IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 174
WRC 2/13

IN THE MATTER OF	application for leave to file amended statement of claim
BETWEEN	ARTHUR UDOVENKO Plaintiff
AND	OFFSHORE MARINE SERVICES (NZ) LIMITED Defendant

Hearing:	On the papers filed by the plaintiff on 17 and 18 September 2013 and the defendant on 18 September 2013
Appearances:	Paul McBride, counsel for plaintiff Susan Hornsby-Geluk, counsel for defendant
Judgment:	19 September 2013

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff has sought leave to amend his statement of claim to include a second and alternative cause of action/prayer for relief under s 4 of the Wages Protection Act 1983 (the Wages Protection Act). The application is opposed by the defendant. The parties agreed that the application ought to be dealt with on the papers given the timeframes involved.

[2] In essence the claim relates to whether the plaintiff was correctly paid by the defendant during two specified periods. He seeks declarations that he was entitled to payment of remuneration for the equal time off already earned by him while working on board the defendant's vessel from 14 November 2011 to the date of his suspension on 10 December 2011, and for a two-day period following his suspension. The sums sought are set out in a schedule to the present statement of claim. He seeks to amend his claim to include an alleged breach of s 4 of the Wages

Protection Act. That provision states that subject to certain other provisions of the Act an employer shall, when wages become payable to a worker, pay the entire amount out of those wages to the worker without deduction. The allegedly unlawful deductions are those amounts already identified in the schedule to the statement of claim.

[3] The defendant opposes leave on two grounds. First it is said that the proposed amendment is not "a matter" that was before the Employment Relations Authority (the Authority) and is accordingly excluded from the Court's jurisdiction on a de novo challenge under s 179 of the Employment Relations Act 2000 (the Act). Second it is submitted that the defendant would be prejudiced by the grant of leave given that the hearing commences in a few days, namely on 23 September 2013 and further evidence will be required to respond to the new pleading.

[4] In relation to the first point, the defendant submits that the question for the Court is whether or not the plaintiff's proposed claim for breach of s 4 of the Wages Protection Act was part of the Authority's investigation or was a question before the Authority. In this regard it is submitted that the Authority dealt with a claim for wage arrears rather than a claim that the defendant had made an unlawful deduction. It is further submitted that in order to succeed on the proposed new cause of action the plaintiff must establish that a deduction was in fact made. Counsel points out that the word "deduction" does not appear in the Authority's determination and nor is there reference to the Wages Protection Act. It is submitted that as the issue of whether a deduction was made was not a matter before the Authority the proposed cause of action falls outside the scope of s 179. It is also submitted that the prescribed process for pursuing a claim for an unlawful deduction has not been followed.

[5] Counsel for the plaintiff submits that the proposed amendment does not fall foul of s 179, that it arises on the current pleadings, would not require either party to advance any additional evidence, there is no prejudice to the defendant, and that it is in the interests of justice that leave be granted, to ensure that all issues of controversy between the parties are clear on the face of the pleadings.

[6] It is well established that the Court may grant leave to amend a pleading after a case has been set down.

[7] Section 179 provides that a party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of it may elect to have the matter heard by the Court. Section 187(1)(a) provides that the Court has exclusive jurisdiction to hear and determine elections under s 179 for a hearing of a matter previously determined by the Authority.

[8] It is common ground that the pleading of breach of the Wages Protection Act was not before the Authority. The Authority did not, accordingly, consider whether there had been a breach of that Act, or whether an unlawful deduction had been made to the plaintiff's wages by the defendant. That is not, however, decisive.

[9] In *Newick v Working In Limited*[1] leave to add in a new cause of action was granted, the Court observing that:[2]

> Additional causes of action, not advanced in the Authority, can be pursued on a *de novo* challenge, provided the "twin statutory requirements" (of having been questions before the Authority (s 179) and having been brought within time (ss 114 and 142)) are met and the claim is within the overall jurisdiction of the Court. There is, accordingly, no objection to re-couching a legal claim, provided the matter itself was before the Authority.
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> I conclude that while the plaintiff did not pursue a cause of action in estoppel before the Authority that does not, of itself, amount to an abuse of process in terms of pursuing such a claim on a *de novo* challenge in this Court. The offer of payment for the six month's work was a matter before the Authority and can be pursued in a re-formulated claim in the Court.

[10] In *Bourne v Real Journeys Limited*[3] Judge Couch referred to an earlier judgment of the full Court and held that the Court could hear and decide matters which were not actually determined by the Authority, provided they were part of the Authority's investigation.

[11] An overly technical approach is not to be taken. That would enable form to trump substance. And as the Court of Appeal emphasised in *Thornton Hall*

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[1] [2012] NZEmpC 156.
[2] At [26] and [27].
[3] [2012] NZEmpC 2.

Manufacturing v Shanton Apparel Ltd,[4] in dealing with an application for leave to amend the Court should be mindful that:

> The parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding.

[12] While no cause of action under the Wages Protection Act was pursued in the Authority, a dispute as to whether the plaintiff had been correctly paid during the periods referred to in the statement of claim was. As the Authority's determination records, the defendant sought a declaration that it had correctly paid the plaintiff and that it did not have any further liability in relation to his claim for arrears of wages. Broadly speaking the "matter" before the Authority was whether the defendant had paid the plaintiff appropriately and, if not, what wages he had owing to him. What the plaintiff is seeking to do is reformulate his claim, to argue that the defendant used the sums properly owing to the plaintiff without his knowledge or consent, which (he will argue) amounts to an unlawful deduction of wages which must now be repaid. The proposed amendment provides an alternative platform for effectively achieving the same ends.

[13] The defendant submits that it is prejudiced by the application. It appears that the application was drawn to the defendant's notice on 10 September 2013, nearly two weeks before the scheduled hearing date. The wage arrears that are claimed under the proposed amendments mirror the lost wages that are set out in the schedule to the statement of claim. There is material that is contained within the plaintiff's brief of evidence and the agreed bundle of documents that have been filed in accordance with earlier timetabling orders in relation to the circumstances in which he says his pay was dealt with during the periods in question which will, it is said, provide an evidential platform for the new cause of action. Mr McBride submits that the new cause of action would not require additional evidence from either party and is one that can readily (and appropriately) be dealt with by way of submission.

[14] Any prejudice to the defendant must be balanced against prejudice to the defendant if leave is not granted – in particular that he will be unable to pursue an alternative cause of action and the relief sought under it.

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[4] [1989] 3 NZLR 304, 309.

[15] Standing back and considering the overall interests of justice, I am satisfied that leave ought to be granted. If the defendant requires additional time to prepare evidence to respond to the matters which are raised in terms of the proposed new pleading then any prejudice can be addressed, if necessary, by way of an adjournment. Issues as to whether the steps taken by the defendant in the circumstances amount to a deduction in terms of the Wages Protection Act and issues relating to the scope of s 11(1) can be traversed more fully at trial, including by way of legal submission.

[16] An amended statement of claim is to be filed and served no later than 3pm on 19 September 2013. The defendant is to file and serve a statement of defence to the amended statement of claim by 4pm on 20 September 2013. Leave is reserved for the defendant to apply for an adjournment.

[17] No costs were sought in relation to the application and none are ordered.

Christina Inglis
Judge

Judgment signed at 9.30am on 19 September 2013