IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 50
EMPC 334/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for directions as to the nature and scope of the hearing
AND IN THE MATTER OF	an application for further and better particulars of the statement of claim
BETWEEN	ATLAS CONCRETE LIMITED Plaintiff
AND	SHANE HADFIELD Defendant

Hearing:	14 February 2024 (Heard at Wellington via AVL)
Appearances:	J D Turner and H Wijewardhana, counsel for plaintiff P Cranney and G Liu, counsel for defendant
Judgment:	22 March 2024

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for directions as to the nature and scope of the hearing)
(Application for further and better particulars of the statement of claim)

Introduction

[1] The plaintiff has filed a challenge against a determination of the Employment Relations Authority finding that the defendant was unjustifiably disadvantaged and

unjustifiably dismissed.[1] The finding of unjustified disadvantage was based on defects in the process leading up to Mr Hadfield's suspension which were not minor and which resulted in him being treated unfairly.[2] Similarly the Authority found that the process leading up to Mr Hadfield's dismissal was procedurally flawed and had led to his dismissal being unjustified. The Authority went on to find that Mr Hadfield's dismissal was substantively justified.[3]

[2] Mr Hadfield was awarded $7,310.10 in lost remuneration, directed at both the disadvantage and the dismissal.[4] The Authority found that he had contributed to the situation giving rise to his established personal grievance and made a reduction of 20 per cent of the remedies he would otherwise have been entitled to under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).[5]

[3] The plaintiff elected to pursue a challenge to parts of the Authority's determination, and did not seek a hearing de novo (as it is entitled to do under s 179(3)(b) of the Act). The defendant wishes to argue that the Authority erred in respect of various findings it made. He did not file a challenge to the Authority's determination within the 28-day timeframe for doing so.[6] Rather, a statement of defence to the plaintiff's statement of claim was filed,[7] which contained a positive defence.[8]

[4] The plaintiff submits that the defendant has made a procedural error in light of the matters he seeks to take issue with. The defendant, it is said, should have filed a challenge of his own (effectively a cross-challenge), is now out of time and requires leave from the Court, which it says it may oppose. The defendant disagrees with the contention that there was only one procedural route available. He says that he was entitled to raise a positive defence and that the plaintiff is now out of time for filing a reply to it, and accordingly requires leave (which may be opposed).

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1 *Hadfield v Atlas Concrete Limited* [2023] NZERA 470 (Member Beck).
2 At [46] and [61].
3 At [68].
4 At [71].
5 At [74].
6 Employment Relations Act 2000, s 179(2).
7 Employment Court Regulations 2000, reg 19(2).
8 Regulation 20(1)(b)(ii).

[5] In addition, the defendant has filed an application for directions which raised a number of issues about the way in which the statement of claim is pleaded. It is said that it is prolix and inadequate and directions are sought requiring it to be repleaded. The plaintiff opposes the application and says that the statement of claim is compliant.

[6] Finally, the defendant seeks orders from the Court as to the nature and extent of the hearing, which the plaintiff says would improperly broaden the hearing beyond its non-de novo challenge. The defendant says that the plaintiff should have filed a response to the orders that it sought, failed to do so and now requires leave (which may be opposed).

[7] As will be evident, the issues identified by the parties are interdependent; much depends on what the proper scope of the hearing will be, in terms of the issues and evidence that will be before the Court. But the answer to that question is itself dependent on the pleadings, which are in a state of flux. As Mr Cranney (counsel for the defendant) observed, the provisions of the Act relating to challenges are not straightforward and have given rise to ongoing uncertainty and confusion over the years. While he suggested that it might be timely for the Court to "work [the ongoing uncertainty and confusion] out", there is a limit to what the Court can do. Ultimately the Court's task is to interpret and apply the legislation, while seeking to explain it in a readily digestible way. That is the task I now turn to.

The legal framework for pleadings

[8] I start with the wording of s 179 of the Act: "Challenges to determinations of Authority". It provides that:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
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> (2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.

> (3) The election must—
>
> (a) specify the determination, or the part of the determination, to which the election relates; and
>
> (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a hearing de novo).
>
> (4) If the party making the election is not seeking a hearing *de novo*, the election must specify, in addition to the matters specified in subsection (3),—
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> (a) any error of law or fact alleged by that party; and
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> (b) any question of law or fact to be resolved; and
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> (c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
>
> (d) the relief sought.
>
> …

[9] The following points emerge from the provision. A party who is dissatisfied with a determination of the Authority has a statutory right to pursue a challenge to the Court. That is called an election (which I will refer to as an election to challenge). When a party makes an election to challenge, they must file a statement of claim. The statement of claim must be in the prescribed form. The election to challenge can be against the whole of the Authority's determination or part of the Authority's determination.[9]

> [22] There are two kinds of challenges — those that are required by the plaintiff to be a full hearing of the entire matter (a hearing de novo), and those that are not so required. In that latter event the plaintiff must give additional information for the purpose of making it clear to the Court and to other parties what are the issues involved and the Court must direct, in relation to the issues involved, the nature and extent of the hearing. As stated, the parties to this case were in substantial agreement about the proper scope of the hearing and what they proposed was acceptable to the Court.

[10] The election to challenge must specify the determination or the part of the determination to which it relates. The plaintiff's statement of claim specifies that it is

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[9] As explained in *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 (EmpC).

directed at parts of the Authority's determination. At this point it suffices to note that there is a dispute as to what parts of the determination the plaintiff's statement of claim is directed at.

[11] The election to challenge must also state whether or not the party making the election is seeking a full hearing of the entire matter (a de novo hearing).

[12] The plaintiff's election to challenge states that a de novo hearing is not sought.

[13] If the party making the election to challenge is not seeking a de novo hearing, the election must specify the additional matters set out in s 179(4)(a)-(d), namely any error of fact or law alleged; any question of law or fact to be resolved; the grounds on which the election is made with due particularity; and the relief sought. The defendant says that the statement of claim is defective in each of these respects. I return to an assessment of this complaint below.

[14] Where a de novo hearing is not sought, the defendant may, in addition to complying with the requirements relating to statements of defence set out in reg 20 of the Employment Court Regulations 2000 (the Regulations), include in the statement of defence "an indication of the defendant's view of the appropriate nature and extent of the hearing."[10] When a defendant has filed a statement of defence that includes a response, the plaintiff may file a further document replying to the defendant's response. Any such reply must be filed within 14 days. The Court must then give a direction as to the nature and extent of the hearing under s 182(3).[11]

[15] In this case, the defendant set out his views as to the appropriate nature and extent of the hearing in his statement of defence (under the heading "Scope of Hearing"). The plaintiff evidently has concerns about the proposed nature and extent of the hearing of its challenge but has not filed a reply as required by the Act. It now seeks to do so, by way of an application for leave to extend time.

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10 See reg 21: "Response where hearing de novo not sought."
11 See reg 21(5).

The concerns raised by the parties

[16] It is convenient to start with the adequacy of the plaintiff's statement of claim. Pleading perfection is not required. In this case, I accept that some matters are included in the statement of claim that are best addressed elsewhere: some irrelevancies (the parts of the determination the plaintiff does *not* take issue with), some argument and some evidence. However, when read in its entirety it adequately sets out the parts of the determination the plaintiff wishes to bring before the Court on its challenge. Namely, the plaintiff challenges particular factual and legal findings said to support the Authority's conclusion that the defendant's dismissal was procedurally unjustified and that remedies should flow from that overarching finding. Mr Turner, counsel for the plaintiff, confirmed the position in respect of the plaintiff's challenge during the course of the hearing.

[17] I consider the statement of claim to be adequately pleaded. The defendant is sufficiently on notice of the claim and the basis for it. I do not propose to direct a repleading of the statement of claim.

[18] The Court has previously dealt with the procedure relating to positive defences in *Stormont v Peddle Thorp Aitken Ltd*.[12] As the Court observed, there is no specific procedure provided for within the Act or the Regulations. The High Court Rules 2016 deal with such matters (called affirmative defences) and these Rules apply via reg 6.

[19] Mr Turner makes the point that positive defences are not an alternative to challenges. I agree. If it were otherwise the 28-day timeframe for challenging a determination would be redundant.

[20] Mr Cranney submits that the defendant's positive defences are appropriately pleaded having regard to the matters raised within them.

[21] The issue is resolved by a consideration of what the defendant is seeking to do via its pleadings. Regulation 19 is clear. It states that a party intending to defend a

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[12] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12, [2017] ERNZ 51.

proceeding is obliged to file a statement of defence. The statement of defence is directed at the particular allegations contained within the statement of claim. Where an election relates to part, but not all, of a determination it is that part that is relevant in terms of any statement of defence.

[22] A positive defence, like an affirmative defence, can rely on material outside the pleadings and assert facts which, if true, would defeat the plaintiff's claims even if the allegations in the statement of claim are true.[13] In this case the allegations in the statement of claim are directed at alleged errors of fact and law made by the Authority in reaching its determination that the dismissal was procedurally unjustified and as to the remedies that flowed from that finding, which are also said to be in error.

[23] During the course of argument I understood Mr Cranney to accept the proposition that a positive defence is directed at the claims specified in the statement of claim. A challenge to the lawfulness of the plaintiff's drug and alcohol policy, pleaded in the statement of claim as one of the matters the Authority erred in interpreting, would fall into the positive defence category. A point of law relevant to a determination of the plaintiff's claim might also be appropriately raised by way of positive defence.

[24] Mr Cranney spent some time in oral submissions contending that a positive defence is an appropriate vehicle to argue that the dismissal was substantively justified in spite of the statement of claim referring only to procedural justification. There is some strength in this argument given the wording of s 103A of the Act, which is focused on asking, and answering, whether the employer's actions in totality were what a fair and reasonable employer could have done in the circumstances.

[25] In this case, however, a number of matters are set out in the positive defence which clearly go beyond the claims made in the statement of claim; the most notable one is the contention that the Authority erred in fact and law in finding that the

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[13] Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR5.48.15].

defendant's suspension was justified. That is a matter that is appropriately pursued by way of cross-challenge. Leave is now required to do so.

Where does all of this lead?

[26] As discussed during the course of argument, if the defendant seeks leave to file a cross-challenge in respect of the Authority's findings as to the justification of the suspension and as to the substantive justification for the dismissal, and if leave is granted, the defendant will be entitled to seek a hearing de novo or a non-de novo hearing. In circumstances where all matters are effectively before the Court, the Court has a discretion, under s 182(3)(b), to direct the nature and extent of the hearing. It is not uncommon for this to result in a direction that the hearing will be de novo.[14]

[27] It will be apparent that I regard it as premature to deal with issues relating to the nature and scope of the hearing. That is because it may, depending on the outcome of any application for leave, be a hearing directed at both parties' challenges. The issue may drop away at that point. For the same reason it is premature to deal with the plaintiff's concerns about the adequacy of the defendant's statement of defence as currently pleaded. Both matters are accordingly adjourned, and may be brought back before the Court, as appropriate, in due course.

[28] Counsel may wish to take the opportunity to discuss matters to see whether agreement can be reached. If not, the following directions are made. The defendant should file and serve any application for leave to extend time to file a challenge within 10 working days of the date of this judgment; the plaintiff will have a further 10 working days to file any notice of opposition. The application and notice of opposition should be accompanied by any affidavits that the respective party wishes to rely on, together with any submissions. The defendant will then have a further five working days to file and serve any reply. I then propose to deal with any application for leave on the papers. Further timetabling directions would then need to be made in respect of the residual issues identified in this judgment.

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[14] See for example *Hayne v ASG* [2014] NZEmpC 113, [2014] ERNZ 701.

[29] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2.45 pm on 22 March 2024