IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2020] NZEmpC 26
EMPC 196/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to adduce further evidence
BETWEEN	DEREK GIBSON-SMITH Plaintiff
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing: (on the papers)

Appearances: M Quigg, for the plaintiff
P Chemis, for the defendant

Judgment: 10 March 2020

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:
(Application to adduce further evidence)

Introduction

[1] On 29 November 2019, I reserved judgment following the substantive hearing of this proceeding.

[2] On 4 March 2020, shortly before my judgment was to be delivered, Mr Gibson-Smith applied for leave to file a further affidavit. That application is opposed by the Ministry of Business, Innovation and Employment (MBIE).

[3] Before outlining the competing positions, it is necessary to describe the background.

[4] Mr Gibson-Smith has for some 16 years worked in a call centre now operated by MBIE, and prior to its creation, by other government entities.

[5] In 2003, he was employed as a tenancy officer to deal primarily with queries raised under the Residential Tenancies Act 1986. He says that when he was employed, bond queries were dealt with by bond officers.

[6] In 2008, his employer agreed that he would not be required to assume responsibilities for bond queries, notwithstanding that this was the case for some advisors performing tenancy work. This meant his primary focus would continue to be on work generated by the tenancy line. This arrangement continued for some years.

[7] In early 2018, Mr Gibson-Smith was requested to attend training about bond queries because MBIE wished to merge the tenancy and bond lines. He responded by stating he could not be required to do this, given the long-standing agreement he would not be required to undertake such work.

[8] MBIE says that having regard to the terms of his initial employment and the changing needs of its call centre operation, it was entitled to make this request.

[9] It says that there was an informal arrangement only in 2008 that Mr Gibson-Smith not undertake bond work, and that flexibility was part and parcel of his current job description. It also says he had not lost his position by redundancy because of a proposal to amalgamate the tenancy and bond lines. It followed he was not entitled to redundancy compensation. It also says it adopted a fair process with regard to the merger, and that there is no basis for Mr Gibson-Smith's assertion that he has a disadvantage grievance.

Mr Gibson-Smith's proposed evidence

[10] Mr Gibson-Smith's proposed evidence relates to the scope of information provided by MBIE to Mr Gibson-Smith very recently about its intended merger of the tenancy and bond lines; and as to whether his current role is in fact redundant.

[11] In the affidavit for which leave is sought, Mr Gibson-Smith refers to emails sent him by Wendy Devlin of MBIE on 31 January and 4 February 2020, which indicated MBIE would be implementing an interactive voice response (IVR) function with effect from 5 February 2020 on the tenancy and bond lines. There would be a two-tiered menu that would prompt callers to select:

- what they are calling about (bond, mediation tribunal, healthy homes, or general tenancy); and

- what type of customer they are (tenant, landlord, property manager or other).

[12] In his proposed evidence, Mr Gibson-Smith says that the combined tenancy and bond line, in conjunction with the IVR function, would allocate callers to specific advisors based on the options selected by callers. This means, he says, that the IVR function has the ability to be programmed to never allocate callers to him if such a person is calling about bonds; and that it also has the ability to be programmed to allocate callers to him when a caller indicates he or she is calling about a tenancy issue.

[13] Annexed to Mr Gibson-Smith's proposed evidence is an exchange of correspondence between counsel. In that correspondence, Mr Quigg, counsel for Mr Gibson-Smith, said MBIE should not require him to be trained to answer bond calls, or to answer bond-related calls, because it is possible for the IVR function to not allocate bond calls to him at all.

[14] In response, Mr Chemis, counsel for MBIE, said that stakeholders had suggested that MBIE trial the IVR function; and this is what it has done. Long-term, MBIE was not sure whether it would continue to adopt this facility, or precisely how it would manage the tenancy and bond lines from a technical perspective.

[15] He said that MBIE does not wish to allocate specific calls to individual advisors because it considered the separation between bond and tenancy queries was inefficient and not in its stakeholders' interests. MBIE was continuing to cross-train tenancy and bond line advisors, which meant those persons could address both types of queries without calls being transferred.

[16] Reference was also made to evidence concerning technical issues which were discussed during the hearing. In further exchanges, counsel maintained their respective positions on these factual issues.

Submissions

[17] In support of the application, Mr Quigg submitted:

a) The Court could accept and call for such evidence and information as in equity and good conscience it thinks fit. It was, he said, well established that the Evidence Act 2006 (the EA) provides a helpful, albeit non-binding, indication of the way in which the Court should approach such a matter.

b) Section 98 of the EA states that a party may not offer further evidence after closing that party's case, except with the permission of the Judge. Permission is not to be granted if any unfairness caused to any other party by the granting of permission could not be remedied by an adjournment or an award of costs or both.

c) The interests of justice required leave being granted because Mr Gibson-Smith had been surprised by these recent developments and the implementation of an IVR function; he had previously understood there would be no ability to filter bond and tenancy calls. He did not call evidence on this issue at the hearing because he was unaware the IVR function was to be introduced. His affidavit would be of significant probative value.

d) A discreet issue was raised in respect of which the documentation would speak for itself, and the issue could be dealt with quickly and without any significant delay.

[18] In response, Mr Chemis submitted:

a) Mr Gibson-Smith had closed his case, and in those circumstances the Court's discretion must be exercised sparingly and only in exceptional circumstances. None were identified in the application.

b) The evidence the plaintiff proposed to lead merely identified the IVR functionality and expressed the plaintiff's desire for that to be used for his benefit.

c) This evidence, even if accepted, could not change the largely agreed factual position upon which the Court would decide the case, that is, that MBIE is cross-training all its advisors and was requiring them to undertake both tenancy and bond line work.

d) The evidence would not be conclusive of the case, or even likely to have a substantial bearing on essential issues.

e) Were leave to be granted, the evidence and MBIE's response would need to be tested in the usual way, which would needlessly prolong the proceeding and add additional and unnecessary costs.

[19] In reply, Mr Quigg submitted:

a) The Court was advised by a number of witnesses, including Mr Gibson-Smith, that there would be a single line on which bond and tenancy calls would be answered. There was no mention or reference to an ongoing ability to filter or separate bond and tenancy calls.

b) There now appears to be very little need for Mr Gibson-Smith to be cross-trained given the very low number of bond calls he received as a result of the implementation of the IVR function.

c) The delay and cost as a result of receiving further evidence would not be significant. Mr Gibson-Smith had no way of avoiding this, as he had no knowledge at the time of the hearing of the upcoming introduction of the IVR function.

Legal principles

[20] The relevant principles can be succinctly summarised. Section 98 of the EA relevantly reads:

> **98 Further evidence after closure of case**
>
> (1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the permission of the Judge.
>
> (2) In a civil proceeding, the Judge may not grant permission under subsection (1) if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.
>
> ...
>
> (5) The Judge may grant permission under subsection (1),–
>
> ...
>
> (b) ... at any time until judgment is delivered.

[21] In the High Court, it has been observed that the discretion which exists under s 98 of the EA must be exercised by reference to the purposes of the EA as contained in s 6, which relevantly provides:[1]

> **6 Purpose**
>
> The purpose of this Act is to help secure the just determination of proceedings by—
>
> (a) providing for facts to be established by the application of logical rules; and
>
> ...
>
> (c) promoting fairness to parties and witnesses; and
>
> ...
>
> (e) avoiding unjustifiable expense and delay; and
>
> ...

[22] In its review of the Evidence Code which led to the enactment of the EA, the Law Commission said that in most civil proceedings, and barring any irremediable unfairness to other parties, a Judge "is likely to permit a party to call further evidence" under s 98(2).[2]

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1 *Lindsay v Noble Investments Ltd* [2014] NZHC 799 at [126].

2 Law Commission, *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C359], read in light of Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [11]–[12] indicating that "the Commentary [is] an authoritative guide to interpreting the [Evidence Act] provisions".

[23] I note Mr Chemis' submission that the admission of evidence after judgment has been reserved should only occur sparingly and in exceptional circumstances. That was certainly the case at common law,[3] but may not now be the position given the codification of the applicable principles;[4] the provisions of the EA should be the starting point.

[24] In my view, the Court must scrutinise very carefully any application to admit late evidence, particularly if it is no more than an attempt to have a second bite at the cherry. But such an application may succeed if the interests of justice so require. An aspect of that assessment, at least in this case, is whether the proposed evidence is potentially relevant to a key issue in the case; and whether that evidence could with reasonable diligence have been led at trial.

Discussion

[25] On the face of it, the information referred to by Mr Gibson-Smith as to the operation of the IVR function was not known to him at the time of the hearing; nor was it referred to expressly at the hearing, although there was some evidence concerning the fact that a merger of the tenancy and bond lines would result in a single 0800 number for relevant callers.

[26] Mr Quigg submitted that the proposed evidence is important, because it goes to the heart of why MBIE is seeking to require Mr Gibson-Smith to answer bond-related calls. For its part, MBIE says it may not wish to persevere with the IVR function. It says that the merger of the two lines will be going ahead, and that cross-training is therefore essential.

[27] I have concluded that the nuances of these issues are best teased out in a short hearing, so that the relevance of this information can be properly assessed by the Court.

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3 *Equiticorp Industries Group Ltd (in stat man) v Hawkins* [1996] 2 NZLR 82 (HC) at [85].
4 *Lindsay*, above n 1, at [125]–[127].

[28] I note Mr Chemis' point that it would be necessary for the Court to reconvene, giving rise to delay and expense.

[29] That is so, but the Court must balance against those factors the need to address the surrounding circumstances relating to MBIE's decision to merge the tenancy and bond lines carefully.

[30] Moreover, the potential for delay can be mitigated by a prompt hearing within the next two weeks if the parties are available; and cost issues can be addressed in due course in the usual way.

[31] I am persuaded that the interests of justice require the application to be granted. I direct the Registrar to liaise with counsel as quickly as possible to establish a two-hour hearing to allow evidence and submissions on this one topic to be explored. An advance telephone directions conference is also to be established for timetabling purposes.

[32] I reserve costs.

B A Corkill
Judge

Judgment signed at 3.45 pm on 10 March 2020