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McKeich v DDUP NZ Limited [2021] NZEmpC 51 (22 April 2021)

Last Updated: 30 April 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[\[2021\] NZEmpC 51](#)

EMPC 342/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND IN THE MATTER	of an application for further and better particulars
BETWEEN	SOPHIE MCKEICH First Plaintiff
AND	SHANE HANSON Second Plaintiff
AND	DDUP NZ LIMITED First Defendant
AND	YONG LIU Second Defendant

Hearing: (on the papers)

Appearances: G Lloyd, counsel for plaintiffs No
appearance for first defendant
R Fletcher, counsel for second
defendant

Judgment: 22 April 2021

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

(Application for further and better particulars)

Introduction

[1] Mr Yong Liu, the second defendant, seeks further and better particulars of an amended statement of claim in which claims of an enforcement nature are brought by Ms McKeich and Mr Hanson against Mr Liu.

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[2] The proceeding has its genesis in a series of determinations of the Employment Relations Authority (the Authority).

[3] The first dealt with personal grievance claims brought by both Ms McKeich and Mr Hanson on the grounds of unjustified dismissal by DDUP NZ Ltd (DDUP). The applications succeeded, with awards for lost and unpaid wages being made, compensation for humiliation, loss of dignity and injury to feelings being awarded, along with a contribution to costs.¹ There was no appearance by the company at the relevant investigation meeting.

[4] Ms McKeich and Mr Hanson then brought an application for a compliance order against DDUP.² The Authority was satisfied none of the above sums had been paid, and a compliance order was granted. A penalty was also sought, but the

Authority considered it had no jurisdiction to make such an order. It did, however, award indemnity costs. Again, DDUP did not participate.

[5] By September 2019, neither the original orders nor the compliance order had been satisfied.

[6] Ms McKeich and Mr Hanson therefore brought a yet further proceeding, this time citing not only DDUP as first respondent, but also Mr Liu as a second respondent. The relief sought was a direction that the Authority "... pierce the corporate veil and have the second respondent named as the true employer for the purposes of compliance..." with the two previous determinations.

[7] A subsequent application, brought by Ms McKeich and Mr Hanson, requested the Authority to remove the application to the Employment Court, on the grounds that an important point of law was raised.

[8] In a determination dealing with the application for removal, the Authority stated it was satisfied both respondents had been properly served.³ Neither, however, participated in the hearing relating to the application.

1 *McKeich v DDUP NZ Ltd* [2018] NZERA Wellington 102 (Member Loftus).

2 *McKeich v DDUP NZ Ltd* [2019] NZERA 276 (Member Loftus)

3 *McKeich v DDUP NZ Ltd* [2019] NZERA 555 at [8]–[11]. (Member Loftus).

[9] For three reasons, the Authority determined removal should be directed.

[10] First, the Authority was concerned at aspects of Mr Liu's conduct as a director. The Authority was unaware of any consideration of such issues in identical or similar jurisdictions relating to the piercing of the corporate veil. Therefore it was considered appropriate that the Court assess this issue in the first instance.⁴

[11] Second, recent legislative changes suggested Parliament intended to extend a director's responsibility so as to enhance the protection provided to workers who had been deprived of their entitlements.⁵ It was therefore appropriate for the Court to consider whether a different approach to the doctrine may be appropriate.

[12] Third, the Authority considered the company may have assets, and that the powers of the Court might be more suitable to address recovery options.⁶

[13] Accordingly, the order for removal was made.

[14] Following removal, Ms McKeich and Mr Hanson filed and served a statement of claim for the purposes of the removed proceeding. It raised the same cause of action as had been pleaded before the Authority.

[15] There were some difficulties with service on Mr Liu, but ultimately I was satisfied this had occurred, and so ruled.

[16] A statement of defence was subsequently filed and served by Mr Liu. In it, he acknowledged he had been a director of DDUP, but that in his personal capacity he had no knowledge of the allegations brought against him. He denied that he could be liable in any respect.

[17] Subsequently, I held a telephone directions conference with counsel, and directed the parties to attend mediation. This occurred, but it did not resolve the issues which exist between the parties.

4 At [20].

5 At [21].

6 At [22].

[18] Ms McKeich and Mr Hanson then filed and served an amended statement of claim. Detailed particulars for the purposes of the cause of action relating to the piercing of the corporate veil were added. A second cause of action was also raised, being a claim for a compliance order under [s 137](#) of the [Employment Relations Act 2000](#) (the Act) to the effect Mr Liu should ensure DDUP paid the monies owing to the plaintiffs.

[19] Mr Liu then brought his application for further and better particulars of the amended statement of claim.

Relevant principles

[20] Before commenting on the points raised for Mr Liu, I summarise the principles which apply in respect of such an application.

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

11 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.

...

[22] In *Lorigan v Infinity Automotive Ltd*, I summarised a number of the applicable principles, as follows:⁷

[19] Of particular importance is reg 11(2), which emphasises the responsibility of a party bringing a claim to fully, fairly, and clearly inform the Court and the defendant of the nature and details of the claim, the relief sought, and the grounds upon which it is sought.

[20] As Judge Travis observed, there is in fact no specific regulation by which this Court may order a more explicit pleading to be filed and served; but this is a situation where recourse to the High Court Rules may be appropriate under reg 6. That regulation provides that where the Regulations or the Act do not provide a form of procedure, the Court must dispose of the case as nearly as may be practicable in accordance with the Act or the Regulations or the provisions of the High Court Rules affecting any similar case. Judge Travis found that r 5.21 of the High Court Rules was the relevant rule to apply in the circumstances of this case, a conclusion with which I respectfully agree.

[21] Rule 5.21 emphasises that a party, by notice, may require any other party to give further particulars which may be necessary to give fair notice of a cause of action or ground of defence, or particulars required by the rules. If the Court considers the pleading is defective, or does not give particulars properly required by the notice, it may order a more explicit pleading to be filed and served.

[22] For present purposes, the main point raised for Infinity is whether it has been fully, fairly and clearly informed of the claim against it.

[23] In *Body Corporate 74246 v QBE Insurance (International) Ltd*, the Court summarised the position by stating that the following questions could be asked:

- a. Has sufficient information been provided to inform the other party of the case to enable them to take steps to respond?
- b. Is there a real risk that the other party may face a trial by ambush if further particulars are not provided?
- c. Is the request oppressive or an unreasonable burden upon the party concerned?

[24] Finally, I emphasise the point made in the Regulations, to the effect that there is a requirement to specify *facts* upon which a claim is based, but not the *evidence* of the facts: reg 11(1)(b).

[23] I apply these principles.

⁷ *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153 (footnotes omitted).

Analysis

[24] Before outlining the application brought for Mr Liu, I make several preliminary points.

[25] Mr Fletcher, counsel for Mr Liu, submitted his client had been “joined” without notice. However, the present action was commenced by the filing of a fresh statement of problem which cited Mr Liu as one of two respondents. That statement of problem was, so the Authority found, duly served on Mr Liu. He did not participate in the application for removal, as noted. Nor is there an application to strike him out as a second defendant. I therefore consider that issue no further.

[26] Second, it appears to be suggested that there is an issue as to whether the application now removed to this Court could proceed on either a de novo or non-de novo basis. Such a submission misunderstands the procedural position. The proceeding which was brought before the Authority has been removed to the Court. As I have already noted in a minute I issued to the parties, the Court is called on to consider exercising such powers as the Authority may have possessed in relation to the issues raised by the plaintiff.⁸

[27] Third, the amended statement of claim was filed and served after Mr Liu had in fact filed a statement of defence in relation to the first cause of action. He appears to have been able to do so without difficulty.

[28] The question at this stage, then, is whether further and better particulars are required to facilitate the filing and serving of an amended statement of defence in relation to the new paragraphs which have been added. That is an issue of narrow scope.

[29] It is appropriate to deal sequentially with the other issues raised by Mr Liu in support of his application for further and better particulars.

8 Minute dated 12 October 2020 at [2].

The plaintiffs' statements of claim should be pleaded in separate documents

[30] It is submitted that a composite pleading, as brought by the two plaintiffs in this case, confuses the issues regarding the facts which each plaintiff relies on to support their respective claims.

[31] I disagree. This is a compliance action where the substantive claims of the plaintiffs have already been established.

[32] The Authority determined that the company employed Ms McKeich and Mr Hanson, and they were unjustifiably dismissed.

[33] What is now in question is first, whether the corporate veil should be pierced so as to attach liability to Mr Liu personally, and in the alternative, whether a compliance order should be made requiring him to ensure the company satisfies the awards it has been directed to pay.

[34] I am satisfied that the amended statement of claim properly raises the legal issue which needs to be resolved in respect of each cause of action. For the purposes of those claims, the factual issues will turn on the manner in which Mr Liu discharged his role of director at the time of the plaintiffs' employment. Any differences in his interactions with each plaintiff will be issues of evidence which it is not the place of a statement of claim to recite, as is reinforced in reg 11 of the Regulations.

[35] I also accept Mr Lloyd's submission that no application for separate hearings has been brought under reg 18. On the basis of the material before the Court at present, it is doubtful that such an application would be granted, having regard to the conventional criteria which must apply to such an application.⁹

Concerns as to the naming of the second defendant as employer

[36] Objection is raised regarding the naming of Mr Liu as employer on the basis that:

⁹ See generally *Goodship v Minister of Fisheries* [\[2001\] NZAR 274](#), [\(2000\) 15 PRNZ 256](#).

- a. The plaintiffs have not specified which entity's corporate veil is to be pierced.
- b. The plaintiffs have not clearly indicated who the second defendant actually is.
- c. They do not clearly indicate what they expect the proposed order to do.

[37] I do not consider any of these criticisms to be justified.

[38] It is of course the case that the plaintiffs are seeking to pierce the corporate veil of DDUP.

[39] The identity of the second defendant is clearly alleged. He is cited because he was a director of DDUP. It is plainly alleged he was the controlling mind of the business operation and that this justifies a conclusion he should be regarded as the plaintiffs' employer.

[40] The third assertion is also misconceived. Paragraph 1 of the amended statement of claim describes the alternative basis on which orders are sought – either the second defendant should be named as employer “... for the purposes of compliance...” of the sums directed to be paid. Alternatively, a compliance order under s 137 of the Act should be made requiring Mr Liu to take all necessary steps to ensure DDUP complies with the determinations of the Authority.

The employment status of each plaintiff

[41] Mr Fletcher's submissions for Mr Liu discussed a range of factual conclusions reached by the Authority as to the employment status of each plaintiff.

[42] He emphasised that this included a finding that DDUP was the employer. That may be so, but what is in issue now is whether the Court should declare Mr Liu to have also been an employer of the plaintiffs, for enforcement purposes.

[43] In any event, the points made are in the nature of submission, and do not lead to a conclusion that more particulars are appropriate.

Second defendant's status

[44] The main grievance raised in respect of Mr Liu is whether he has been appropriately joined – an assertion I have already rejected.

[45] It is also contended that paras 2.7, 7 and 12 of the amended statement of claim provide "assertions with no supporting evidence" for the contentions made as to the lifting of the veil so as to attach liability to Mr Liu.

[46] The amended statement of claim, in other paragraphs, sets out the key elements of the claims made in these paragraphs.

[47] Moreover, as already observed, the pleading is required to describe facts, but not the evidence of facts upon which the claims are based.

[48] Standing back, I am satisfied that the requirements of reg 11 are met.

Companies Office records

[49] The amended statement of claim refers to the history of DDUP's filings in the Companies Office. It is alleged that these steps support a conclusion that Mr Liu attempted to avoid an adverse determination by the Authority. Mr Fletcher submits that there needs to be more specificity with regard to these steps.

[50] I consider the steps alleged to have been taken by Mr Liu, with regard to documents filed in the Companies Office, are adequately identified. Whether they are sufficient to draw the inferences referred to in the amended statement of claim, is a separate question to be considered at the substantive hearing.

Allegations regarding a person's state of mind

[51] Reference is also made to three paragraphs in the amended statement of claim which, it is submitted, involve Mr Liu's state of mind, because they assert that his actions show he attempted to avoid personal liability, acted in a deliberate cynical and dishonest way, sought to undermine and demonstrate a contempt for the employment institutions, and that these were actions that are blameworthy and should not be attributed to the first defendant.

[52] Mr Fletcher submitted that in light of r 5.17 of the [High Court Rules 2016](#) (HCR), particulars of the facts relied on be included.

[53] HCR 5.17, which may apply via reg 6 of the Regulations, relevantly provides that where a party alleges a state of mind of a person, that party must give particulars of the facts relied on in alleging that state of mind.

[54] I find that the pleading meets the test under HCR 5.17, because the facts the plaintiffs will rely on are spelt out. Whether they are sufficiently strong to warrant the inference drawn in the pleading is again a separate question that will have to be assessed at the substantive hearing in light of the evidence called.

The claim does not lead to or justify remedies sought

[55] Mr Fletcher submitted it is impossible to see how, on the pleaded facts, the corporate veil should be pierced, nor that a compliance order is justified. These are legal submissions as to the strength of the plaintiffs' case. They are not points which go to the provision of further and better particulars.

[56] I repeat that the present application is not one for a strike out order.

Conclusion

[57] I dismiss Mr Liu's application for further and better particulars.

[58] Ms McKeich and Mr Hanson are entitled to costs on a 2B basis.

B A Corkill Judge

Judgment signed at 2.15 pm on 22 April 2021

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