

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**CC 20/07  
CRC 21/06**

IN THE MATTER OF proceedings removed from the  
Employment Relations Authority

AND IN THE MATTER OF an application by the defendant for  
further and better particulars and timetable  
orders

BETWEEN THOMAS PAUL O'FLYNN  
Plaintiff

AND THE SOUTHLAND DISTRICT HEALTH  
BOARD  
Defendant

Hearing: 17 September 2007  
(Heard at Wellington)

Appearances: H B Rennie QC and Penelope Ryder-Lewis, Counsel for the Plaintiff  
J G Miles QC, Counsel for the Defendant

Judgment: 2 November 2007

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**JUDGMENT OF JUDGE C M SHAW**

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[1] This is an application for further and better particulars of the statement of claim made by the defendant in the proceedings.

**Relevant principles of law**

[2] Regulation 11 of the Employment Court Regulations 2000 requires a statement of claim to include:

- The general nature of the claim;
- The facts (but not the evidence of the facts) upon which the claim is based;

- 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;
- The relief sought, including, in the case of money, the method by which the claim is calculated;
- The grounds of the claim;
- The nature and details of the claim;
- The relief sought; and
- The grounds upon which it is sought.

[3] Each paragraph of a statement of claim must be concise and must be confined to one topic.

[4] 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 a 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.<sup>1</sup>
- Prevent surprise.
- Enable the preparation of evidence.
- Limit and define the issues.

[5] The difference between facts and the evidence of the facts can be problematic as McGechan J acknowledged in *Price Waterhouse v Fortex Group Ltd*<sup>2</sup>:

*Nor ... does it greatly help to talk in terms of “facts” (to be pleaded) and “evidence” (for trial) as if there were some bright-line distinction between the two. There is not. “Facts” can merge into “evidence” without any clear dividing line.*

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<sup>1</sup> *Commerce Commission v Qantas Airways Ltd* (1992) 5 PRNZ 227 at 230 Barker J

<sup>2</sup> CA 179/98, Blanchard, Tipping, McGechan JJ, 30 November 1998

*In marginal cases, it is better to avoid generalities and rules of thumb, and to return to principle. The pleader and the 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?”*

[6] Mr Miles, for the defendant, submitted that it is also important for there to be sufficient particulars to allow the Court to supervise the interlocutory process, to allow discovery to proceed in an orderly and intelligent basis, and to adjudicate at trial.

[7] In addition to these established principles, some considerations arise particularly in the circumstances of the plaintiff, the nature of the defendant’s organisation, and the relationship between them.

## **1. Personal grievance/ breach of contract**

[8] The statement of claim alleges two main causes of action: A breach of the employment agreement and a claim of unjustified dismissal.

[9] While the plaintiff bears the burden of proving any breach of his employment agreement, in the case of a personal grievance the only onus on the plaintiff is to prove that he was dismissed. The burden of proof then falls to the defendant to justify the dismissal. In such a case, it may well be that the obligation to provide particulars rests more with the defendant than the plaintiff.

[10] In this case, however, where the principal allegation is breach of contract and where the defendant is seeking particulars about that cause of action, it is incumbent on the plaintiff to provide sufficient particulars in terms of the legal principles cited above.

## **2. Circumstances of the plaintiff**

[11] The plaintiff claims he is suffering from an incapacity caused by the way in which he was treated or omitted to be treated by the defendant. Mr Rennie submitted on his behalf that, where a plaintiff is suffering from acknowledged medical problems, this of itself can provide a serious impediment to the obtaining of sufficient instructions to give all the particulars which might normally be expected of a plaintiff.

### **3. Nature of the defendant's organisation**

[12] The defendant is the former employer of the plaintiff. It holds his employment records and all documentation relating to the incidents which form the background to this claim particularly the personal files of other relevant employees. Therefore, the source of the information required in the particulars may be already in the hands of the defendant.

#### **The pleadings**

[13] The following is a summary of the relevant allegations in the statement of claim.

[14] The plaintiff is a psychiatrist who was employed under various agreements by the defendant district health board from 1998 as a clinical director of mental health services. He was also engaged by the Ministry of Health as director of area mental health services for Southland. His employment is governed by specified implied terms and the defendant has statutory duties under the Health and Safety in Employment Act 1992.

[15] Established positions for psychiatrists in the defendant's mental health service were vacant or held by persons of limited qualifications; independent reviews had found that the physical facilities provided by the defendant were inadequate and represented a hazard; and management personnel were inadequately skilled and not trustworthy.

[16] Before 2003 employees of the defendant in the mental health service had sustained stress, impairment of health, and had been unable to work or continue to work because of the deficiencies.

[17] The defendant's workload was 2.5 times the normal professional workload and as a result of the way he was treated the plaintiff became ill. He was on sick leave from September 2003 until he was dismissed in November 2005 because there did not appear to be any realistic prospect of his being able to return to work in the reasonable future.

[18] Two causes of action are pleaded: breach of the plaintiff's employment agreement and unjustified dismissal. Particulars are only sought in relation to the breach of contract. Materially, the plaintiff pleads that:

- He had raised concerns about workplace health.
- There were internal deficiencies in the administration of human resources. He was entitled to but did not receive clinical support or accurate and timely information about key risks and problems including about another psychiatrist, Dr Fisher.
- The defendant failed to respond to serious understaffing in response to an agreement between the defendant and the Crown to increase the level of mental health services.
- As a consequence, the defendant allegedly left the plaintiff undefended and without sufficient support in the face of continuing and oppressive attacks from external agencies following a homicide by a patient.

[19] The plaintiff alleges that the defendant:

- Required him to manage Dr Fisher without disclosing important information known to it.
- Failed to adequately support the plaintiff in his role as the director of area mental health services for Southland and in his professional relationship with the Director of Mental Health Services.
- Withheld essential information from him about Dr Fisher and Mrs Metcalfe which was known to the defendant.
- Failed to pay his correct salary which caused him loss.
- Failed to submit his family's immigration documents or obtain residency status for him and his family; did not recruit or provide essential support staff or inform him of essential information.

[20] In relation to remedies, the plaintiff materially claims:

- Medical expenses for visits to medical practitioners and costs of his medication.
- Expenses of psychiatric and psychological counselling.
- Other costs to be quantified at trial.

### **The application**

[21] As part of the objection to the application, the plaintiff's solicitor filed an affidavit which annexes a number of documents which have been released to the plaintiff by the Health and Disability Commissioner in August 2007 following applications under the Official Information Act 1982 and the Privacy Act 1993, and other relevant correspondence.

[22] The defendant's application seeks particulars of pleadings in paragraphs 8, 15, and 19.2 of the statement of claim. The plaintiff originally objected to the entire application on the basis that it was defective in form and had no supporting affidavit nor a draft statement of defence and the defendant had failed to file a statement of defence in time. Following a judicial conference, it was agreed that the application for particulars should proceed notwithstanding these objections.

[23] The plaintiff's substantive objection to the application is on the grounds that the statement of claim has been filed in accordance with regulation 11(2) of the Employment Court Regulations 2000, is not bereft of particulars and is capable of being responded to by way of a defence. Further, it is alleged that the particulars sought are either matters of evidence and/or are already in the knowledge of the defendant being information held by the defendant which it will have to disclose to the Court and the plaintiff in these proceedings.

[24] Mr Miles submitted that the attack by the plaintiff on the actions of the defendant are very broad and cover almost every conceivable aspect, not only of the plaintiff's job but also of the defendant's mental health operation. He acknowledges that a plaintiff pleading a stress case will need to express some matters with some generality. Although he initially submitted that the defendant faces a special disadvantage, in the course of the hearing he accepted in relation to at least some of

the allegations of the statement of claim that if the names of persons and/or reports are given, the particulars relating to those persons and/or reports are within the knowledge of the defendant because it has the files relating to them.

[25] To this, Mr Rennie responded that as a matter of practicality much of the information sought by the defendant is already in the defendant's hands and will not be able to be supplied until disclosure has been completed. He accepted that it is appropriate for the plaintiff to supply some but not all particulars sought and, because the plaintiff is now in possession of the documents referred to in Mr Bartlett's affidavit, this is now more possible than before.

[26] The defendant seeks particulars in respect of the two substantive parts of the statement of claim in paragraphs 8 and 15 and the remedies part in paragraph 19.2.

### **Decision**

[27] Set out below are extracts from the defendant's application for particulars followed by orders relating to each part.

#### **Clause 8 of the statement of claim**

[28] Clause 8 generally contains allegations that the defendant's physical facilities and management personnel were inadequate and raised issues of workplace safety.

[29] On the basis of the relevant principles, the plaintiff is ordered to give some but not all particulars sought. Because of the nature of the claim and the fact that most of the information must be in the records and knowledge of the defendant, the particulars of clause 8 to be given by the plaintiff are limited to those which identify and specify the identities of places, reports, and/or persons who are referred to in the allegations. The plaintiff is not required to give any further evidence in support of them. The plaintiff is to provide the following relating to clause 8:

#### **Paragraph 8.3 statement of claim**

##### **Allegation:**

At all material times as the defendant knew:

The physical facilities provided by the defendant for the mental health service were inadequate and had been found in previous independent reviews to present a hazard to patients and staff.

**Particulars sought:**

- 1.1 In what specific ways were the physical facilities provided inadequate?
- 1.2 In what particular independent reviews had the facilities been found inadequate? and
- 1.3 What particular hazards were identified in relation to patients and staff?

**Orders**

- The plaintiff is to specify the physical facilities alleged to be inadequate.
- The plaintiff is to specify the independent reviews which identified the inadequacies and particular hazards alleged.

**Paragraph 8.4 statement of claim:**

**Allegation:**

Management personnel employed by the defendant to undertake recruitment of staff and to manage the employment of staff in the defendant's mental health service were inadequately skilled and not trustworthy.

**Particulars sought:**

- 2.1 Which management personnel referred to in paragraph 8.4 were inadequately skilled and not trustworthy?
- 2.2 In what respect were those persons inadequately skilled and not trustworthy?
- 2.3 On what basis is it alleged that they were inadequately skilled and not trustworthy (by reference to documents or otherwise)?
- 2.4 How is it said that the DHB knew of the alleged inadequacy and lack of trustworthiness (by reference to documents or otherwise)?
- 2.5 The date or dates upon which Dr O'Flynn advised the Southland District Health Board that said persons were inadequately skilled and/or not trustworthy and to whom he gave this notice.

## **Order**

- The plaintiff is to specify the management personnel referred to in paragraph 8.4.

### **Paragraph 8.5 statement of claim**

#### **Allegation:**

Prior to 2003 on several occasions persons employed by the defendant in the mental health service had sustained personal stress, impairment of health, and had been unable to work or continue in work through the effect of the deficiencies in workplace safety at Southland.

#### **Particulars sought:**

- 3.1 Which persons are referred to in paragraph 8.5?
- 3.2 On what specific occasions did those persons sustain personal; stress/impairment of health, and/or become unable to work?
- 3.3 Which particular deficiencies are alleged to have caused the injuries?
- 3.4 On what basis is it alleged that the Southland District Health Board knew that the alleged deficiencies were the cause of these injuries?

## **Order**

- The plaintiff is to specify the persons referred to in clause 8.5.

### **Clause 15 of the statement of claim**

[30] Clause 15 of the statement of claim pleads the specific breaches of express and/or implied terms of the plaintiff's employment agreement.

[31] Mr Rennie submitted that, given the medical condition of the plaintiff, the particulars sought in relation to these allegations have been difficult to obtain but now more detail may be provided because of the material now obtained and referred to in Mr Bartlett's affidavit.

[32] For his part, Mr Miles agreed that certain particulars were no longer vigorously pursued. The plaintiff is to provide the following particulars relating to clause 15:

### **Paragraph 15.1 statement of claim**

#### **Allegation:**

At all material times during the plaintiff's employment, the defendant by its conduct breached the express and/or implied terms of the plaintiff's employment agreement and/or duties under the Health and Safety in Employment Act 1992. More explicitly, but without limiting the general allegation, the breaches include that the defendant, with the knowledge alleged in paragraph 8 or otherwise having unjustifiably and/or recklessly failed to ascertain knowledge of those matters:

15.1 Failed to deal with the plaintiff as a good and considerate employer, and particularly failed to deal with the matters known to the defendant and particularised in paragraphs 5, 6, and 8 to 10 of this statement of claim and the concerns that the plaintiff raised in relation to workplace health and safety.

#### **Particulars sought:**

- 4.1 What specific concerns did the plaintiff raise?
- 4.2 On what date or dates and with whom did the plaintiff raise these concerns?
- 4.3 In what way did he bring those concerns to the attention of the defendant (by reference to documents or otherwise).

#### **Order**

- The plaintiff is to provide each of the particulars sought by the defendant in 4.1, 4.2, and 4.3.

### **Paragraph 15.2.1 statement of claim**

#### **Allegation:**

At all material times during the plaintiff's employment, the defendant by its conduct breached the express and/or implied terms of the plaintiff's employment agreement and/or duties under the Health and Safety in Employment Act 1992. More explicitly, but without limiting the general allegation, the breaches include that the defendant, with the knowledge alleged in paragraph 8 or otherwise having unjustifiably and/or recklessly failed to ascertain knowledge of those matters:

15.2 Failed and continued to fail to provide the plaintiff with a safe working environment, to avoid harm to him at work, and to ensure that the plaintiff was not harmed by the inaction of the defendant, including:

15.2.1 Having internal deficiencies in administration, particularly in human resources, with the effect that the plaintiff did not receive either the support from those areas which he was entitled to receive as clinical director, including the provision of adequate staffing resources to meet his needs, nor did he receive accurate and timely information in respect of key risks and problems (of whom Dr Peter Fisher was one).

**Particulars sought:**

- 5.1 What specific internal deficiencies were there in the administration in human resources?
- 5.2 What support was the plaintiff entitled to receive as clinical director that he did not receive?
- 5.3 What information was he not aware of in relation to Dr Fisher (or any other alleged key risks and problems)?
- 5.4 By what means it is said that the defendant knew of those alleged key risks and problems?
- 5.5 On what date did the defendant know of these alleged key risks and problems?

**Orders**

- The plaintiff is to provide the particulars sought in 5.1.
- The plaintiff is to specify the key risks and problems about which he did not receive accurate or timely information.

**Paragraph 15.2.2 statement of claim**

**Allegation:**

At all material times during the plaintiff's employment, the defendant by its conduct breached the express and/or implied terms of the plaintiff's employment agreement and/or duties under the Health and Safety in Employment Act 1992. More explicitly, but without limiting the general allegation, the breaches include that the defendant, with the knowledge alleged in paragraph 8 or otherwise having unjustifiably and/or recklessly failed to ascertain knowledge of those matters:

- 15.2 Failed and continued to fail to provide the plaintiff with a safe working environment, to avoid harm to him at work, and to ensure that the plaintiff was not harmed by the inaction of the defendant, including:

15.2.2 Failing to respond to serious understaffing, both generally and in response to an agreement between the defendant and the Crown to increase the level of mental health services provided, in order to meet the community's needs in the area served by the defendant.

**Particulars sought:**

- 6.1 What agreement is referred to in 15.2.2? (please indicate the relevant document).
- 6.2 In what respect did the defendant fail to respond to the alleged agreement?
- 6.3 Is it alleged that the defendant intentionally failed to perform an agreement with the Crown?
- 6.4 If the failure was intentional, please state the basis upon which it is alleged that there was an intentional breach.
- 6.5 If intentional or innocent, the particular breaches.

**Order**

- The plaintiff is to provide each of the particulars sought by the defendant in 6.1 and 6.2.

**Paragraph 15.2.3 statement of claim**

**Allegation:**

At all material times during the plaintiff's employment, the defendant by its conduct breached the express and/or implied terms of the plaintiff's employment agreement and/or duties under the Health and Safety in Employment Act 1992. More explicitly, but without limiting the general allegation, the breaches include that the defendant, with the knowledge alleged in paragraph 8 or otherwise having unjustifiably and/or recklessly failed to ascertain knowledge of those matters:

15.2 Failed and continued to fail to provide the plaintiff with a safe working environment, to avoid harm to him at work, and to ensure that the plaintiff was not harmed by the inaction of the defendant, including:

15.2.3 Failing to respond to the situation where, following [a] homicide the plaintiff was left undefended and without sufficient support to face continuing and oppressive attacks from external agencies, including the Director, Mental Health Services and the Health and Disabilities Commissioner.

**Particulars sought:**

- 7.1 The facts upon which it is alleged that the plaintiff was left undefended.
- 7.2 The facts upon which it is alleged that the plaintiff was left without sufficient support.
- 7.3 The nature of the defence and support that the plaintiff alleges was legally required to be supplied to him.

### **Order**

- The plaintiff is to supply each of the particulars sought by the defendant in 7.1 and 7.2.

### **Paragraph 15.3.4 statement of claim**

#### **Allegation:**

15.3 From the commencement of his employment, the defendant required the plaintiff to undertake work that was continually excessive in volume, complexity and stress, and which was required to be undertaken in circumstances that lacked the resources and/or support needed for the plaintiff to safely carry out his employment, including:

15.3.4 Requiring the plaintiff to manage a staff member Dr Peter Fisher without disclosing important information known to the defendant about Dr Fisher.

#### **Particulars sought:**

- 8.1 What is the knowledge alleged to have been known to the defendant about Dr Fisher?
- 8.2 When is it alleged that the defendant had that knowledge?
- 8.3 On what date did the defendant obtain the knowledge and by what means (by reference to documents or otherwise)?

### **Order**

- The plaintiff is to supply each of the particulars sought by the defendant in 8.1 and 8.2.

### **Paragraph 15.4.4 statement of claim**

#### **Allegation:**

15.4 Treated the plaintiff in such as way as to damage the relationship of trust, confidence and fair dealing, including:

15.4.4 Failing to adequately support the plaintiff in his role as Director of Area Mental Health Services for Southland and in his working relationship with the Director of Mental Health Services, Dr Chaplow.

**Particulars sought:**

- 9.1 What support should the plaintiff have had as Director of Area Mental Health Services that he did not receive?
- 9.2 The details of the working relationship with the Director of Mental Health Services, Dr Chaplow (by reference to documents or otherwise).
- 9.3 When the plaintiff advised the defendant of said matters between himself and Dr Chaplow (by reference to documents or otherwise).
- 9.4 What the defendant was obliged to do about such issues.

**Order**

- The plaintiff is to provide the particulars sought in 9.1.

**Paragraph 15.4.5 statement of claim**

**Allegation:**

- 15.4 Treated the plaintiff in such as way as to damage the relationship of trust, confidence and fair dealing, including:
  - 15.4.5 Withholding from the plaintiff essential information about known risks including information about Dr Fisher and Mrs Wendy Metcalfe.

**Particulars sought:**

Please state:

- 10.1 The specific essential information about known risks other than Dr Fisher and Mrs Metcalfe, when that information was known to the defendant (by reference to documents or otherwise) and the basis upon which it is alleged that that information was withheld.
- 10.2 What essential information about risks concerning Dr Fisher and Mrs Metcalfe were withheld from the plaintiff, when that information came to the defendant and on what basis it is alleged that it was withheld from the plaintiff.

## **Order**

- The plaintiff is to provide particulars of known risks other than Dr Fisher and Mrs Metcalfe referred to in clause 15.4.5 of the statement of claim.

### **Paragraph 15.4.6 statement of claim**

#### **Allegation:**

15.4 Treated the plaintiff in such as way as to damage the relationship of trust, confidence and fair dealing, including:

15.4.6 Failing to deal honestly and fairly with the plaintiff in that the defendant through Mrs Metcalfe did not fix or pay his correct salary; did not submit the O'Flynn family's immigration documents or otherwise act to obtain residency status for the plaintiff and his family; did not recruit or provide essential support staff; and did not inform the plaintiff of essential information as alleged.

#### **Particulars sought:**

- 11.1 The date or dates upon which it is alleged Mrs Metcalfe did not fix or pay the plaintiff's correct salary.
- 11.2 The basis upon which it is alleged that his salary was not fixed or paid correctly.
- 11.3 Whether the defendant has suffered any loss thereby (and if so, the particulars thereof).
- 11.4 His current residency status and that of his family.
- 11.5 The particular steps which Mrs Metcalfe failed to take in relation to the family's immigration status.
- 11.6 The consequences of those alleged failures (including the loss associated with those failures, if any).
- 11.7 The particulars of the failure to provide or recruit essential support staff or inform the plaintiff of essential information (if additional to the particulars supplied previously).

[33] Mr Miles did not press the defendant's claim for particulars sought in 11.1 to 11.6.

## **Order**

- The plaintiff is required to provide the particulars sought by the defendant in 11.7.

### **Paragraph 15.5.2 statement of claim**

#### **Allegation:**

15.5 Failed to take all practicable steps to provide and maintain a safe working environment with reasonable and safe management processes, including:

15.5.2 Having internal deficiencies in administration, particularly in human resources, with the effect that the plaintiff did not receive either the support from those areas which he was entitled to receive as clinical director, nor did he receive accurate and timely information in respect of key risks and problems (of whom Dr Fisher was one).

#### **Particulars sought:**

12. Please state with particularity what the alleged internal deficiencies and information failures were (in the event that they are in addition to those already supplied in response to particular requests for particulars above).

## **Order**

- The plaintiff is required to specify the support which the plaintiff alleges he was entitled to have but did not receive.

### **Clause 19.2 of the statement of claim**

[34] The third area of particulars sought relates to the financial losses alleged in this clause to have been suffered by the plaintiff.

### **Paragraph 19.2 statement of claim**

#### **Financial loss:**

The plaintiff has also suffered financial loss as a result of the conduct of the defendant, and will continue to do so indefinitely, namely:

19.2 Medical expenses associated with visits to his doctor and other medical practitioners, in addition to the costs of medication prescribed to him.

#### **Particulars sought:**

Please state:

- 13.1 The dates upon which the plaintiff attended doctor and other practitioners.
- 13.2 The names of those practitioners.
- 13.3 The purpose for the consultation.
- 13.4 The costs associated with the consultation.
- 13.5 The medication prescribed.
- 13.6 The cost of the medication prescribed.

30. **Paragraph 19.3 statement of claim**

**Financial loss:**

Psychiatric and psychological counselling expenses.

**Particulars sought:**

- 14. Please state the psychiatric and psychological counselling expenses (by reference to the date, amount and particular counsellor).

31. **Paragraph 19.4 statement of claim**

**Financial loss:**

Other costs arising to be quantified at trial.

**Particulars sought:**

- 15. Please state all other costs arising, appropriately particularised.

[35] The particulars sought in relation to paragraphs 19.2 and 19.3 are all matters of evidence. The details of the plaintiff's medical certificates are in the defendant's possession. The plaintiff accepts that by trial he will have to provide a schedule of costs claimed. However, as these are matters of evidence to be provided at trial, there will be no order as to particulars in relation to these matters.

**Conclusion**

[36] The defendant's request for particulars is granted but only to the extent specified in the orders made above.

[37] Counsel have agreed that the plaintiff will have 6 weeks from the date of this judgment for the particulars to be provided.

### **Other matters**

[38] Mr Rennie advised that the medical examination of the plaintiff is being arranged.

### **Disclosure**

[39] Counsel are to commence the disclosure process by filing memoranda which will be exchanged after the plaintiff files his particulars. They will adopt this procedure without prejudice to the need for the formal disclosure procedure in the Employment Court Regulations 2000 to be followed if required.

### **Costs**

[40] Costs on this application are reserved pending the resolution of the substantive proceedings.

**C M Shaw**  
**JUDGE**

Judgment signed at 9am on 2 November 2007