

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 119
WRC 2/11**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN MALCOLM FRENCH
Plaintiff

AND ACCIDENT COMPENSATION
CORPORATION
Defendant

Hearing: 27 September 2011 by telephone conference

Appearances: Barbara Buckett, counsel for the plaintiff
Peter Churchman, counsel for the defendant

Judgment: 27 September 2011

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

[1] This matter is set down for hearing next week, beginning on 5 October 2011. The plaintiff now seeks an adjournment of that hearing.

[2] The plaintiff commenced proceedings in the Authority in September 2010. His principal concern then was that his position had been restructured so that he reported to a second tier manager rather than the chief executive. This change was said to be unjustifiable and other wise carried out in breach of the defendant's duties to the plaintiff. In the course of the Authority's investigation, the defendant reversed that change, restoring the plaintiff to his former position. The plaintiff claimed nonetheless that he had been disadvantaged. The Authority determined¹ that the

¹ [2011] NZERA Wellington 2

plaintiff had been effectively returned to his former position and that he had suffered no disadvantage.

[3] During the investigation, two other issues emerged. The first was whether the plaintiff's terms of employment were derived from a collective agreement. The Authority determined that they were not. The second issue was whether a secondment agreement between the parties remained in effect. The Authority determined that it did.

[4] The plaintiff challenged that determination but the nature of the hearing elected was unclear. Section 179(3) of the Employment Relations Act 2000 (the Act) requires every election to "state whether or not the party making the election is seeking a full hearing of the entire matter", that is a hearing de novo. There was no such statement in the plaintiff's statement of claim. In paragraph 4 of the statement of claim, the plaintiff said that the election related to only part of the determination, the implication being that a de novo hearing was not sought. Inconsistent with that, however, the statement of claim did not specify the matters required by s 179(4) when a de novo hearing is not sought.

[5] The impression I formed from reading the pleadings was that the plaintiff was not seeking a hearing de novo but, in the hearing today, Ms Buckett told me that she believed the hearing was to be de novo. This clearly illustrates the uncertainty of the plaintiff's pleading.

[6] The difference is of considerable importance. In a hearing de novo, the parties may pursue any aspect of the employment relationship problem which was before the Authority. Where the hearing is not de novo, the Court may only deal with matters which were decided by the Authority. This means that there is only limited scope for evidence which was not provided to the Authority and no scope for remedies arising out of events which have occurred since the Authority completed its investigation.

[7] The current proceeding has been the subject of several telephone conferences between counsel and Judge Ford. It is apparent from his minute of the first

conference on 8 July 2011 that the plaintiff was then reluctant to have the matter set down for hearing because of continuing events in the workplace. At the second conference on 17 August 2011, counsel for the plaintiff told the judge that there were fresh matters the plaintiff wished to raise with the Authority and to have removed into the Court. A tentative fixture was then allocated for 5 to 7 October 2011 and a further conference scheduled on 12 September 2011. At that conference, counsel again indicated that the plaintiff was intending to make further claims but nothing had been filed. In these circumstances, Judge Ford understandably confirmed the fixture.

[8] Last Friday, 23 September 2011, Ms Buckett filed a very brief memorandum seeking an adjournment on the grounds that an “amended statement of problem” had been filed in the Authority together with an application to remove the new matters raised in that statement to the Court. A copy of the statement and the application were attached. Significantly, however, the memorandum gave no explanation for the delay in taking further steps in the Authority.

[9] Today, the Registrar was provided with a copy of an email from the Chief Member of the Authority, Mr Dumbleton, declaring the amended statement of problem to be a nullity. That is because the plaintiff purported to file it in proceedings which have already been fully investigated and determined by the Authority.

[10] Mr Dumbleton is undoubtedly correct and, in the course of the hearing today, Ms Buckett acknowledged that. She told me that she had given immediate instructions for a member of her staff to lodge a fresh statement of problem to properly put the plaintiff’s further claims before the Authority. She also told me that her instructions were to apply to have those new proceedings before the Authority removed into the Court.

[11] Accepting what Ms Buckett told me at face value, I have read what is now to be the fresh statement of problem in the Authority. It has a number of deficiencies and inconsistencies which I pointed out to Ms Buckett and which she said would be remedied. In substance, what the plaintiff alleges is that, following the Authority’s

determination, he was wrongfully kept out of his position, denied the opportunity to work and was unjustifiably dismissed on grounds of redundancy. That dismissal is said to have occurred on 18 July 2011.

[12] The background to these allegations is the sequence of events which was considered by the Authority in the determination now challenged in the Court. For that reason, Ms Buckett submits that the new claims and the issues in the challenge are inextricably linked and ought to be heard together.

[13] There is obvious logic in this submission but the matters are not currently all within the control of the Court. Assuming the new statement of problem is suitably amended and lodged with the Authority and that an application for removal is made, it will be a matter for the Authority to decide whether that application is granted.

[14] I must also consider the effect of an adjournment on the defendant. Mr Churchman filed a memorandum opposing the application, describing the unhelpful and unsatisfactory manner in which he said the plaintiff's further personal grievances had been raised. From my discussion with Mr Churchman during the hearing, however, it appears that the defendant will not suffer any real prejudice in the presentation of its case if the matter is adjourned. Some of counsel's time will be wasted but that is a matter which can be remedied by an award of costs.

[15] A further consideration is whether the proceedings now before the Court are properly ready for hearing. It appears they are not. The briefs of evidence filed and served on behalf of the plaintiff apparently traverse events right up to date, going well beyond what is relevant to the current proceedings. On the other hand, the briefs of the defendant's witnesses are limited to events up to the end of the Authority's investigation meeting. This mismatch undoubtedly arises out of the deficiencies in the statement of claim and would need to be remedied before the evidence was given. The nature of the hearing must also be clarified.

[16] At the end of the day, I must be guided by what I perceive to be the interests of justice. In this case, that favours an adjournment. As I told counsel in the course

of the hearing, however, any adjournment would be on terms which the plaintiff must observe. I therefore order:

- (a) The fixture scheduled to begin on 5 October 2011 is vacated.
- (b) The plaintiff is to lodge his further proceedings, including an application for removal into the Court, with the Authority without delay and, in any event, no later than Friday 30 September 2011.
- (c) The plaintiff is to pursue those proceedings in the Authority diligently and without delay.
- (d) The plaintiff is to file and serve within 5 working days after today an amended statement of claim complying fully with s 179 of the Act and regulation 11 of the Employment Court Regulations 2000.
- (e) The registrar is to schedule a further judicial telephone conference with counsel in four weeks' time to assess progress and give further directions.

[17] I fix costs in any event on the application for adjournment. The plaintiff is to pay the defendant \$1,000 by way of costs within 10 working days after today.

AA Couch
Judge

Signed at 3.30pm on 27 September 2011.