

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 159
ARC 47/04**

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

BETWEEN Q
Plaintiff

AND W
Defendant

ARC 70/08

AND IN THE MATTER of proceedings removed

AND IN THE MATTER of further and better particulars

BETWEEN Q
Plaintiff

AND W
Defendant

Hearing: 10 September 2012
(Heard at Auckland)

Appearances: Q, plaintiff
David France, counsel for defendant

Judgment: 18 September 2012

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant has applied for orders requiring the plaintiff to provide further and better particulars in relation to the further amended statement of claim dated 22 October 2010.

[2] As early as 14 December 2010, counsel for the defendant claimed that various pleadings within the further amended statement of claim were deficient and failed to provide sufficient particulars to fully, fairly and clearly inform the defendant of the nature and details of the claim. These were identified in the further amended statement of defence.

[3] There was an indication that the plaintiff would obtain legal advice and that an amended statement of claim would be filed. That did not eventuate. The claim for further particulars was finally brought to a head by the defendant's application of 5 July 2012.

[4] In a memorandum of counsel for the defendant, the plaintiff was invited to respond to counsel's suggestion of an alternative way of dealing with the application for particulars. That memorandum had invited the plaintiff to file a further amended statement of claim in accordance with reg 11 of the Employment Court Regulations 2000 (the regulations) addressing the claim for further and better particulars sought by the defendant.

[5] The plaintiff opposed the making of the orders sought by the defendant and declined to file an amended statement of claim. She contended that all facts and information have always been available to the defendant which held records of all employment matters and therefore all the particulars would be available to the defendant without the plaintiff having to plead them.

[6] The plaintiff referred to a previous document she filed, dated 25 January 2011 which contained numerous examples allegedly showing that the matters about which the defendant was now seeking particulars had been provided previously in earlier statements of claim. The plaintiff contended that the defendant's request was completely unreasonable and unnecessary.

[7] In his submissions in support of the application for an order requiring further particulars, Mr France, counsel for the defendant, referred to the protracted history of these proceedings, which date back to 2004. The amended statement of claim dated

22 October 2010 followed from a judgment I issued on 26 March 2010¹ which found that various pleadings in the previous amended statement of claim dated 9 October 2008 were statute barred. It required that a further amended statement of claim be filed and served within 60 days from the date of that judgment. The plaintiff then sought leave to appeal to the Court of Appeal. When that application was discontinued, the amended statement of claim dated 22 October 2010 was filed.

[8] As to the document of 25 January 2011, Mr France correctly submitted that it did not comply with the requirement that pleadings be contained in one document. He also submitted that the cross-references did not satisfactorily address the request for further and better particulars.

[9] Mr France relied on reg 11 of the regulations which states:

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:
 - (g) in the case of a statement of claim filed under regulation 7, whether a full hearing (a hearing *de novo*) is sought, and, if not, the matters required by section 179(4) of the Act, namely,—
 - (i) any error of law or fact alleged by the plaintiff; and
 - (ii) any question of law or fact to be resolved; and

¹ [2010] NZEmpC 28.

- (iii) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
 - (iv) the relief sought.
- (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.
- (3) Each paragraph of a statement of claim must be concise and must be confined to 1 topic.

[10] Mr France particularly relied on reg 11(2) and cited *O'Flynn v Southland District Health Board*² where the Employment Court observed:³

In the absence of provisions for applications for further particulars in the Employment Court Regulations, rule 185 of the High Court Rules applies. The settled principles from authorities relating to that rule are that there must be sufficient particulars in the statement of claim to:

- Inform the other party of the nature of the case as distinguished from the mode in which the case will be proved.
- Prevent surprise.
- Enable the preparation of evidence.
- Limit and define the issues.

[11] The High Court rule that now applies is r 5.21 which allows a party by notice to require the other party to provide further particulars that may be necessary to give fair notice of the cause of action and to file a more explicit statement of claim. The notice must indicate as clearly as possible the points on which the pleading is considered defective. If it is not complied with, the Court, if it considers that the pleading objected to is defective or does not give particulars properly required by the notice, may order a more explicit pleading to be filed and served.

² CC 20/07, 2 November 2007.

³ At [4].

[12] Regulation 6 provides that where the regulations or the Employment Relations Act 2000 (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. I am satisfied that r 5.21 is the relevant rule to apply to the circumstances of this case.

[13] Mr France pointed out that the further amended statement of claim alleges six causes of action, two of which were the subject of the present application. These were the second cause of action consisting of a personal grievance alleging constructive dismissal and the third cause of action which alleges breaches of employment agreements and contracts.

[14] Mr France submitted that the plaintiff's attack on the defendant's actions during the plaintiff's employment was broad and involved numerous alleged incidents concerning her job, her terms of employment and her treatment by the defendant. He noted that the plaintiff alleges in her pleadings that the defendant has engaged in various unlawful actions against her and has breached various legislative obligations and express and implied terms of her employment. These allegations, he submitted, were pleaded in broad terms and the allegations included: bullying; harassment; victimisation; stress; excessive workloads; lack of adequate support; lack of training; discrimination on various grounds; incidents of breaches of good faith; oral variations to the plaintiff's employment agreement; breach of the plaintiff's employment agreement; instances of complaints regarding salary and working conditions; duress; undue influence; incorrect recording of sick leave; and instances of refusals to grant study leave.

[15] Mr France alleged that in making these allegations the plaintiff has provided the defendant and the Court with little information as to when the events allegedly occurred, the basic detail of what the alleged actions or incidents involved, and the persons who engaged in such treatment of the plaintiff.

[16] Mr France relied on *O'Neill v Wellington Free Ambulance Service Inc*,⁴ where Chief Judge Goddard stated that where a plaintiff relies on a number of incidents to support a claim these should be pleaded and held:⁵

It is inappropriate for the plaintiff to provide a non-exhaustive list of examples of incidents. ... The statement of claim must include all incidents being relied on, although it can be amended, if necessary, once discovery has occurred. It is not an option for the plaintiff to wait until after discovery before providing further particulars. Particulars must precede discovery for it is the pleadings that inform parties about the scope of discovery. Nor is it an answer to the defendant's complaint that all will be revealed well in advance in the plaintiff's briefs of evidence. The defendant is entitled to know the framework of the case it has to meet. Also it is also important for the Court to know before the hearing starts what the issues are that it will have to decide.

[17] Mr France also referred to *Price Waterhouse v Fortex Group Ltd*,⁶ where the Court of Appeal held:⁷

The pleader and Court simply ask "in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the case to be met?".

[18] The defendant's submission was that the further amended statement of claim in respect to the issues raised by the defendant does not provide such sufficiently clear and particularised details, grounds and alleged facts that are necessary in order to fully inform the Court and the defendant of her claims. The provisions of such particulars is said to be of importance in determining:

- a) The case the defendant now has to prepare for;
- b) The evidence which will need to be prepared;
- c) Whether aspects of the defendant's claims are statute barred or otherwise outside the jurisdiction of the Court; and
- d) What the hearing is going to entail and how it can most efficiently and effectively proceed.

⁴ WC 18/02, 7 June 2002.

⁵ At [21].

⁶ CA 179/98, 30 November 1998.

⁷ At 19.

[19] In broad terms the particulars sought by the defendant asked the plaintiff to set out what she claims happened, when it happened, who was responsible for causing it, and, if relevant any documents or policies which the defendant is alleged to have breached.

[20] Mr France went through each of the paragraphs in the further amended statement of claim and indicated the particulars that were now required in terms of the notice that had been given. I am satisfied that each and every one of those particulars is required to be provided for the plaintiff to comply with reg 11. For clarity's sake but to avoid additionally lengthening this judgment, the further and better particulars sought are annexed to this judgment.⁸ I order that those particulars be provided by means of a further amended statement of claim.

[21] The plaintiff sought additional time for the provision of an amended statement of claim. She advised that she was again seeking further legal advice. It was agreed that the most appropriate course would be to allow the plaintiff two months from 10 September 2012 to obtain that advice and file the amended statement of claim.

[22] If the plaintiff has been unable to comply with that timeframe then either party may apply to the Court for a further review of the requirement to file the amended statement of claim, embodying the particulars that have been ordered.

[23] Although it was not part of the application for further and better particulars, Mr France drew attention to paragraphs in the further amended statement of claim which he submitted are statute barred, as found by the Court in the judgment of 26 March 2010. He also referred to a minute I issued on 9 December 2009 in which I stated that the Court did not have any jurisdiction to issue an urgent order sought by the plaintiff that the defendant provide the ACC with certain information. In that minute I stated:

... The plaintiff was unable to point to any legal basis for this Court having jurisdiction to issue such an order and I am satisfied that there is none. The application for that order is therefore dismissed.

⁸ Appendix A.

[24] The defendant has put in issue as statute barred the following paragraphs of the amended statement of claim:

41. which claims that her ACC claim was declined because the defendant deliberately provided inaccurate information and withheld information;
43. which refers to the obligation of the defendant to provide ACC with accurate records;
44. which relates to figures provided by the defendant to ACC;
51. which claims that the defendant as an accredited employer, has an obligation to pay the abatement for weekly compensation payments cover;
52. which claims that as an accredited employer the defendant has an obligation to pay all medical expenses and rehabilitation costs in relation to the plaintiff's cover.

[25] I make no ruling on these matters. I draw them to the plaintiff's attention if she is in the process of obtaining legal advice because it is the defendant's announced intention that if they appear in any new statement of claim then there will be an application for them to be struck out. It would be unfortunate if this caused even further delay in having these long outstanding matters set down for hearing.

[26] Costs in relation to the defendant's successful application for further and better particulars are reserved.

Interim name suppression

[27] In my judgment of 26 March 2010,⁹ referred to in para [7] above, I granted the plaintiff an interim non-publication order under clause 12(1) of Sch 3 of the Act and directed that the name of the plaintiff in the Employment Court proceedings be suppressed in the interim. That order was to apply until further order of the Court. I also directed that that judgment was to be sent only to the parties, the registry and other Judges of the Employment Court and not to have any wider circulation.

⁹ At [65].

[28] I convened a chambers conference on 26 March 2010 to deal with directions for the disposition of the plaintiff's application for suppression. A timetable for the filing of affidavits and submissions was agreed so that the Court could determine the issue of suppression on the papers.

[29] The parties complied with the agreed timetable and on 10 May 2010, at another chambers conference, the parties confirmed that they had no further material to put before the Court in respect of the plaintiff's application for name suppression.

[30] There the matter rested because the plaintiff had proceedings before the Court of Appeal and she had advised that she thought she had sought name suppression in that Court. There was also the wish of the parties to settle matters at a Judicial Settlement Conference. In the event there has not been a Judicial Settlement Conference. On 14 December 2010 the Employment Court was advised by the Court of Appeal that the plaintiff's application for leave to appeal out of time had been abandoned.

[31] The present judgment is the first to be issued since the making of the interim suppression orders. For reasons that will be given in a separate judgment, the interim suppression order is hereby discharged. This judgment and my judgment of 26 March 2010 may now be circulated in accordance with the Court's practice.

B S Travis
Judge

Judgment signed at 4.30pm on 18 September 2012

APPLICATION BY DEFENDANT FOR ORDERS REQUIRING PLAINTIFF TO PROVIDE FURTHER AND BETTER PARTICULARS OF FURTHER AMENDED STATEMENT OF CLAIM DATED 22 OCTOBER 2010

TO: The Registrar, Employment Court, Auckland

AND TO: The Plaintiff

Take notice that the [W], the defendant in this proceeding mentioned above, applies to the Employment Court at Auckland for orders that the plaintiff: -

- a. provide further and better particulars of each of the plaintiff's claims, as requested below; and
- b. Pay the defendant costs in relation to this application.

The further and better particulars sought in relation to the Amended Statement of Claim dated 22 October 2010 and filed on 22 October 2010 are as follows:

1. In relation to paragraph 11 of the Further Amended Statement of Claim:

- 1.1. Particulars as to when the defendant admitted the claim for injury, whether it was admitted in writing and if so the date of that document, and who admitted the claim for injury on behalf of the defendant.

2. In relation to paragraph 13 of the Further Amended Statement of Claim:

3. Particulars as to when the defendant acknowledged to the plaintiff that it would pay the plaintiff a top up of the 20% of the last 52 weeks of income not paid by ACC, who made that acknowledgment.

4. **In relation to paragraph 15(a) of the Further Amended Statement of Claim:**

4.1. Particulars as to the duties the plaintiff alleges she was required to perform which she relies on in claiming she was overworked by the defendant.

4.2. The dates when the plaintiff alleges she was overworked by the defendant.

4.3. The nine full time employee roles with the defendant, which are performing the work which the plaintiff pleads she was required to perform on her own.

5. **In relation to paragraph 15(b) of the Further Amended Statement of Claim:**

5.1. Particulars as to what caused the plaintiff's high levels of stress; when the plaintiff alleges she was experiencing high levels of stress; and how the high levels of stress affected the plaintiff.

5.2. Particulars to support the pleading that the defendant had the ability to ameliorate those high levels of stress including what steps the plaintiff took to inform the defendant of the high levels of stress she was experiencing, and what the plaintiff says the defendant could have done to rectify the situation resulting in high levels of stress.

6. **In relation to paragraph 15(c) of the Further Amended Statement of Claim:**

6.1. Particulars of what the unreasonable workload consisted of.

7. **In relation to paragraph 15(d) of the Further Amended Statement of Claim:**

7.1. Particulars to support the claim of lack of adequate support; the claim of lack of supervision; and the claim of lack of adequate training.

8. In relation to paragraph 15(e) of the Further Amended Statement of Claim:

- 8.1. What the defendant failed to do to provide a safe working environment.
- 8.2. What improvements were requested by the plaintiff; when those improvements were requested; and why the improvements were requested by the plaintiff.

9. In relation to paragraph 15(f) of the Further Amended Statement of Claim:

- 9.1. Particulars of each of the bullying incidents experienced by the plaintiff.
- 9.2. Particulars as to when each of the bullying incidents occurred, and who was responsible for the bullying.
- 9.3. Particulars of each of the harassment incidents experienced by the plaintiff.
- 9.4. Particulars as to when each of the harassment incidents occurred; and who was responsible for the harassment
- 9.5. Particulars of each of the victimisation incidents experienced by the plaintiff.
- 9.6. Particulars as to when each of the victimisation incidents occurred and who was responsible for the victimisation.
- 9.7. Particulars as to how the defendant failed to protect the plaintiff from the alleged bullying, harassment and victimisation.
- 9.8. Particulars as to when the defendant raised allegations of bullying, harassment and victimisation including the dates in which they were raised, whom the claims were raised with and whether the plaintiff raised them in writing.

10. **In relation to paragraph 15(h) of the Further Amended Statement of Claim:**

- 10.1. Particulars to support the allegations of discrimination the plaintiff suffered on the basis of disability.
- 10.2. Particulars to support the allegation of discrimination the plaintiff suffered on the basis of employment status.
- 10.3. Particulars of the discrimination the plaintiff suffered on the basis of bullying.
- 10.4. In relation to each of the further particulars requested in 7.1, 7.2 and 7.3 herein, particulars of what each allegation of discriminations consisted of, when it occurred and the individuals who were responsible for the discrimination.

11. **In relation to paragraph 15(i) of the Further Amended Statement of Claim:**

- 11.1. Particulars of the "*lesser equal employment opportunities*" the plaintiff experienced in comparison to other employees, including what those lesser equal employment opportunities were and what employment opportunities other employees had which were not available to the plaintiff.

12. **In relation to paragraph 15(j) of the Further Amended Statement of Claim:**

- 12.1. When the plaintiff alleges the defendant breached its duty of care to the plaintiff, how that duty of care was breached and which individuals were responsible for the breach of duty of care.

13. **In relation to paragraph 15(i) of the Further Amended Statement of Claim:**

- 13.1. Particulars of what the implied duties are referred to in paragraph 15(l).
- 13.2. Particulars as to how the defendant failed to adhere to those implied duties.

14. **In relation to paragraph 16 of the Further Amended Statement of Claim:**

- 14.1. The circumstances which required the defendant to consider redeployment options for the plaintiff.
- 14.2. Any terms of employment being relied on by the plaintiff which required the defendant to consider redeployment options for the plaintiff.

15. **In relation to Paragraph 18 of the Further Amended Statement of Claim:**

- 15.1. How the defendant breached its good faith obligations; when the defendant breached its good faith obligations and which representative of the defendant in particular was responsible for the breaches of good faith.
- 15.2. Those parts of the code of good faith which apply to the defendant and which the plaintiff alleges the defendant breached.

16. **In relation to paragraph 25 of the Further Amended Statement of Claim:**

- 16.1. The treatment the plaintiff claims she experienced whilst employed by the defendant which the plaintiff is relying on in her claim for "*compensatory damages*".

17. **In relation to paragraph 33 of the Further Amended Statement of Claim:**

- 17.1. Particulars of the trial period which the defendant was required to advise the plaintiff of, including the employment agreement in which the trial period the plaintiff is referring to is contained, the clause in that employment agreement providing for a trial period, and when the trial period applied to the plaintiff.

18. **In relation to paragraph 34 of the Further Amended Statement of Claim:**

- 18.1. Particulars of what each of the oral charges to the individual employment agreement referred to by the plaintiff were which the plaintiff says were agreed between the plaintiff and defendant; the date or dates when those

oral changes were agreed, and with whom the plaintiff reached agreement on such oral terms of employment.

19. **In relation to paragraph 36 of the Further Amended Statement of Claim:**

19.1. Who the plaintiff raised concerns about salary and working conditions with, when those concerns were raised, and what those concerns related to.

20. **In relation to paragraph 38 of the Further Amended Statement of Claim:**

20.1. Particulars of the provisions in the "*collective contract*" which were breached by the defendant.

21. **In relation to paragraph 39(b) of the Further Amended Statement of Claim:**

21.1. Particulars to support the allegation that the plaintiff's contract was signed under duress, including particulars as to the contract the plaintiff is referring to; particulars as to the nature of the duress the defendant exerted on the plaintiff and who exerted the "*duress*" on the plaintiff.

22. **In relation to paragraph 39(c) of the Further Amended Statement of Claim:**

22.1. Particulars of the verbal negotiations between the plaintiff and the defendant that formed part of the contractual agreement, including when those verbal negotiations occurred and who they occurred with.

23. **In relation to paragraph 39(d) of the Further Amended Statement of Claim:**

23.1. Particulars of the fixed term contract the plaintiff is referring to.

23.2. The recorded grievances the plaintiff alleges the defendant failed to address including a description of the grievances and what particular events and/or incidences they related to, the dates when those grievances were first raised, who they were raised with, whether they were raised in writing and if so the date and form of the written correspondence.

24. **In relation to paragraph 39(e) of the Further Amended Statement of Claim:**

- 24.1. Particulars of the financial incentives the defendant withheld from the plaintiff.
- 24.2. Particulars of the undue influence the defendant exerted over the plaintiff during the bargaining process.

25. **In relation to paragraph 39(f) of the Further Amended Statement of Claim:**

- 25.1. Particulars as to how the defendant failed to comply with its obligations relating to accident leave, sick leave, holiday leave and holiday pay including what those obligations were, any employment agreement the plaintiff was a party to, policy of the defendant which included the obligations and/or statutes which contain the obligations.
- 25.2. When the defendant failed to correctly consider accident leave and/or sick leave and/or holiday leave and/or holiday pay in relation to the plaintiff.

26. **In relation to paragraph 39(g) of the Further Amended Statement of Claim:**

- 26.1. Particulars as to when sick leave was incorrectly recorded and why it was incorrectly recorded and the amount of sick leave that was incorrectly recorded.

27. **In relation to paragraph 39(i) of the Further Amended Statement of Claim:**

- 27.1. Particulars of the work the plaintiff pleads she was required to take home after "*the contract had ceased*".
- 27.2. Particulars of any terms and conditions of employment between the plaintiff and the defendant whereby the defendant agreed to pay the plaintiff for such work after the plaintiff had resigned from her employment, the University representative that agreement was entered into with, and any written documentation detailing those terms and conditions.

28. In relation to paragraph 39(k) of the Further Amended Statement of Claim:

28.1. Particulars of the condition of employment referred to whereby the plaintiff was entitled to receive time off in lieu of overtime, including the specific terms in the employment agreement between the plaintiff and the defendant.

28.2. Particulars of when the plaintiff's pay was deducted for taking time off in lieu including the dates in which the plaintiff's pay was deducted for taking time off in lieu and the amount of pay deducted on each occasion this occurred.

29. In relation to paragraph 39(o) of the Further Amended Statement of Claim:

29.1. Particulars of the discrimination referred to by the plaintiff which the plaintiff alleges led to injury including particulars of the injuries suffered by the plaintiff as a result of such discrimination and when the injury or injuries were suffered.

30. In relation to paragraph 39(p) of the Further Amended Statement of Claim:

30.1. When the plaintiff requested study leave, who she requested study leave from and whether such a request was made in writing.

This application is made in reliance on Rule 11 of the Employment Court Regulations 2000 and section 221 of the Employment Relations Act 2000.