IN THE COURT OF APPEAL OF NEW ZEALAND

CA278/96
CA298/96

BETWEEN **ACCIDENT REHABILITATION AND COMPENSATION INSURANCE CORPORATION**

Appellant

AND **ANGELA MARY KELLY**

Respondent

Coram: Gault J
Thomas J
Hammond J

Hearing: 20 March 1997

Counsel: J F Timmins and P J Cullen for Appellant
S J Cooper for Respondent

Judgment: 20 March 1997

JUDGMENT OF GAULT AND HAMMOND JJ

Ms Kelly, the respondent in these two appeals, has brought proceedings in the Employment Court against the Corporation, her former employer. In her first cause of action she alleges wrongful dismissal as a result of having been constructively dismissed in circumstances arising out of a determination by her employer to institute and carry out an external review of the unit within the Corporation of which she was manager. Her prayer for relief incorporates claims for special damages for loss of salary and anticipated salary and benefits up to the year 2006, general damages for mental distress, anxiety, loss of dignity and injury to feelings, compensation for damage to professional reputation, aggravated damages, exemplary damages, interest and costs.

In her second cause of action Ms Kelly alleges breach of contract with particular reference to an alleged implied term imposing obligations of trust and

confidence upon the employer. Her allegations are directed to the conduct of the Corporation leading up to the termination of her employment but also extending to publication subsequently of the report of the review of her unit which was carried out. The same relief is claimed as for the first cause of action.

Her third cause of action also alleges breach of contract in relation to the employer's competency assessment programme. This again involves alleged breaches of obligations upon the employer to treat her fairly and without disadvantage. The relief sought under this cause of action comprises general damages for mental distress, anxiety, loss of dignity and injury to feelings, compensation for damage to professional reputation, interest and costs.

The present appeals are against decisions on interlocutory matters given in the Employment Court respectively by the Chief Judge on 20 November 1996 and Judge Palmer on 13 December 1996.

The Chief Judge dealt with an application for an order for further and better discovery, an application for leave to administer interrogatories and timetable issues. He made an order for further and better discovery which was included within the appeal against his judgment but that was abandoned in this Court. He made a further order allowing certain interrogatories and that, in part, is the subject of an appeal and requires consideration. He also made an order that the matter be tried in the Employment Court to commence on 14 April 1997 to continue until completed. To this end he has indicated an allowance of up to eight hearing days.

Judge Palmer dealt with an application by the Corporation to strike out from the prayers for relief the claims for compensation for damage to professional reputation and to exemplary and aggravated damages. The claim for damages to professional reputation was opposed on the ground that, to the extent that damages can be awarded, they will be encompassed by the claim for general damages, and in any event, should be dealt with in separate proceedings for defamation commenced by Ms Kelly in the High Court. The claims for exemplary and aggravated damages were attacked

on the ground that there is no jurisdiction in the Employment Court to make such awards for breaches or wrongful termination of employment contracts.

Judge Palmer reached the conclusion that it could not be said with certainty that aggravated or exemplary damages are unavailable for breach of employment contracts and that the matter is best determined against the appropriate evidential background. In the case of the claim for damages for injury to professional reputation, to the extent that there is any overlap with relief claimed in the High Court proceedings, he considered that can be taken into account to avoid any double compensation in those proceedings in the event that they come for determination. The application to strike out was dismissed.

Today we have heard argument on those matters still at issue between the parties. On the application to strike out the claims in the prayers for relief Mr Timmins submitted that the Corporation is entitled to know what it is facing in the proceeding and is anxious to obtain definitive findings as to the availability at law of aggravated and exemplary damages and damages for injury to reputation for breach or wrongful termination of employment contracts. He had quite extensive written submissions referring to decisions in which the question of remedy for breach of contract has been considered since the decision in ***Addis v Gramaphone Co Ltd*** [1909] AC 488 has been regarded as no longer applying in New Zealand. These include ***Whelan v Waitaki Meats Ltd*** [1991] 2 NZLR 74, ***Ogilvy and Mather (New Zealand) v Turner*** [1993] 2 ERNZ 799, ***Andrews v Parceline Express Ltd*** [1994] 2 ERNZ 385, ***Welsh v Parapine Horticultural Products Ltd*** CA241/92, judgment 7 October 1993, ***Tak and Co Inc v AEL Corporation Ltd & Anor*** (1995) 5 NZBLC 103,887, ***Bloxham v Robinson*** [1996] 7 TCLR 122.

At the outset of the oral argument Mr Timmins was asked how it would effect the trial scheduled in the Employment Court in the near future if the claims he objected to were to remain. He acknowledged that it now cannot be argued that general damages are unavailable for wrongful termination and breach of employment contracts. He contended that the scope of general damages may extend to damage to reputation

in appropriate circumstances - indeed it is because of that that he has concern at the potential for double recovery in the defamation proceedings.

When pressed to identify factors and evidence that would not be relevant to a claim for general damages but would be relevant to the claims for the other forms of relief to which he objects, he was unable to identify any. He said, however, that the inclusion of the additional claims mean that the Corporation will be required to treat the aspect of relief much more seriously as the exposure goes beyond general damages as generally approached in the Employment Court.

It is well recognised that the law relating to remedies, particularly in contracts, has been, and is, undergoing some change. The cases just cited demonstrate that. In that context we are satisfied that questions of the availability of particular forms of relief are better considered as they arise in factual settings rather than in the abstract on applications to strike out. - particularly in circumstances (as here) where we can see no significant impact on the evidence likely to be called at the trial.

The claim for injury to reputation does seem potentially to overlap the claim in the separate High Court proceeding in defamation. But to the extent that the injury to reputation is said to flow from the employer's conduct rather than its statements and publications, it is accepted by Mr Timmins that the claim for general damages extends to it. In that situation strike out is not appropriate. Any concern at possible double recovery can be addressed when and if it arises.

The appeal on the strike out application is therefore dismissed.

We add that we think it is unfortunate that the respondent has been put to the expense of contesting an appeal brought by a major public corporation when, in practical terms, the issues can be readily dealt with (if they are still necessary) after the facts have been determined. In so saying we recognise that the respondent may have brought the matter on herself to some extent by claiming so broadly and, we are inclined to think, unrealistically.

We turn to the interrogatories. The relevant Employment Court Regulations 1991 do not make provision for interrogatories but it is common ground that the Court may order that interrogatories be answered in appropriate cases. The well established rules governing interrogatories in proceedings in the general courts therefore should be applied: see eg r278 High Court Rules.

For the purpose of this appeal there remain seven interrogatories which the Corporation resists. In five of these reference is made to statements in documents disclosed by the Corporation on discovery. The questions seek answers as to the source and content of information giving rise to the statements in the documents.

It is a well settled principle that a party may interrogate to ascertain relevant facts but not evidence going to establish those facts. References in the cases to "primary facts" seem to be made to distinguish evidence from which those facts are to be inferred. Necessarily interrogatories must be considered in the context of the particular proceedings. They are best assessed for allowability by a Judge who is conversant with the issues. Decisions are a matter of judgment which will not lightly be interfered with.

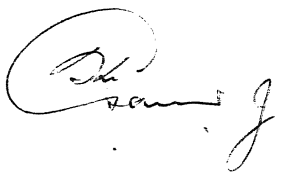
In the present case it was accepted by Ms Cooper that the questions here in issue are directed to the motivation for conduct of the Corporation. Generally in proceedings alleging breach of contract the focus is on the communications and conduct between the contracting parties and motivation is immaterial. Ms Cooper was unable to point to any particular relevance in this case apart perhaps from some possible bearing upon the obligation of confidence and fair dealing and exemplary damages. Even in those areas, however, the real enquiry is as to the conduct of the employer towards the employee and its impact so that motivation will indeed be peripheral if relevant at all. Even if they are relevant, we think the five questions in this category really seek evidence rather than primary fact and should not be allowed. The objection to the remaining two interrogatories (Nos 1 and 2) was not strongly pressed by Mr Timmins. He accepted that even if they seek particulars rather than facts they

are not objectionable on that ground. They can remain and are to be answered as directed by the Chief Judge.

We comment that it was only as a result of analysis in the course of argument that the true nature of the issues material to the pleaded causes of action started to emerge and this, to a degree, is symptomatic of Employment proceedings that find their way to this Court. In a jurisdiction that should be straight forward, speedy and easily understood all too frequently we see undue complication and technicality. This tends to confuse issues and lead to departure from principle. Careful analysis of what must be proved to establish or defeat each cause of action, and confinement of evidence to that, will result in much shorter hearings and less expense to the parties. By "throwing in" everything parties risk having thrown out the good with the bad.

Accordingly, the appeal against the order for further and better discovery is dismissed. That against the order to answer interrogatories is allowed in respect of questions three, four, five, eight and nine. It is otherwise dismissed.

As to costs the greater work in preparation clearly related to the strike out application. On that the Commission has been unsuccessful. Even though it succeeded in part in respect of the interrogatories the Commission must meet costs on the appeal from the Chief Judge so far as it related to discovery and was not pursued. In the circumstances, we think it is appropriate to make a global award of costs in favour of the respondent in the sum of $3,000 together with disbursements as approved by the Registrar. Costs in the Employment Court continue to be reserved.



Solicitors
Cullen & Co, Wellington, for Appellant
S M Cooper, Wellington, for Respondent

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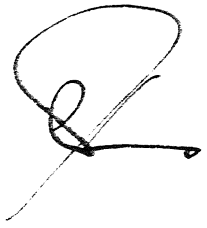
ORAL JUDGMENT OF THOMAS J

I fully concur with the judgment of Gault and Hammond JJ, but wish to add a word relating to the manner in which ***Bloxham v Robinson*** (1996) 7 TCLR, 122, has been reported.

Bloxham v Robinson was referred to extensively in the written submissions of counsel in this case. The judgment of the majority and the dissenting judgment have been reported in the Trade and Commerce Law Reports, and that report has been of considerable assistance to the Court. The decision also has been cited on a number of occasions in the High Court. I wish to refer, however, to what is called a "Note" published without the judgments in the New Zealand Law Reports. See [1996]

2 NZLR 664. Because the judgments are not reported, practitioners do not have the opportunity to assess the accuracy of the Note by referring to the judgments at the time of reading. While, of course, the prerogative of an editor of law reports to decide which judgments will or will not be published is not challenged, it must be questioned whether the format of publishing such a Note without the judgments is necessarily helpful to either practitioners or the Courts. It is certainly unhelpful if the note is not a correct summary of the judgments. It is appropriate, therefore, to indicate that, in my view, the Note in question is not an accurate summary of the majority's judgment, either in suggesting that it followed ***Addis v Gramophone Co Ltd*** [1909] AC 488 or in stating that ***Rowlands v Collow*** [1992] 1 NZLR 178 was not followed, as distinct from not being applied.

Reference to the majority's judgment shows that the majority referred to what the Judge in the Court below had said, and then mentioned two more recent cases in the United Kingdom, without discussion or overt or express endorsement. The majority then stated their finding to the effect they were not persuaded to take a different view from that expressed by the trial Judge in the Court below, that is, to refuse damages for mental stress in the circumstances of that case. While the correct view for this Court to take of the judgment will be a matter for submissions by counsel in a future case, I do not apprehend that the majority intended to depart from the recent decisions of this Court on the question of damages for mental stress for breach of contract. See ***Mouat v Clark Boyce*** [1992] 2 NZLR 559, per Cooke P at 568 and Richardson J at 573-574; ***Watson v Dolmark Industries Ltd*** [1992] 3 NZLR 311, per Cooke P at 316; and ***Snodgrass v Hammington,*** (22 December 1995, CA 254/93). Until the issue has been reviewed by a full Court of this Court, therefore, it is not prudent to assume that the Court has reverted to the legal position attributed to ***Addis*** or that the principle articulated in ***Rowlands v Collow*** has been impliedly overruled by the majority's judgment. It is suggested that no reliance should be placed on the Note.



Solicitors
Cullen & Co, Wellington for Appellant
S M Cooper, Wellington for Respondent