Employment Court of New Zealand

Hutton v Provencocadmus Limited (in receivership) [2012] NZEmpC 127 (31 July 2012)

Last Updated: 13 August 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 127

ARC 92/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF application for leave

BETWEEN AYLA HUTTON AND 111 OTHERS Plaintiff

AND PROVENCOCADMUS LIMITED (IN RECEIVERSHIP)

First Defendant

AND AND PROVENCO PAYMENTS LIMITED (IN RECEIVERSHIP) Second Defendant

Hearing: 30 and 31 July 2012 (Heard at Auckland)

Counsel: Philip Skelton and Anja Borchardt, counsel for plaintiffs

Tim Clarke counsel and Susannah Maxfield for defendants

Judgment: 31 July 2012

ORAL INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] This proceeding is a de novo challenge to a determination of the Employment

Relations Authority dated 8 November 2011.[1] The statement of claim was filed on 6

December 2011. It pleads that each of the plaintiffs was jointly employed by the first defendant ProvencoCadmus Ltd (PCL) and the second defendant Provenco Payments Ltd (PPL) having regard to the real nature of the relationship (pursuant to s 6 of the Employment Relations Act 2000). The sole issue in these proceedings is

the identity of the plaintiffs' former employer prior to receivership.

[2] A statement of defence was filed on 27 January 2012. The defendants contend that the plaintiffs were solely employed by the first defendant. A directions conference was convened on 9 March 2012 before Judge Travis. At that stage both parties confirmed that they were ready for trial and that there were no outstanding interlocutory issues.[2]

[3] Counsel were agreed that the proceedings currently before the Court would deal with the claims of only six of the 112 plaintiffs and would be in the nature of a test case. The intention was that the Court's judgment in the test case now before the Court would achieve savings in Court time and judicial resources and may lead to the parties being able to settle the remaining 106 claims or at least isolate and narrow the issues. Counsel agreed at the directions conference that it would be appropriate to allocate a five day fixture although it was anticipated that only four days would be required. Five days were

accordingly allocated, with the agreement of counsel, commencing 30 July.

[4] Despite counsels' confirmation that there were no outstanding interlocutory matters, an amended statement of claim pleading a new cause of action was filed effectively one day out from trial. That was followed with an application for leave, if required. The defendants oppose the grant of leave.

[5] The plaintiffs are seeking to amend the statement of claim to incorporate a new cause of action relating to an alleged breach of s 12 of the Fair Trading Act by the first defendant. Mr Skelton described it as an important cause of action which he was obliged, on behalf of the plaintiffs, to pursue.

[6] The proposed cause of action is directed at a document that was posted on the company's website and which purports to set out differences between the old and new individual employment agreement being offered in the context of a restructuring then taking place (the "key differences" document). The plaintiffs wish to advance an argument that the documentation was misleading in the sense that it allegedly

contained a significant omission, namely changes to the identity of the employing

company and the plaintiffs were effectively lulled into a false sense of security about the supposedly minor nature of the changes to the new agreement.

[7] There appears to be no dispute that the author of the document is one of the plaintiffs, Mr Corrick, who is intending to give evidence in these proceedings. That raised issues which I return to later.

[8] Mr Skelton, on behalf of the plaintiffs, initially suggested that no leave was required to file an amended statement of claim in the Employment Court, essentially on the basis that there is no comparable setting down procedure in this Court on which the relevant High Court Rules (r 7.18) is predicated. If that was correct it would undermine the policy rationale for the requirement for leave to be obtained and would enable a party to amend their pleadings at any time they wish.

[9] I consider that the High Court Rules apply by analogy.[3] Following discussion, counsel was content to rely on the merits of the application. Mr Skelton submitted that it was in the interests of justice that leave be granted to avoid the need for the plaintiffs to issue fresh proceedings in relation to the Fair Trading Act claim and that the amended pleading would not cause undue prejudice to the defendants because the allegations are based on the interpretation of, and inferences to be drawn from, a document that has been known to the parties for a considerable period of time, and which was before the Employment Relations Authority.

[10] The reason for the delay in pursuing the proposed new cause of action is said to be counsel's belated appreciation of the true significance of the document, sparked by preparation of the plaintiffs' written opening submissions and having reflected on a brief of evidence filed by the defendants and served on 16 July 2012. Counsel submitted that if leave was granted it would not cause any significant prejudice for the defendants or delay the hearing of the matter.

[11] As I say, the defendants opposed the grant of leave. Mr Clarke submitted that no proper basis had been laid for the application and that there was no evidence

before the Court explaining the delay in pursuing it. It was submitted that the

amended pleading is statute barred on the basis that it falls outside the three year timeframe for pursing a claim provided for within the Fair Trading Act. It was further submitted that the remedies sought in relation to the proposed new cause of action are misconceived and that the amendment is not necessary to do justice between the parties because the real issue, namely who is the employer or employers, is already squarely before the Court and the proposed new cause of action is an unnecessary distraction and does not necessarily lead to a conclusion that the second defendant, PPL, was the plaintiffs' employer.

[12] A number of factors are relevant to a consideration of whether leave ought to be granted to amend a claim after setting down:[4]

- Is it in the interests of justice?
- Whether the other party will be significantly prejudiced; Whether it is likely to cause significant delay.

[13] I was referred to a judgment of Chief Judge Colgan in *Corrections Association of New Zealand Inc*[5] where His Honour confirmed that leave to amend proceedings at a late stage is a discretionary decision having regard to whether such an amendment is necessary to determine the real issue between the parties and does not result in injustice to other parties.[6] I also consider it relevant to have regard to the broader interests of the community in terms of preserving the allocation of Court time and ensuring the orderly disposition of proceedings.

[14] In *Corrections Association of New Zealand* the Court was prepared to grant leave and to address any disadvantage to the defendant by way of costs.[7] Mr Skelton referred to the Court's observation that under the Employment Relations Act, there

is

a particular statutory scheme and a legislative emphasis on resolving employment

relationship problems on their merits rather than by the formulas by which they may have been presented by either or both parties. Chief Judge Colgan observed that although adversarial in nature, this is not traditional litigation based on formal and prescriptive pleadings.[8]

[15] Both counsel agreed that ultimately a balancing exercise was required; having regard to the general concern that parties to litigation comply properly with the procedural requirements and the particular interests in each case, ensuring that the case is justly determined.

[16] Plainly there must be some basis or material before the Court on which the Court's discretionary power to grant an application can be based.[9] Mr Skelton explained the reasons underlying the delay in pursuing the application, confirming that they lay squarely at his door. I do not consider that the absence of an affidavit to this effect, which Mr Skelton offered to file if required, is fatal to the application. The reasons for the delay have been explained and drawn to the Court's attention.

The document at issue was before the Authority, and was, it appears, the subject of evidence. It is at a very belated stage that it has occurred to counsel that it might form the basis of a new cause of action, but I accept Mr Skelton's explanation that it had simply not occurred to him earlier and that the preparation of the summary of legal argument in opening and the receipt of one of the defendants' briefs of evidence in relation to a witness who had not given evidence before the Authority on

16 July (so shortly before the hearing date) prompted consideration of the new proposed cause of action.

[17] I accept that if the proposed new cause of action is time barred the application must be dismissed.[10] Section 43(5) provides that a claim for contravention of the Act must be brought within three years after the date on which the loss or damage or the likelihood of loss or damage was discovered or ought reasonably to have been discovered. The defendants submit that the loss or damage accrued when the plaintiffs entered into an employment agreement with a different

employer as a result of the alleged breach and that the plaintiffs knew about the

alleged misrepresentation when they signed the new employment agreements in late

2008.

[18] I consider there to be force in Mr Skelton's submission that the date from which the three year time period ran is the date on which the plaintiffs' loss or damage or likelihood of loss or damage was discovered or was reasonably discoverable, being when the plaintiffs say they received advice from the receivers in relation to their claims and the identity of their employer and who that was assumed significance (although this will be a matter of fact requiring determination).

[19] Mr Clarke submitted that as one of the plaintiffs prepared the document at issue it would be inequitable for him to rely on his own default in pursuing the cause of action against the defendants. As was raised with counsel who appeared this afternoon for Mr Corrick, Mrs Reed, it seems most unusual for the plaintiff, Mr Corrick, to be pursuing a claim based on a cause of action relying effectively on his own default. The point that Mr Clarke raises in relation to Mr Corrick does not, however, deal with the position in relation to the remaining plaintiffs.

[20] The central issue in this case is the identity of the employer or employers. Mr Clarke submitted that the new cause of action will not add to that issue and rather will have a distracting effect. He submitted that the remedies sought were deficient. For example, voiding of the contract with the first defendant would not logically lead to the second defendant being found to be the employer. However, if the plaintiffs succeed on their proposed cause of action, it does open up a range of possible remedies for them, including variation, which on the current pleadings are not available and which may well affect the identity issue of who was (and was not) the employer/employers, particularly if the contract with the first defendant is held to be void. I accept that the remedies sought in the context of the proposed new cause of action are likely to raise difficult issues. However, in my view, such issues do not of themselves preclude the grant of leave.

[21] The documentation at issue has been known to the parties for some time and, as I say, was before the Authority. Mr Clarke did not suggest that a significant amount of new evidence would be required to respond to the proposed new

pleadings. He did not suggest that from the defendants' perspective an adjournment

would be required. Indeed he made it plain that an adjournment was not sought.

[22] Plainly the proposed new cause of action would lead to some additional hearing time, including by way of cross-examination. And both counsel would need to address the Court on the matters arising in terms of the new pleadings by way of submissions. However, the estimated hearing time of both counsel appears to have been four days and five days is allocated on a "just in case" basis. If further time is required there are a range of options available, including the filing of written legal submissions following hearing.

[23] Prejudice in relation to additional costs incurred by the defendants can be dealt with in terms of a costs order. Mr Clarke initially submitted that if the application for leave was granted, the defendant ought to be given an opportunity to file a statement of defence and a counterclaim against the plaintiff who drafted the document at issue, essentially for breach of his obligations as an employee. I accept that the defendants must have a reasonable opportunity to respond to the new claim and Mr Skelton did not suggest otherwise.

[24] A further issue arose in relation to the position of Mr Corrick, the plaintiff who appears to have drafted the key differences document. He is not one of the six lead plaintiffs but he is a plaintiff in these proceedings and is due to give evidence. As Mr Clarke pointed out during the course of argument on the leave application, it is necessary for him to have the opportunity to seek separate advice given the position that the proposed amendments to the pleadings potentially puts him in. Mr Skelton accepted that Mr Corrick would need to have the opportunity to seek independent legal advice also (and he has now done so).

[25] Mr Clarke raised issues relating to delay. He accepted that a statement of defence could be filed promptly (and one has now been filed). He advised the Court that if leave was granted the defendants would not be wishing to pursue a counterclaim in the context of these proceedings relating to the six test plaintiffs but would reserve their position in relation to the non-test case plaintiffs, including Mr Corrick, or to bring an independent claim subsequently. He pointed out that the

receivers have duties to secured creditors who are having to wait until these matters are determined and that they are understandably concerned about any delay.

[26] I am sympathetic to the position that the defendants find themselves in. I accept that it is in the parties' interests to bring these proceedings to a conclusion, and in the interests of secured creditors as Mr Clarke submits. The point that concerned me most acutely was that those interests must be balanced against the overall interests of justice, including having regard to Mr Corrick's position. I accordingly stood the matter down. Mr Corrick was given the opportunity to obtain independent legal advice and counsel has now appeared before the Court on his instructions. He has instructed counsel that he wishes the proceedings to proceed today and that he is willing to give evidence tomorrow. He is aware of the possibility of the defendants taking action at some later date.

[27] In the circumstances and weighing all matters before me, I am prepared to grant the application advanced on behalf of the plaintiffs to amend their statement of claim. The defendants have now filed a statement of defence to the amended statement of claim. They have indicated that they do not wish to file a counterclaim but have reserved their position in relation to other plaintiffs.

[28] Costs are reserved.

Christina Inglis

Judge

Oral Interlocutory Judgment delivered at 2.40pm on 31 July 2012

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[1] [2011] NZERA Auckland 482.

[2] At [3] of the Minute that was issued by His Honour following that conference.

[3] Reg 6(2)(a)(ii) of the Employment Court Regulations 2000.
[4] *Body Corporate 177519 v Auckland City Council* HC Auckland CIV-2005-404-5563, 24 May 2011 at [12].

[5] *Corrections Association of New Zealand Inc v Chief Executive in respect of the Department of*

Corrections [2004] NZEmpC 137; [2004] 2 ERNZ 277.

[6] At [9].

[7] At [10].
[8] At [7].
[9] *Fordham v Xcentrix Communications Ltd* [1996] NZHC 1268; (1996) 9 PRNZ 682 (HC) at 685.
[10] Rule 7.77(2)(a).

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