Judgment Number: CC 7/04
File Number: CRC 24/02

IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

IN THE MATTER	of a challenge to determination of Employment Relations Authority
AND IN THE MATTER	of an application for leave to amend statement of claim and an application for costs
BETWEEN	Vicki Smith
	Plaintiff
AND	McCulloch and Partners
	Defendant

Court:	Goddard CJ
Hearing:	Wellington (Teleconference), 30 March 2004
Submissions received:	22 January, 19 February, and 17 March 2004
Appearances:	M-J Thomas, Counsel for Plaintiff R Chapman, Counsel for Defendant
Judgment:	19 April 2004

JUDGMENT OF THE CHIEF JUDGE

Introduction

1. This judgment decides two issues:

i. Whether the plaintiff should have leave to amend her claim for distress damages to $27,500 being the amount that I awarded her in my judgment dated 11 June 2003 (number CC 17/03);

ii. How much the plaintiff should be awarded for the costs of this proceeding.

2. Counsel have addressed these issues in written memoranda and, in addition, were given the opportunity, which they took, of addressing me orally in Chambers, by telephone. Both Ms Thomas and Mr Chapman told me that they had nothing to add to their written

submissions but offered to answer any questions. There followed some discussion which did not, however, make any significant change to the written submissions except perhaps to further clarify them.

3. The history of the matter is as follows:

a. The plaintiff, Vicki Smith, raised an employment relationship problem about the circumstances of her summary dismissal on 24 May 2002 from her employment with the defendant.

b. The problem was investigated on 11 October 2002 by the Employment Relations Authority which, in a determination dated 22 November 2002, dismissed the plaintiff's claim holding that the termination of her employment had been substantively and procedurally justifiable.

c. Dissatisfied with that outcome, the plaintiff challenged it by filing a statement of claim in this Court on 20 December 2002. The plaintiff sought a hearing *de novo* of the proceeding and the following relief: lost wages from the date of dismissal to the date of hearing, and compensation in the sum of $15,000. The heads of compensation were not specified.

d. The hearing of the challenge commenced on 28 May 2003.

e. On the previous day the plaintiff learned that two trustees of the YMCA, for whom she was then working, had been approached by Mr Jackson, one of the principals of the defendant. As reported to the plaintiff, queries were made of the trustees whether they knew her history and asking why they had not asked McCullochs for a reference. The plaintiff was later to say in evidence that she was devastated to learn about this approach and that she felt that her former employer was acting in a punitive way towards her and was also retaliating in this way for her taking a personal grievance.

f. Notice of this fresh evidence was given to Mr Chapman and it seems common ground between counsel that Ms Thomas made it clear that this altered the complexion of the case. However, it is also agreed that she did not expressly say that she would be claiming a higher amount than stated in the statement of claim; indeed, neither the statement of claim nor the amount claimed was adverted to.

g. When the hearing began the following day the Court heard argument at the outset on whether the plaintiff should be allowed to give a supplementary brief of evidence describing the recent developments.

h. After hearing argument I allowed the evidence to be given. The plaintiff was not cross-examined on it, nor did Mr Jackson attempt to deny it when he came to give evidence, although he was not forthcoming and had to be pressed in cross-examination before he acknowledged that his purpose was to tell the plaintiff's employer that she had deliberately misled the defendant and been dishonest in her responses. That view, however strongly held by Mr Jackson, was incorrect and misguided, as my judgment held and explained.

i. At the end of the hearing Ms Thomas relied on her written summary of argument which did not deal with remedies at all. However, she amplified her submissions orally, at which point she made it clear that the subsequent evidence related to humiliation. She described Mr Jackson's action in the week before the hearing as a double kick that compounded already significant distress and humiliation. She argued that the plaintiff's behaviour had been branded as dishonest and that Mr Jackson must have known the effect such an outburst would have on the plaintiff and on her present and future performance.

j. Subsequently the matter went on appeal to the Court of Appeal. One of the grounds of appeal was that I was wrong in law to have awarded the plaintiff $27,500 when she had only claimed $15,000 in her statement of claim. On this issue it seems appropriate to allow the judgment of the Court of Appeal (*McCulloch and Partners v Smith* unreported, 3 December 2003, CA133/03) to speak for itself:

> *[3] The first point, in respect of which leave was granted, is directed to the quantum of the award by the Chief Judge as compensation for humiliation. The short point is that in the statement of claim the sum of $15,000 was sought whereas the Chief Judge awarded $27,500. In normal circumstances it would be a simple matter of reducing the award to the amount claimed, there being no jurisdiction to award a greater amount. In this case, however, it is said for the respondent that the matter proceeded in the Employment Court on the basis that a greater award was being sought than had been claimed because of an event immediately before the hearing which aggravated the hurt and humiliation of the respondent. It was said, and accepted by Mr Chapman for the appellant, that prior notice had been given that the further aggravating conduct would be raised. Mr Chapman said, however, that the appellant proceeded on the basis that the additional claim was still within the original amount sought. He was not able to point to any strong ground on which he would have been able to resist an application to amend the claim had it been made at the hearing.*

> *[4] In the circumstances we do not consider we can form any clear view on how the case was run before the Chief Judge, although the fact that he awarded more than was claimed suggests the contention for the respondent should not be too readily dismissed.*
>
> *[5] We are satisfied that the correct course is to refer the matter back to the Employment Court under s215 of the Employment Relations Act to enable reconsideration of the award and any application that may be made to amend the claim.*

k. The judgment of the Court of Appeal was dated 3 December 2003 but no immediate step was taken. After obtaining the views of counsel as to what should happen next, I issued a minute on 9 February 2004 which resulted in a timetable and further submissions, both on this issue and on costs.

l. The memorandum of submissions filed by Ms Thomas was accompanied by a formal application for an order amending the statement of claim to increase the compensation claimed from $15,000 to $27,500 on the grounds that the defendant was not prejudiced in that all matters relied on for the increase in compensation were made known to it prior to the hearing and that the defendant has acknowledged that had a formal application been made, its case would have remained the same and that there is no further evidence that it could have adduced.

The competing arguments

4. In her memorandum Ms Thomas, in addition to supporting this application, argued in the alternative that such an application was unnecessary. She told me that, in the Court of Appeal, there was a fundamental difference in the positions taken by counsel for the two parties. Her position had been that she had sought a greater amount than $15,000 but accepted she had not formally amended the statement of claim.

5. No objection was taken to counsel providing evidence from the Bar and accordingly I received it. Ms Thomas told me that when her client had learned of the approach by Mr Jackson she instructed Ms Thomas to act upon it. She, in turn, advised Mr Chapman of the information and of her intention to call evidence about it and enquired of him whether an increased settlement offer would be made. She indicated her view that this new development would significantly increase any award of compensation. Mr Chapman wrote to her the next day declining to make any increased offer. Ms Thomas said that she believed that it had been made clear that her client considered that Mr Jackson's approach impacted significantly upon the employee and would significantly increase any compensation awarded.

6. Ms Thomas pointed out that the argument about the admissibility of the supplementary brief was centred on its relevance and that she had stressed that the employer's past employment conduct was relevant to the compensatory award and essentially changed the flavour of the case. She had also argued that the recent information significantly impacted upon the compensation sought, placing the case at the upper end of the spectrum.

7. Ms Thomas submitted that this Court was clearly aware that the employee had increased her claim for compensation because otherwise the award that was made would not have been made. She argued that even if the employer did not realise that a greater compensatory sum was being sought, it suffered no prejudice as the case would have been run exactly the same way. Ms Thomas also argued that the Court has jurisdiction to award compensation in excess of that pleaded in the statement of claim. She sought to rely on rule 115 of the High Court Rules which provides that it is not necessary to ask for general or other relief. She argued further that the Court of Appeal's referral of the case back to this Court clearly accepts the possibility of the application for leave being made and granted. Ms Thomas submitted that the defendant has not been prejudiced because –

a. It was never going to offer more than $3,000 and the waiver of the costs awarded to it in the Authority. She said that it could not be seriously suggested that the employer would have made a larger offer to settle if told not merely about the new evidence but also that the claim was going to be increased.

b. The award had not come out of "left field". The approaches made by Mr Jackson were known to the employer and to its counsel who was able to give advice on the significance of that evidence.

c. The employer was not prejudiced in the running of the case and a formal application would not have changed the evidence or cross-examination.

d. No opposition to an application to amend the statement of claim could have been successfully maintained.

8. Mr Chapman told me that the defendant does not accept that any informal application was made at any stage of the hearing. He agreed that counsel for the plaintiff did not specifically refer the Court to the statement of claim or the relief sought, and that at the hearing no reference was made to the actual amount of compensation sought. He accepted that the Court has jurisdiction to allow an amendment to the pleadings at any stage, as had

been recognised by the Court of Appeal. He submitted that the general principles are to be found in *Elders Pastoral Ltd v Marr* [1987] 2 PRNZ 383 (CA).

9. Mr Chapman argued *"in the strongest possible terms"* that an amendment to the plaintiff's claim increasing the amount of compensation sought to the amount awarded would cause significant prejudice to the defendant, which could not now be cured by any of the usual means available when an amendment is sought prior to judgment. He accepted in part the plaintiff's view of the argument in the Court of Appeal as set out in Ms Thomas's memorandum. He told me that there had been considerable discussion regarding settlement prior to the hearing in this Court, and that mediation had been attempted prior to the Employment Relations Authority investigation. Further settlement discussions took place after the filing of the plaintiff's challenge to the determination and also during the week prior to the Court hearing.

10. Mr Chapman accepted that the plaintiff did not learn until 26 May 2003 that two trustees of her employer had been approached by Mr Jackson about her employment. Mr Chapman also accepted that Ms Thomas advised him promptly of this information and of her intention to call evidence of these approaches. He also accepts that Ms Thomas indicated that, in her view, this new development would significantly increase any award of compensation but he says there was never any suggestion in this discussion that the amount sought in the statement of claim was going to be increased or that there was going to be any amendment to the pleadings at all, and there was none.

11. Mr Chapman argued that the defendant was entitled to assume that the plaintiff was still seeking an award of compensation of up to $15,000 and that the Court's jurisdiction to award compensation would be limited to the amount sought in the pleadings. He argued that pleadings are fundamental to all litigation, they frame and define the claim so that the defendant knows precisely the basis of the claim and the amount sought. It can then make decisions about how the case is to be conducted, assess litigation risk, evidence, and settlement options.

12. Mr Chapman stressed that the defendant is a firm of chartered accountants having nine partners and throughout the proceedings counsel has attended meetings of the partnership to report on progress and to obtain specific instructions relating to the conduct of the case. Mr Chapman said that while a supplementary brief of evidence was presented only the day before the hearing, such late notice was not objected to because it was accepted that it had only come to the knowledge of the plaintiff and there was no prejudice

to the defendant because no further or other evidence was to be presented in response to it other than through the defendant's witness, Mr Jackson.

13. However, Mr Chapman submitted the same is not true in respect to an application to amend the amount of compensation sought – had it been made during the course of the hearing, counsel would have been obliged to seek further instructions which would have necessitated an adjournment which is almost certain to have been granted. Consideration would have been given to an increase in the settlement offer in those circumstances. Mr Chapman argued that, because no application to amend was made, the defendant was deprived of the opportunity which it should have had to consider its position in the light of the new evidence and the increased claim if one was to be made. Mr Chapman said that if an application had been made, he would have sought an adjournment to obtain instructions.

14. Mr Chapman sought to put a gloss on Ms Thomas's submission that the Court of Appeal, in referring the matter back to this Court, accepted the possibility of the present application being made and granted. Mr Chapman stressed that he told the Court of Appeal, and confirmed to me, that he was not aware at any time during the course of the substantive hearing that counsel for the plaintiff submitted that a greater award than originally sought was justified and sought. He assured me that this was not said or intimated. It was because of the disagreement between counsel that the Court of Appeal decided on the course that it did on the basis that this Court would be better placed on a reconsideration to decide whether or not the plaintiff's submission had any basis. He argued that the Court of Appeal judgment makes it clear that unless this Court, on a reconsideration, is able to find that there was some informal application or information that the amount of the claim was being increased, the Court would have no jurisdiction to award more than the amount sought.

15. The defendant sought costs on this application in any event because the plaintiff was seeking an indulgence. Mr Chapman suggested a figure of $1,500.

Decision of the case on amendment

16. The plaintiff's application is wider than it should be, according to Mr Chapman. It simply seeks an amendment to the statement of claim. It is necessary to have regard to what the Court of Appeal said and meant because this Court's function upon a matter being returned to it following an appeal (and for this purpose it is not necessary to distinguish between an appeal and an application for leave to appeal) is to have regard to the Court of Appeal's reasons for taking that step: Employment Relations Act 2000 s215(3). That

involves considering what the Court of Appeal did and what reasons it gave for doing what it did.

17. It is quite clear from paragraph [5] of the Court of Appeal's judgment that it referred the matter back to this Court under s215 of the Act *"to enable reconsideration of the award and any application* ***that may be made*** *to amend the claim"*. The reason the Court of Appeal gave for taking this course was that it was unable to form any clear view on how the case was run before this Court although the fact that I awarded more than was claimed suggests that the plaintiff's contention should not be too readily dismissed. That contention was, as recorded by the Court of Appeal, that the matter had proceeded in this Court on the basis that a greater award was being sought than had been claimed because of an aggravating event immediately before the hearing. The Court of Appeal also noted that prior notice had been given that the aggravating conduct would be raised.

18. It seems to me that the following considerations are appropriate:

i. was the case run on a different basis to the statement of claim? and

ii. if not, should leave to amend be granted even now?

19. It seems to me that in either event the plaintiff should have been or should be now allowed to increase her claim unless for her to do so causes irremediable prejudice to the defendant.

20. In dealing with the first issue, it is clear that I was satisfied that the justice of the case called for an award of $27,500. I would no doubt have considered both lower and higher sums but, in the event that I considered higher amounts, I would routinely have applied moderation. Nevertheless, it was obviously clear to me that this was a case calling for a higher award than usual partly because the nature of the case had been completely misunderstood by the defendant and because of the defendant's aggravating conduct which was of a vindictive character. Indeed, as I said in my judgment at paragraph 46, this was a very bad case of its kind whose impact on the plaintiff had been greatly aggravated by Mr Jackson's initiatives coming to her notice. It is also clear that the evidence of this aggravating conduct had a profound impact on the amount of the award because it smacked of retaliatory conduct, which is prohibited by the Employment Relations Act 2000 and which can have, and did in this case, a profound impact on a former employee's level of distress.

21. The amount awarded being therefore in my view a just amount, there must be some strong reason for withholding any part of it from the plaintiff. That reason is said to be that the defendant was on notice of a claim for $15,000 but ended up being at risk of a higher award being made.

22. It is necessary to examine that proposition. It is of course not to the point, nor did Ms Thomas seek to argue, that there may not be any distinct obligation for a plaintiff in a statement of claim to specify the amount being claimed for distress damages. It is necessary to specify the relief sought including, in the case of money, the method by which the claim is calculated (reg 11(1)(d) Employment Court Regulations 2000) but, as no calculation is required of the compensatory award, it may be sufficient for a statement of claim merely to seek compensation without specifying an amount. In this case the plaintiff elected to specify an amount. For that reason also, she cannot justify a higher award by relying on the silent general prayer. However, the plaintiff must be taken, in specifying the compensation she was seeking, to be referring to compensation for actions that had preceded the filing of the statement of claim. It was not safe for the defendant or its counsel to assume that the amount claimed at that time would exhaustively cover also actions taking place later. In my judgment, it should have been apparent to the defendant and to Mr Chapman that the amount claimed on 20 December 2002 could not possibly have any application to Mr Jackson's behaviour on or about 17 May 2003.

23. As the Court of Appeal has pointed out, the defendant had advance notice that this behaviour was going to be disclosed to the Court and would be the subject of an enhanced claim. The defendant had no basis for thinking that, other than by coincidence, the total award would be contained within the $15,000 being sought for the effects of the dismissal down to the filing of the statement of claim. In other words, the defendant knew that Mr Jackson's behaviour was being put forward as an element that would attract compensation. It should have been apparent that it could not possibly have been included in the amount of compensation already being sought for the manner of the dismissal.

24. For that reason I hold that the defendant has not been prejudiced in that it was able to advance all the evidence it had in opposition to the plaintiff's evidence of Mr Jackson's recent behaviour. Ms Thomas is probably right in saying that she did not need to increase the amount of the claim. Be that as it may, she had fully discharged her professional obligations by giving the earliest possible notice of the new development, and of the plaintiff's intentions to make use of it to the defendant's detriment. Mr Chapman argued that he would have made an application for an adjournment and that it would have been granted. I feel bound to say that, although some adjournment may have been granted, it is

likely to have been very brief. The Court had travelled to Invercargill expressly to hear this one case. Any adjournment would have been for a matter of a small number of hours and the only disadvantage that the defendant suffered was its contended inability to seek instructions and to make a different offer. I do not accept that an adjournment will have made any significant difference. The defendant had had notice of the new evidence, it had had an opportunity to increase its offer, but it made an offer that was – especially in those circumstances – unrealistically low. I have no reason to think that its attitude is likely to have been more greatly affected by a formal change to the pleadings than it was by notice of the damaging new evidence.

25. This conclusion renders it unnecessary to consider, except in the alternative, whether I should grant leave to amend the claim in any event.

26. Much the same considerations would apply as to prejudice. In my experience at the Bar, there has never been any difficulty about a plaintiff increasing a claim during a hearing or trial.

27. On any view of the matter, leave should be given and the amount of the claim increased to conform to the amount of the judgment, that is to say $27,500.

28. I understand that the defendant has paid $15,000 and it ought now to pay the balance.

Costs

29. I now turn to the costs argument. The actual costs incurred were $4,461.10. Mr Chapman accepts that this is a reasonable expenditure of resources on this case although at the upper end of what he would have expected. Given that concession, the only question is, what is a reasonable contribution for the defendant to make to this expenditure. I cannot accept, in the light of Mr Chapman's concession, that the Court should award only $1,500 when its practice is to award a realistic contribution, often not less than 60 percent of actual costs reasonably incurred. In this case, I can understand Ms Thomas seeking 80 percent as it is one that ought to have been settled early on. The costs were, moreover, added to as a result of the aggravating conduct just before the hearing. However, I think that the justice of the case will be met sufficiently by an award of an amount close to two-thirds of the actual costs or (in round figures) $3,000, plus the usual disbursements to be agreed or, failing agreement, fixed by the Registrar. There will be an order accordingly.

30. In reaching these conclusions, I have been guided by the recent costs decision of the Court of Appeal in *Health Waikato v Emsley* unreported, 25 March 2004, CA69/03, which seems to restate principles that have been applied by this Court and its predecessor ever since my judgment in *NZALPA V Registrar of Unions* [1989] 2 NZILR 550 at 551-2, (1989) ERNZ Sel Cas 304 at 306-7, and the full Court's judgment approving it in *NZ Labourers IUOW v Fletcher Challenge Ltd and Firth Industries Ltd* [1990] 1 NZILR 557 at 574-5, (1990) ERNZ Sel Cas 644 at 664.

31. In relation to the application for leave to amend the statement of claim, I think that the defendant has taken a highly technical point and there should be a further award of costs to the plaintiff in respect of this application in the sum of $500.

32. It is necessary only to note in relation to the costs before the Employment Relations Authority that it had awarded the defendant $1,000 and that the parties have agreed that this should be reversed so that $1,000 is payable to the plaintiff by the defendant for costs in respect of the matter when it was before the Authority.

Disposition

33. In summary, therefore, the outcome is that there will be an order amending the statement of claim so that it seeks $27,500 compensation for the dismissal and for the aggravating behaviour just before the hearing, and an order for costs in this Court in the plaintiff's favour in the sum of $3,500 plus disbursements to be agreed or fixed, as stated, for costs, and by consent a further $1,000 for costs in the Employment Relations Authority.

Judgment signed at 3pm on Monday, 19 April 2004