IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 104
CRC 12/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	CHRISTINE LORRAINE COY Plaintiff
AND	COMMISSIONER OF POLICE Defendant

Hearing: 11 August 2010 (by telephone conference call)

Appearances: Scott Fairclough, Counsel for Plaintiff
Antoinette Russell and Sally McKechnie, Counsel for Defendant

Judgment: 11 August 2010

INTERLOCUTORY JUDGMENT (NO 4) OF CHIEF JUDGE GL COLGAN

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[1] This next interlocutory judgment decides the plaintiff's opposed application for adjournment of the trial due to start next Monday 16 August 2010. Notice of the plaintiff's intention to seek an adjournment was first received at about 3.40 pm on the afternoon of Tuesday 10 August 2010. A telephone conference call with counsel for the parties was held at noon on the following day at which I heard arguments in support of, and in opposition to, an adjournment. I granted the adjournment reluctantly, and on terms, for reasons I said I would give in this judgment.

[2] The fixture was scheduled to last 12 consecutive sitting days in Christchurch beginning next Monday. All of the usual arrangements have been made for a fixture of that duration plus some additional and particular arrangements. Among the latter is the installation of a document management software system provided by the Crown Law Office which is representing the defendant. Witnesses for the defendant

have made arrangements to travel from Washington DC and Brisbane to give evidence at the hearing. A number of the witnesses are from the South Canterbury region and will have made arrangements to travel to Christchurch to give evidence.

[3] Counsel for the plaintiff, Mr Fairclough, says that two recent interlocutory judgments have so disrupted his and his client's preparation for the hearing that changes necessarily consequent upon those judgments cannot be put in place within the next few days or, at least, have not been able to be since the judgments were issued.

[4] Mr Fairclough has identified the issues arising from the two judgments as follows. First, in my judgment issued on 8 July 2010,[1] I declined to allow the plaintiff's husband, John Langbehn, to conduct her case as advocate assisting Mr Fairclough as counsel and, in particular, to undertake cross-examination of the defendant's witnesses for the reasons set out in that judgment that I will not repeat here. This direction, which was made on the application of the defendant who apprehended problems arising from Mr Langbehn's intended role, should not really have come as a surprise to counsel for the plaintiff. Given that the judgment permitted Mr Langbehn to sit with and advise counsel at the hearing, it is difficult to understand how that direction could so affect the case, about five weeks before its start, that Mr Fairclough is now unable to undertake that role.

[5] The second event that Mr Fairclough says has affected adversely, indeed fatally, his and his client's ability to prepare properly for the hearing, is the decision issued first on Friday 6 August 2010 but then recalled and reissued on Monday 9 August 2010[2] by adding some previously omitted material. That determined the defendant's challenges to the admissibility of some of the plaintiff's intended evidence. Mr Fairclough says that as a result of this judgment, the whole of the plaintiff's evidence will need to be recast and additional witnesses will need to be called to establish evidence that I have ruled inadmissible as hearsay when led through other witnesses. Although Mr Fairclough indicates that three additional witnesses have been, or will be able to be, summonsed, counsel says that it is really

[1] [2010] NZEmpC 88.
[2] [2010] NZEmpC 103.

the very substantial task of redrafting Ms Coy's evidence, in line with the directions given in that judgment, which will be impossible to achieve by the start of play on Monday 16 August 2010.

[6] Mr Fairclough reiterates the complaint that he made at the hearing of the defendant's application for orders determining admissibility of evidence on 2 August 2010 that the Commissioner has left it until almost the last moment before the trial to make these challenges. That is despite the evidence of the plaintiff's witnesses having been supplied to the defendant, in some cases for many months, and in the absence of any reason being provided by the defendant as to why he waited until only shortly before the start of the trial to challenge major portions of the evidence.

[7] Although by a fine margin and reluctantly, I adjourned the fixture on terms for the following reasons.

[8] The application by the defendant for numerous and significant rulings on the admissibility of the plaintiff's intended evidence, and including especially the plaintiff's own evidence, was made very late. Ms Coy's brief of evidence has been available and known to the defendant for many months. The consequence of deciding that admissibility application, as I did on 9 August 2010, is not merely the deletion from Ms Coy's very lengthy brief of a number of passages but, necessarily, a complete re-write of her evidence so that it makes sense in the way that it would not have if it had only suffered excisions. It has been inevitable, also, that the plaintiff has had to try to call additional witnesses as a result of not being permitted to have their evidence introduced in the form of hearsay by Ms Coy and other witnesses for the plaintiff.

[9] Although, when I asked Mr Fairclough bluntly what would be the consequences if I declined the adjournment application, counsel told me that he would appeal that decision, that is no reason for granting the adjournment. Rather, I do so because I consider that the practical consequence of not doing so would be to put at risk the whole of the plaintiff's case. Put another way, it would not have been surprising that the plaintiff would simply have elected to discontinue her proceeding and face an application for substantial costs. I do not consider this would have been

a just outcome or, at least, not have been as just an outcome as the alternatives that are available.

[10] In granting the adjournment, I am very conscious that a substantial number of people, not merely the parties and their representatives, have made personal and professional rearrangements and have prepared themselves mentally for giving evidence. They will now have to be told that this will not happen, at least this year. The Court very much regrets those consequences of the decision to adjourn and trusts that this can be communicated to those witnesses and others who are no doubt affected adversely.

[11] The terms on which the adjournment is granted are as follows.

[12] First, the adjournment is sine die and no further fixture will be allocated to the case until counsel for both parties certify to the Registrar that it is ready for trial and that no more interlocutory applications will be made.

[13] Next, the adjournment is granted with costs on the adjournment being reserved. Although Ms Russell sought to have imposed a condition that Ms Coy be disqualified from any claim for lost remuneration after 16 August 2010, I do not consider that to be a just condition attaching to an adjournment, although it may be a matter for submission when the case comes to trial.

[14] The adjournment is granted except that the evidence of two overseas witnesses, who have already made arrangements to travel to New Zealand, will be taken in Christchurch on 19 August 2010 or such other date as both can give evidence while they are still in New Zealand. Although Mr Fairclough objected to having to prepare cross-examination of those two witnesses, I do not consider that it is too onerous a condition to require counsel for the plaintiff to put to them the evidence that will be given by the plaintiff's witnesses that may contradict theirs. Unless by arrangement with the Registrar of a change of date of hearing, the evidence of Superintendent Sandra Manderson and Dawn Bell will be taken in the Employment Court at Christchurch beginning at 9.30 am on Thursday 19 August 2010 and will form part of the record when the remainder of the case goes to trial.

[15] There is one outstanding interlocutory issue that I am in the course of determining at the moment which relates to the permitted redaction of what are known to the parties as the Penn notes. It is agreed that an unredacted copy of these notes will be forwarded to the Registrar by counsel for the defendant so that I can determine the permissible extent, if any, of redaction of copies of those notes given to counsel for the plaintiff.

[16] As I advised counsel, it is unlikely that, by the time a fixture comes to be set down after certification by counsel, this will be before March 2011 and may be later than that.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 11 August 2010