IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2025] NZEmpC 8
EMPC 60/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to adduce further evidence
BETWEEN	CARL BERRYMAN Plaintiff
AND	FONTERRA COOPERATIVE GROUP LIMITED Defendant

Hearing: On the papers

Appearances: E Lambert, advocate for plaintiff
R Rendle and M Austin, counsel for defendant

Judgment: 24 January 2025

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M S KING
(Application to adduce further evidence)

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[1] An application has been advanced by the plaintiff to admit further evidence in these proceedings. The application was filed after the hearing had been part heard; both parties' evidence in chief and cross examination had been completed, save for the evidence of the defendant's expert witness, Professor John Fraser. Professor Fraser was not available to give evidence in person during the November 2024 hearing. The parties agreed to Professor Fraser giving evidence at a later date (28 February 2025). On 11 November 2024 the plaintiff's representative confirmed that the plaintiff's case had been concluded, following the completion of Karin Berryman's evidence. On

6 December 2024 the plaintiff applied to adduce further evidence. The defendant opposes the application.

[2] Both parties agree that the Court has jurisdiction to make the orders sought. Where they part company is the way in which the Court's discretion ought to be exercised.

[3] The starting point for determining issues relating to the admission of evidence, including after the hearing but prior to judgment, is s 189 of the Employment Relations Act 2000. It provides:

> **189 Equity and good conscience**
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> (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
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> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[4] It is well established that the Court has jurisdiction to admit evidence at any time up to judgment being delivered. Section 98 of the Evidence Act 2006 reflects the position:

> **98 Further evidence after closure of case**
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> (1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the permission of the Judge.
>
> (2) In a civil proceeding, the Judge may not grant permission under subsection (1) if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.
>
> …
>
> (5) The Judge may grant permission under subsection (1),—
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> (a) if there is a jury, at any time until the jury retires to consider its verdict:
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> (b) in any other proceeding, at any time until judgment is delivered.

[5] The Employment Court acknowledged in *Keighran v Kensington Tavern Ltd* that while s 98 and the cases decided under it are helpful in considering the approach

that might usefully be adopted, consideration of whether or not evidence and/or information should be "admitted", "accepted" or "called for" in the Employment Court will be informed by a broader inquiry than simply whether the proposed evidence and/or information would be admissible in the High Court. It is the twin principles of equity and good conscience which must be looked to for guidance in exercising the Court's discretion.[1]

[6] Ultimately, it is for an applicant to satisfy the Court that evidence not produced at a hearing ought to be admitted after their case has closed. While the discretion to admit further evidence is broad, the power is used sparingly for obvious policy reasons. Policy concerns, which include fairness, the interests of justice and avoiding unnecessary delay in bringing proceedings to a conclusion, apply with equal force in this Court.[2]

[7] The evidence that the plaintiff wishes to adduce at this late stage are four affidavits. The first two affidavits are from the plaintiff and Thomas Callesen, dated 21 November 2024. These affidavits relate to when the defendant ceased conducting rapid antigen testing at its workplaces, following the plaintiff's dismissal. The plaintiff was aware of the defendant's position; the defendant's witnesses had given evidence in the Employment Relations Authority (the Authority) investigation and in the Court that rapid antigen testing continued to be carried out at its workplaces to this day. The plaintiff's evidence in the Authority and in the Court was that the defendant stopped undertaking rapid antigen testing very soon after the plaintiff's employment was terminated on 1 April 2022. A further two affidavits from the plaintiff and Mr Callesen, dated 19 December 2024. These affidavits relate to the above and outline the circumstances giving rise to Mr Callesen now agreeing to provide affidavit evidence in this proceeding.

[8] On 12 November 2024, after hearing the defendant's witnesses give evidence at the hearing that rapid antigen testing in the workplace continued following the plaintiff's termination of employment, the plaintiff contacted former colleagues. The plaintiff spoke with Mr Callesen who had ceased working for the defendant in May

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1 *Keighran v Kensington Tavern Ltd* [2023] NZEmpC 196 at [5].
2 At [6].

2024. Mr Callesen advised that he was prepared to provide an affidavit that said the defendant abandoned its rapid antigen testing policy around July 2022. The plaintiff deposes that he was not aware that Mr Callesen was willing to provide an affidavit until he spoke with him on 12 November 2024.

[9] The plaintiff submitted that the affidavit evidence he is seeking to adduce is relevant and central to the issues before the Court, namely whether the defendant's actions and how they acted were what a fair and reasonable employer could have done in all the circumstances. The plaintiff submits that, given the relevance of the evidence and the impact it could have on the outcome of the proceeding, it is in the interests of justice for the Court to exercise its discretion and allow the plaintiff to adduce this further evidence.

[10] The defendant opposes the application, submitting that the plaintiff has not exercised due diligence. The defendant points to the plaintiff being put on notice of its evidence on rapid antigen testing as far back as October 2023, when the defendant's witnesses gave evidence at the Authority's investigation meeting. The defendant states it filed briefs of evidence in advance of the Court hearing and notes that its evidence on this point did not change at the hearing. The defendant also submits that the plaintiff has not adequately explained why he did not contact Mr Callesen earlier. Mr Callesen had finished working for Fonterra in May 2024; this was in advance of the defendant filing its briefs of evidence and well in advance of the November 2024 hearing. The defendant disputes that the evidence the plaintiff proposes to adduce is central to the issues before the Court, on the basis that the evidence relates to events that occurred around three months after the plaintiff's dismissal. It also submits that the admission of the evidence would unfairly prejudice the defendant.

[11] I find that the plaintiff has failed to adequately explain why Mr Callesen's evidence was not produced at an earlier stage. The plaintiff's own evidence is clear that he made no attempt to contact Mr Callesen prior to 12 November 2024. He does not explain why he did not attempt to contact him at an earlier stage.

[12] I also consider the potential impact of admitting the evidence at this late stage. In particular, if the affidavits were adduced, the defendant would lose its right to

provide evidence in reply and cross-examine the plaintiff and Mr Callesen on the content of their affidavits. Those issues could, of course, be addressed when the hearing is reconvened by providing an opportunity for the plaintiff and Mr Callesen to give their evidence in person and be cross-examined on it, and for the defendant to similarly call witnesses to give evidence in reply. There is, however, a need to weigh issues of use of Court time and the administration of justice more generally into the mix.

[13] Further, the proposed evidence relates to events that occurred around three months after the plaintiff's termination of employment, which I consider reduces the relevance to the central issue of whether the defendant's actions were what a fair and reasonable employer could have done at the time of termination. Overall, I am not satisfied that a sufficient basis has been made out for the exercise of the Court's discretion in the plaintiff's favour; it would not be consistent with the guiding principles of equity and good conscience to allow the plaintiff to adduce the affidavits in the particular circumstances and at this late stage, and I decline to do so.

[14] The defendant is entitled to costs on this application which are reserved.

M S King
Judge

Judgment signed at 4.15 pm on 24 January 2025