed to the plaintiffs; and whether the plaintiffs breached duties owed to the defendant.

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[1] *Cronin-Lampe v Board of Trustees of Melville High School* EmpC Auckland ARC 55/2013, 10 June 2021 at [2](a)–(g).

(d) If the defendant has breached duties owed to the plaintiffs (contractual or otherwise as pleaded), did the cause of action accrue more than six years before the plaintiffs' claims were brought?

(e) Are the plaintiffs' claims for damages barred by s 317 of the Accident Compensation Act 2001?

(f) If any of the above matters are found to be in favour of the plaintiffs, whether they have:

i) contributed to their situation;

ii) failed to mitigate their loss; and

iii) breached duties to the defendant that have caused or contributed to the loss.

(g) If the defendant is liable for remedies and/or compensation to either or both plaintiffs, then the quantum of these.

[4] For present purposes, this is the context within which the objections as to evidence must be resolved.

Procedure

[5] The procedural history of the present application is that on 10 June 2021, I directed the filing of briefs of evidence. The plaintiffs were to file their briefs 12 weeks prior to the fixture, the defendant was to file its briefs six weeks prior to the fixture. Reply briefs were to be filed and served three weeks prior to the fixture.

[6] On 12 December 2022, after the plaintiffs' briefs had been filed in November 2022, counsel filed a joint memorandum seeking a variation of the dates for the filing of the remaining briefs. By this time a fixture was scheduled to commence on 20 February 2023, and the Christmas vacation created logistical problems. By consent I extended time for the filing of the defendant's briefs to 27 January 2023, and for the filing of the plaintiffs' briefs in reply to 7 February 2023. In fact, the plaintiffs' reply briefs were filed after the due date, and as from 10 February 2023.

[7] On 14 February 2023, I convened a telephone directions conference at which a range of topics were discussed. Counsel for the Board, Mr White, raised concerns about the content of the plaintiffs' reply briefs and said that a comprehensive application raising formal objections was being prepared. Accordingly, I timetabled

the filing and service of such an application for late 23 February 2023, and for any notice of opposition for late 24 February 2023.

[8] Extensive documentation was filed by both parties. The Board filed a notice of application, a copy of each of the nine disputed reply briefs with highlighted text to confirm what was in dispute, a schedule providing a brief description of the objections, and a memorandum outlining the Board's overarching position.

[9] The plaintiffs filed a notice of opposition, copies of each disputed brief indicating in some instances where it was accepted redaction could occur but otherwise maintaining that many of the objections should be disallowed, copies of the subject briefs displaying colour-coded text to show its position with regard to individual paragraphs, schedules pertaining to each witness confirming the plaintiffs' position, and a memorandum summarising their position.

The parties' cases

[10] Mr White submitted that a direction should be made that to the extent a brief of evidence goes beyond the limits of what is permitted, it ought not be read, rather than the defendant filing affidavits responding to the offending material. He said that with the reply evidence coming in late, it was impossible to respond to the offending material.

[11] He relied on r 9.7 of the High Court Rules 2016 (HCRs), which outlines the requirements in relation to briefs, which provides that every brief:

> ...
>
> (b) must be in the words of the witness and not in the words of the lawyer involved in drafting the brief:
>
> (c) must not contain evidence that is inadmissible in the proceeding:
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> (d) must not contain any material in the nature of a submission:
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> (e) must avoid repetition:
>
> (f) must avoid the recital of the contents or a summary of documents that are to be produced in any event:
>
> (g) must be confined to the matters in issue.

[12] Mr White also submitted that a useful summary of principles with regard to reply evidence was given in *Minister of Education v Carter-Holt Harvey Ltd*.[2]

[13] That was a proceeding which involved a very substantial civil claim concerning alleged defective cladding in over 800 school buildings. A pre-trial application was considered over three days by the Court; one of the issues was whether reply briefs complied with relevant principles in that Court.

[14] The Court held that r 7.26 of the HCRs, which deals with reply affidavits, confirmed that reply evidence should be limited to new matters raised in the defendant's evidence and should not provide an opportunity to backfill evidence-in-chief. Such a principle could also apply to a reply brief. A reply affidavit/brief should only address matters in the defendant's briefs that could not reasonably have been anticipated when filing the plaintiff's evidence-in-chief. Such an affidavit/brief should not be a vehicle for engagement on every aspect of a defence witnesses' brief and/or reiteration or expansion of the plaintiff's primary evidence. Nor should a reply affidavit/brief be a vehicle for introducing wholly new matters.[3]

[15] Mr White also referred to the dicta of Jagose J in *SCC (NZ) Limited v Samsung Electronic New Zealand Limited,* another substantial commercial proceeding. There the Judge noted that if reply briefs were to be permissible at all, they were to be strictly in reply, responding only to relevant matters raised for the first time in the briefs to which they were replying. They were not an opportunity to deny the truth of the defendant's proposed evidence by restating or enlarging on factors already set out in the plaintiff's statements. Restating and enlarging on prior evidence was described as being "repetitious and argumentative".[4]

[16] Mr White submitted that in this proceeding, there were entire briefs, or passages in briefs, which were inadmissible as they did not satisfy these criteria. The objections were briefly summarised on a per paragraph basis in the individual schedules.

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2 *Minister of Education v Carter Holt Harvey Ltd* [2020] NZHC 1539.
3 At [127], [129] and [137].
4 *SCC (NZ) Ltd v Samsung Electronic New Zealand Ltd* [2018] NZHC 2780 at [205].

[17] He submitted that in relation to witnesses who had provided a brief of evidence-in-chief, there was a tendency to deny the truth of the defendant's evidence by repeating, restating and bolstering the evidence from the primary brief – particularly in the case of Mr and Mrs Cronin-Lampe. Some issues raised should have been contained in briefs from the outset, as they were evident from the plaintiffs' pleaded claim. They did not address new issues from the defendant's briefs, which had focused on the plaintiffs' evidence. Some briefs were also objectionable because they included hearsay, opinion, speculation and submission.

[18] Mr White submitted that the objectionable evidence would result in unfairness and would cause prejudice to the defendant which was compounded by the late filing shortly before the commencement of the trial. It would also add unnecessarily to the length of the trial.

[19] In his oral submissions, Mr White took the Court to particular examples which he said illustrated non-compliance. Especially problematic, he said, was the extensive backfilling: introduction of topics which should have been dealt with at the outset. He also gave examples of what he described as "cross-fertilisation", that is, where Mr and Mrs Cronin-Lampe's reply evidence was an attempt to bolster the evidence of the other.

[20] Relying on further dicta of Jagose J in *SCC (NZ) Limited,* he said reply evidence should not be used by a plaintiff to keep its powder dry by putting up a barebones case at the outset, giving the substance of its evidence "in reply" after seeing the defendant's proposed evidence.

[21] He also argued that prejudice would arise by the plaintiffs calling a witness who attended the school from 1996 to 2000. A brief for this witness had not been filed at the outset. He said the Board was not on notice from Mr and Mrs Cronin-Lampe's pleading or otherwise that such a witness would be called. There were discovery implications. The school was now prejudiced because it would have difficulty in tracing other students from this time who might be called in response.

[22] A further issue, he said, related to the reply brief of a chartered accountant, Mr Brendan Lyne, who is to provide expert evidence for Mr and Mrs Cronin-Lampe on quantum issues. Mr White submitted there was unacceptable backfilling because it was proposed he would provide opinion evidence beyond what he said in his primary brief, on the basis of supplementary information contained in the plaintiffs' reply briefs which should have been given at the outset.

[23] Mr Braun, counsel for the plaintiffs, acknowledged that reply evidence must comply with r 9.7 of the HCRs. He explained that the plaintiffs agreed some redactions could be made, but the remainder of the sought-for objections were opposed. He submitted that overall the plaintiffs had taken a measured approach to the defendant's objections. Redactions had been accepted in some instances even although the plaintiffs disagreed with the objection. This was done for the sake of pragmatism. In other instances, objections were opposed where it was considered the evidence was proper evidence in reply, and within the knowledge of the party adducing the evidence.

[24] The practical approach taken for the plaintiffs would ensure each party would be treated fairly and justly in the presentation of their case and the defendant would not be prejudiced. The removal of evidence had reduced the volume of evidence that would need to be presented at trial.

[25] In his oral submissions, Mr Braun said an assertion that a barebones case had been put up by the plaintiffs at the outset was incorrect. What the plaintiffs had done was not backfilling but clarifying their case. That said, he acknowledged the line was difficult to draw.

[26] He also took the Court to r 9.7(5) of the HCRs, which confirmed that if the requirements relating to a brief were not met, the Court could direct that the brief not be read in whole or in part; and it could make such order as to costs as it saw fit. That is, Mr Braun submitted, the Court had a discretion as to how it might deal with a problem of non-compliance.

Analysis

[27] I begin with a general point as to the admissibility of evidence in this Court. The starting point is the Court's equity and good conscience jurisdiction under s 189(2) of the Employment Relations Act 2000 (the Act). Whether or not evidence and/or information should be "admitted", "accepted", or "called for" is informed by a broad inquiry, and not one that necessarily focuses only on whether the evidence and/or information would be admissible in the High Court.

[28] As Chief Judge Inglis has observed, the Court has a broad discretion under s 189 of the Act, "and it is the twin principles of equity and good conscience which must be looked to for the guiding light in exercising the Court's discretion under that provision".[5]

[29] However, I am also assisted by the dicta of Fitzgerald J in the *Minister of Education*, although it relates to practice under the HCRs.[6]

[30] After reviewing such case law as existed in the High Court, the Court outlined its views with regard to three discrete categories.

[31] The first of these was reply evidence that was repetitive of evidence in primary briefs. The Judge said this was perhaps the least "objectionable" type of non-complying reply evidence since it did not itself require a defendant to confront new arguments or factual matters. She observed that a Court is alive to the fact that repeating points already made does not make them any more persuasive or true.[7]

[32] The Judge went on to note that the main issue arising from this type of problem is the prolonging of proceedings. In that case, it was not suggested that the allocated trial time would be exceeded. She did not make a blanket ruling to the effect that such evidence would not be read, although she encouraged the plaintiff in that case to review its reply evidence in light of her observations.[8]

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5 *Lyttelton Port Company Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [53].
6 *Minister of Education v Carter-Holt Harvey Ltd,* above n 2.
7 At [141].
8 At [142].

[33] The second category she identified was reply evidence which did not address new matters but expanded on or bolstered topics already discussed in primary briefs. She indicated that she had considered whether evidence of this nature ought to be struck out. On balance, she decided not to do so. At the stage she was considering the matter, which was pre-trial, a cautious approach needed to be adopted. One of the reasons that gave pause was the fact that the challenged evidence may well have been elicited in cross-examination in any event, through defence counsel complying with their duty under s 92 of the Evidence Act 2006.[9]

[34] Later she said that the defendant may well need to lead some additional evidence from witnesses to respond to matters in the reply briefs which expand, or build on material addressed in the primary briefs, but which did not go as far as raising wholly new topics. She raised the possibility of this particular problem being able to be addressed in a costs order in due course.[10]

[35] The final category was reply evidence which raised new matters. In the case before the Court, an example was late testing evidence. It was the Court's view that this was perhaps the most egregious form on non-complying reply evidence and could give rise to real prejudice to a defendant.[11]

[36] In my view, the three categories are helpful in grouping the objections raised and provides a way forward in the present case. I also agree that the categories I have referred to so far indicate escalating seriousness.

[37] I also consider that while some issues on the face of it may exceed the proper boundaries of reply evidence, they may be less offensive when considered in context. And at the end of the day, admissibility is to be resolved as a matter of equity and good conscience.

[38] In addition to the problems already discussed, objections are raised on other grounds, including as to opinion evidence, hearsay evidence, speculation, and the giving of submission. These concepts are well understood and do not require

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9 At [148].
10 At [150].
11 At [169].

elaboration here. But, like the objections I have already discussed, they too must be evaluated as a matter of equity and good conscience.

[39] Any objection has to be measured against the primary evidence of the witness in question, against the evidence of the defendant which pertains to the particular issue (if it is referred to), and of course in relation to the content of the proposed reply.

[40] But the Court must also take into account the processes of cross-examination which may result in the evidence which is apparently objectionable being elicited in any event; the Court should also consider whether the prejudice referred to for the defendant can be addressed by the standard process adopted in this Court of permitting supplementary oral evidence by the defendant on the issues of concern, within reason.

[41] In this case, there are to be multiple witnesses on both sides. Comprehensive evidence was filed for the plaintiffs at the outset, in some 15 briefs; the case was not presented on a barebones basis. There are also many volumes of documents in the common bundle – all of which go to make up the factual matrix which the Court will ultimately be required to consider, pertaining to a chronology of some 16 years. Some of the evidence relates not only to particular events, but to the perceived effects of those events. The circumstances are difficult, and not necessarily easy to explain, for either party.

[42] The Court must inevitably be cautious, therefore, in concluding that passages of a reply brief are inadmissible. An unduly clinical approach to the objections raised in the present case, is not necessarily appropriate given the present context. An approach must be adopted which is fair for both parties.

[43] While the High Court authorities to which I have been referred are of assistance, it is to be noted that orders to strike out evidence were not in fact made. Indeed, in one of them, *SCC (NZ) Ltd*, where non-compliance appears to have been particularly egregious, Jagose J said he had given serious consideration to not permitting a particular witness to read his statements, including a reply statement, and instead that his evidence be led. One of the reasons he did not do so was because of

the "indeterminate consequences" for the conduct of a "four-year-old proceeding three-week hearing", a problem which resonates here.[12]

[44] I am also mindful of the observations made by Hammond J in *Air Chathams, v Civil Authority of New Zealand*. When dealing with the pros and cons of determining admissibility challenges at an early stage he said that a judge could never be completely confident that something might not be useful, or that matters have been misperceived at the time when objections are considered:[13]

> ... Judges do not lightly turn away from the seat of justice matters of "evidence" which one side would like to have before the Court. This leads to a sense of grievance on the part of plaintiffs that they have not had their full day in Court.

[45] That is not to say that the objections raised by the defendant have no merit and/or should not be entertained. Multiple individual judgement calls are required. Prejudice has to be weighed in each instance. Assessments of fact and degree are required. But I am satisfied that the cross-examination of the plaintiffs' witnesses, and supplementary evidence by witnesses for the defendant will in many instances alleviate prejudice. The length of the hearing is of course a concern, but that issue may have to be considered as an issue of costs as recognised in s 9.7(5) of the HCRs.

My approach with regard to each of the nine reply briefs

[46] In light of the foregoing analysis, I will be issuing a copy of the schedule prepared by both counsel which summarises their respective positions for each individual, annotated with my rulings according to the following categories:

Category A: Objection allowed due to undue prejudice to the defendant, or for such other reason as may be indicated.

Category B: Objection disallowed on the ground that although the text is repetitive of evidence in the primary brief of

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12 *SCC (NZ) Ltd*, above n 4, at [208].
13 *Air Chathams Ltd v Civil Aviation Authority of New Zealand* (2003) 16 PRNZ 676 at [48].

the witness, it can be the subject of cross-examination of that witness, and/or by the giving of supplementary evidence-in-chief of a relevant defence witness.

Category C: Objection disallowed on the ground that although the text expands or bolsters the evidence contained in the primary brief of the witness or of another witness, it can be the subject of cross-examination of that witness, and/or by the giving of supplementary evidence-in-chief of a relevant defence witness.

Category D: Objection disallowed on the ground that although it raises a wholly new matter, it can be the subject of cross-examination of that witness, and/or by the giving of supplementary evidence-in-chief of a relevant defence witness.

Category E: Objection disallowed on the ground that although it is said to give rise to hearsay, an opinion being given by the witness, speculation, or submission, it can be the subject of cross-examination of that witness, and/or by the giving of supplementary evidence-in-chief of a relevant defence witness.

[47] My ruling with regard to the intended reply evidence of the witnesses involved will be issued before each gives their evidence.

[48] Costs are reserved.

B A Corkill
Judge

Judgment signed at 8.30 am on 21 February 2023