

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 240
EMPC 115/2025**

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to amend the statement of defence and counterclaim
BETWEEN	ANDRIES JOHANNES GOUWS First Plaintiff
AND	ESTENE GOUWS Second Plaintiff
AND	OPTIMAL FIRE LIMITED Defendant

Hearing: 31 October 2025
(Heard at Christchurch by telephone)

Appearances: P Wicks KC and B E Smith, counsel for plaintiffs
A Swan, counsel for defendant

Judgment: 6 November 2025

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for leave to amend the statement of defence and counterclaim)**

[1] This proceeding is about matters removed from the Employment Relations Authority to the Court.¹ The plaintiffs, Andries Gouws and Estene Gouws, are pursuing personal grievance claims following their dismissal by Optimal Fire Ltd. Additionally, they claim that holiday pay is owed to them.

¹ *Gouws v Optimal Fire Ltd* [2025] NZERA 160.

[2] Optimal Fire does not accept the claims by Mr and Mrs Gouws and denies liability to them. In its statement of defence and counterclaim, filed in May 2025, it pursued claims against Mr Gouws alleging he had breached the employment agreement between them, breached the duty of good faith in s 4 of the Employment Relations Act 2000 (the Act) and his duties as a director.² It sought damages of \$868,852.76.

[3] The proceeding was the subject of a telephone directions conference on 21 July 2025. After that conference directions were issued in anticipation of a hearing, including timetabling filing briefs of evidence.

[4] In those directions the hearing was scheduled to be set down for five days in Auckland on a date chosen by the Registrar after consulting counsel. The directions included one which was that, unless otherwise provided, once the hearing was set down no amended pleadings were to be filed, and no interlocutory application was to be made, or step taken, without the leave of a Judge.

[5] The hearing was set down by a notice to the parties on 12 August 2025. The hearing is to begin on 8 December 2025.

The application for leave

[6] On 26 September 2025, an amended statement of defence and counterclaim was filed by Optimal Fire. It was eventually supported by an application for leave to amend the pleadings dated 30 September 2025, together with counsel's memorandum. Subsequently, a further version of the amended pleading was filed identifying the proposed alterations through tracked changes.

[7] As well as tidying up some reasonably inconsequential drafting for clarity, the proposed amendments changed the causes of action by:

- (a) reducing the amount of the damages sought from Mr Gouws to \$384,124.23 (plus interest and costs);

² Companies Act 1993, s 135.

- (b) making a damages claim for the same amount against Mrs Gouws for an alleged breach of the employment agreement between her and Optimal Fire;
- (c) adding a claim for a penalty under s 135 of the Act against Mrs Gouws;
- (d) adding a cause of action against Mr and Mrs Gouws alleging a breach of s 9 of the Fair Trading Act 1986, seeking damages from them (plus interest and costs); and
- (e) seeking to enforce against Mr Gouws the undertaking as to damages he gave to the Employment Relations Authority in successfully applying for interim reinstatement following the dismissal.³

[8] The grounds of Optimal Fire's application can be summarised as:

- (a) During the course of preparing evidence the company considered it was prudent to amend the pleadings to clarify them.
- (b) That clarification was to provide further and better particulars and to add the causes of action mentioned in paragraph [7].
- (c) There was only a short delay between the defendant's briefs of evidence being filed and seeking to amend the pleading.
- (d) The hearing date was unaffected because it was (at the time of filing) two months away.
- (e) There is no prejudice to the plaintiffs.
- (f) It is in the interests of justice that matters be determined on their substantive merits, rather than what was referred to as a "procedural default", referring to Optimal Fire not having amended its pleadings earlier.

³ *Gouws v Optimal Fire Ltd* [2024] NZERA 509.

[9] The application was opposed by Mr and Mrs Gouws. In summary, they did so on the grounds that:

- (a) the delay was inexplicable;
- (b) the proposed penalty action against Mrs Gouws was out of time and therefore barred by s 135 of the Act;
- (c) the Fair Trading Act claim was misconceived, because Mr and Mrs Gouws were not “in trade” as required by s 9 and, consequently, the claim had no reasonable prospect of success;
- (d) if permitted, the amendments would increase the length of the hearing and the plaintiffs’ costs by having to address the jurisdictional issue to respond to the Fair Trading Act claim; and
- (e) the interests of justice did not require the amendments to be granted.

Legal test

[10] The Employment Court Regulations 2000 do not contain a mechanism for a Judge to fix a close of pleadings date or for one to be fixed by default. That can be compared to r 7.6(4) of the High Court Rules 2016 that requires a Judge in allocating a hearing or trial date to also fix a close of pleadings date. If that step is not taken, the rules provide that the close of pleadings date is the later of:

- (a) the date that is 60 working days before the hearing or trial date that is allocated; or
- (b) the date on which the hearing or trial date is allocated.

[11] The significance of r 7.6(4) lies in r 7.7(1). Under that rule, after the close of pleadings date no amended pleading may be filed, and no interlocutory step may be taken, without the leave of a Judge.

[12] In this case, the directions in July 2025 had the effect of providing for the close of pleadings by specifying that no step was to be taken after the proceeding was set

down unless leave was granted. Mr Swan for Optimal Fire, and Mr Wicks KC for Mr and Mrs Gouws, did not submit that the direction had any different effect.

[13] In *Elders Pastoral Ltd v Marr*, the Court of Appeal dealt with an appeal of a decision to allow an amendment to the pleadings made at a very late stage; after final submissions had been heard and following a very long hearing.⁴ The Court upheld the trial Judge's decision to allow the amendment even though doing so was described as a "notable indulgence".⁵

[14] The Court referred to "three formidable hurdles" before an application to amend might succeed, namely whether allowing it is in the interests of justice, that there will not be significant prejudice to the other side or it will not cause significant delay.⁶

[15] There have been many cases subsequently that have applied that approach. For example, in *Lyttelton Port Co Ltd v AON New Zealand Ltd*, the High Court applied the *Marr* case and added, as a further observation, that "the farther or closer the application for amendment is to trial, the less or more formidable those hurdles will be".⁷

Analysis

[16] Before the conference Mr Swan advised the Court by memorandum that the proposed additional causes of action seeking a penalty against Mrs Gouws, and to enforce Mr Gouws' undertaking given in the Authority, were abandoned. Additionally, he accepted that, if the application was granted, it would be necessary for Optimal Fire to provide particulars supporting the proposed claim that Mr and Mrs Gouws were "in trade" for the purposes of the Fair Trading Act.

[17] Mr Swan submitted that allowing the (revised) amended pleading at this stage is in the interests of justice. He said that it would be inappropriate to conclude that, because there was a delay beyond the date on which the hearing notice was issued, it was now too late to seek to amend the claim. He accepted that there was a delay but

⁴ *Elders Pastoral Ltd v Mar* (1987) 2 PRNZ 383 (CA) at 384.

⁵ At 384.

⁶ At 385.

⁷ *Lyttelton Port Co Ltd v AON New Zealand Ltd* [2019] NZHC 726 at [22].

pointed out that the plaintiffs have had notice of this application since the end of September 2025.

[18] Mr Swan said being able to argue the Fair Trading Act cause of action did not require any change to the anticipated evidence already filed and no additional documents were needed beyond those already disclosed. Essentially, the submission was that there would be no prejudice to Mr and Mrs Gouws beyond dealing with a new but discrete legal analysis.

[19] Mr Swan accepted that some extra time would be needed for legal submissions but submitted that would be offset by the time saved because the plaintiffs have given notice that they do not intend to call an expert witness. He anticipated that, in any event, the submissions on this subject would be reasonably short. That would mean the hearing would not be lengthened in any appreciable way and the trial dates are not in jeopardy.

[20] Mr Wicks relied on the grounds in the notice of opposition already referred to. Additionally, he was critical of the absence of any particularisation in the draft pleading as to how s 9 of the Fair Trading Act applies to Mr and Mrs Gouws, in particular how it is said they were “in trade” under that section.

[21] Although the proposed amended pleading seeks to now claim damages against Mrs Gouws for allegedly breaching her employment agreement with Optimal Fire, that amendment was not opposed.

[22] I am satisfied that the application should be granted so that Optimal Fire can pursue claims against Mrs Gouws alleging breaches of her employment agreement with the company and against Mr and Mrs Gouws alleging a breach of s 9 of the Fair Trading Act.

[23] First, as Mr Swan submitted, the application was made two months before the hearing date. That advance notice should mean hearing preparation will not be compromised.

[24] Second, the absence of any changes to the anticipated evidence indicates that Mr and Mrs Gouws will not be prejudiced and the hearing is unlikely to be lengthened

in any appreciable way. Confirmation no further disclosure will be required supports that conclusion.

[25] Third, Mr Wicks described the Fair Trading Act claim as novel and submitted that it faced significant difficulties especially in establishing that, as employees, Mr and Mrs Gouws were “in trade”. I agree that the claim is novel but, at this stage, I am not prepared to conclude that it has no prospects of success. If the position is as Mr Wicks submitted, the response required to deal with the pleading is unlikely to be time consuming.

[26] I accept Mr Swan’s point that it would be unreasonable to deprive Optimal Fire of an ability to pursue these causes of action where no prejudice can realistically be pointed to. Allowing the amendments enables the real controversy to be decided.

[27] A final comment is required. This application was dealt with during a conference on 31 October 2025. At the conclusion of the conference, I informed the parties that the application would be granted, with reasons to follow. This judgment contains those reasons. Separately, a direction was made in a minute arising from the same conference timetabling the filing of the amended statement of defence and counterclaim.

[28] The amended pleading was filed while this judgment was being prepared. I simply note that the defendant is not now pursuing a counterclaim based on the Fair Trading Act.

[29] Costs are reserved.

K G Smith
Judge

Judgment signed at 2.30 pm on 6 November 2025