Employment Court of New Zealand

Berryman v Fonterra Co-operative Group Limited [2025] NZEmpC 166 (7 August 2025)

Last Updated: 8 August 2025

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[2025] NZEmpC 166 EMPC 60/2024

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for leave to file further

submissions

BETWEEN CARL BERRYMAN

Plaintiff

AND FONTERRA COOPERATIVE GROUP LIMITED

Defendant

Hearing: On the papers

Appearances: E Lambert, advocate for plaintiff

R Rendle and M Austin, counsel for defendant

Judgment: 7 August 2025

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE M S KING

(Application for leave to file further submissions)

[1] These proceedings involve a challenge by the plaintiff to a determination of the Employment Relations Authority (the Authority).1 The hearing of the proceedings took place on 11 and 12 November 2024 and 28 February 2025. Closing submissions were given following the conclusion of evidence on 28 February 2025.

[2] On 5 May 2025 the plaintiff's representative, Ms Lambert, filed a memorandum seeking to draw the Court's attention to the District Court's judgment

1 *Berryman v Fonterra Cooperative Group Ltd* [2024] NZERA 44.

in *Department of Labour v Idea Services Ltd*,2 which the plaintiff submitted was binding and relevant to the current proceedings.

[3] On 7 May 2025 the plaintiff filed submissions on the relevance of *Idea Services Ltd* to the current proceeding and the subsequent District Court judgments that had applied it. The defendant opposed the plaintiff's informal request to file further submissions, on the basis that the judgment is not relevant, and no reliance should be placed on it.

[4] On 9 May 2025, after hearing from the parties, the Court declined the plaintiff's informal request to file further submissions. The Court emphasised that *Idea Services Ltd* was determined in 2008 and under a distinct legislative context which did not engage with the legal tests relevant to the plaintiff's claims. Ultimately, a sufficient basis was not made out justifying granting leave to file additional submissions, particularly given Ms Lambert was seeking to introduce *Idea Services Ltd* more than two-months post-hearing.

[5] Notwithstanding the Court's minute, on 13 May 2025 the plaintiff's representative filed a formal application for leave to file further submissions on the following points:

> (a) Whether the doctrine of stare decisis, or the doctrine of precedent, acts to preserve the principle that medical testing and or vaccination in employment may not be required as a condition of employment.
> (b) Whether at the relevant time sch 3A (now repealed) of the Employment Relations Act 2000 acted to nullify the judgment in *Idea Services Ltd* that an employee may not be required to be tested for and/or be required to be vaccinated against a disease in his or her workplace.

[6] A summary of the key grounds in support of the application included that Ms Lambert only became aware of the judgment in *Idea Services Ltd* two months after

2. *Department of Labour v Idea Services Limited* DC Hastings CRN-080220500068, 4 November 2008.

the hearing. Ms Lambert argues that the ratio decidendi, or the legal principle in the case applies "because it deals with what is essentially a contractual prohibition against requiring medical testing of employees." The judgment in *Idea Services Ltd* has not been considered previously by this Court and it is in the public interest for the Court to do so. Further, the application is consistent with s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA). That provision provides every person with the right to the observance of the principles of natural justice, which Ms Lambert suggests includes the "fundamental common law practice of stare decisis."

[7] A brief affidavit was filed by the plaintiff in support, which simply advised that he was aware of the application and had read and approved the draft submissions filed in support of the application.

[8] The defendant filed a notice of opposition on the grounds that the current proceedings are appropriately dealt with under the Employment Relations Act 2000 (the Act). The judgment in *Idea Services Ltd* is neither relevant, nor binding, and the interests of justice do not warrant granting leave to file further submissions. The defendant advised that it would abide by the decision of the Court.

Legal principles

[9] The Court's practice directions outline the approach to final submissions. Practice direction four states:3

4. Final submissions at hearing

1) Except in exceptional circumstances, for which the leave of the Court will be required, parties' final submissions in all cases will be given to the Court immediately following the conclusion of evidence or otherwise at the closure of the parties' cases.

...

[10] Therefore, the issue to be considered is whether exceptional circumstances exist that would justify a departure from the normal rule that final submissions be given immediately following the end of the hearing.

3 “Employment Court of New Zealand: “Practice Directions” (1 September 2024)

<www.employmentcourt.govt.nz> at No 4.

Analysis

> [11] The application and submissions made by Ms Lambert on behalf of the plaintiff do not identify any exceptional circumstances.
>
> [12] Ms Lambert simply asserts that she was not aware of the *Idea Services Ltd* judgment, which was issued in 2008, at the time of the hearing. Being unaware of a District Court judgment is not in of itself an exceptional circumstance. She has had ample opportunity to draw the Court’s attention to legal authorities she considered relevant during the course of the hearing.
>
> [13] However, in fairness to the plaintiff, I will briefly consider the issues raised by Ms Lambert’s submissions to assist in my assessment of whether there are in fact exceptional circumstances.
>
> [14] The plaintiff’s application relies on the doctrine of stare decisis, or the doctrine of precedent. Ms Lambert submits that *Idea Services Ltd* has not been overturned and its ratio decidendi, or the legal principle in the case, remains good law. She submits that the doctrine of precedent requires this Court to follow the decision of the District Court in the judgment in *Idea Services Ltd*.
>
> [15] The doctrine of precedent effectively provides that a court is obliged to follow a decision of another court which is above it in the same hierarchy of courts. However, a court will never be obliged to follow a decision of a court which is lower in the same hierarchy.4 This Court is a senior court. It sits alongside the High Court with an appeal pathway (by leave) to the Court of Appeal and then Supreme Court.5 As such, it is not obliged to follow the decisions of the District Court.
>
> [16] Although the doctrine of precedent does not apply in this case, I will consider whether *Idea Services Ltd* could be of persuasive force and assist in my assessment of whether there are exceptional circumstances to grant this application.

4. Duncan Webb, Katherine Sanders and Paul Scott *The New Zealand Legal System: Structures and Processes* (5th, LexisNexis, Wellington, 2010) at [9.8].

5 Employment Court of New Zealand “Court structure” (7 September 2016)

<www.employmentcourt.govt.nz>. See also Paul Roth “The Place of the Employment Court in the New Zealand Judicial Hierarchy” (2019) 50 VUWLR 233 at 238.

> [17] Before moving to the submissions, it is helpful to outline the factual and statutory context in which *Idea Services Ltd* was determined. It was a case that involved a criminal prosecution of an employer under the Health and Safety in Employment Act 1992 (HSE Act), now repealed. The employer was charged with breaching a statutory obligation under the HSE Act “to take all practicable steps” to ensure the safety of an employee.6 Specifically, the failure to ensure an employee was not exposed to the risk of contracting Hepatitis B in her place of work. The employer did not have any provision in its employment agreement or policies where it could require the employee to undertake medical testing or vaccination or impose adverse consequences if they refused. The Court stated:7

It can hardly be a practicable step demanded of an employer to protect the safety of an employee to require a blood test that the employer has no authority to enforce by either insisting that the test be carried out or by restricting or removing employment if there is a refusal by the employee to do so. All that can be done is to strongly recommend such screening...

> [18] Ms Lambert made the submission that *Idea Services Ltd* provides the legal authority for the principle that medical interventions such as vaccination or testing, which have not been agreed to as a term in an employment agreement, are not lawful in New Zealand workplaces.
>
> [19] However, Ms Lambert’s interpretation of the principles in the judgment is too narrow. I do not consider that the meaning of “legal authority” can be read down so as to only include a term in an employment agreement. It is clear that the law recognises that an employer has the “legal authority” through certain legislation8 and/or lawful policies passed by the employer, to require its employee to undergo medical interventions such as testing or

vaccination in the workplace.

[20] This leads to the material factual difference between *Idea Services Ltd* and the current proceeding. In the current proceeding the defendant employer had a COVID-

6 At [1].

7 At [73].

8. See the COVID-19 Public Health Response (Vaccinations) Order 2021 which imposed mandatory vaccinations on certain classes of worker; Employment Relations Act 2000, sch 3A (repealed)which allowed employers to mandate vaccination for certain work and to terminate employment where those requirements were not met, discussed further at [23]; and see also the cases at [22] which discuss the ability for an employer to impose drug and alcohol testing through a policy.

19 Vaccination Requirements policy, which it relied on as an authority, to require employees to be vaccinated against COVID-19, or in the alternative undertake a Rapid Antigen Test (RAT). No such policy or authority was present in *Idea Services Ltd* and this material difference makes it distinguishable from the current proceeding.

[21] Further, this Court has the benefit of a number of authorities which consider whether medical testing imposed by an employer policy may be lawful under the Act.

[22] In *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*,9 a full Court held that the employer's duty to provide a safe workplace justified a policy of random drug-testing. More specifically, the employer had a duty to identify potential causes and sources of harm in the workplace, and a duty to monitor employees' exposure to hazards. There was nothing in law or in any contract or employment agreement binding on the employer to prevent it from imposing a comprehensive policy on drugs and alcohol in its workplace. The employer was found not to have purported to vary a contract when it issued a policy collateral to the applicable contract.10

[23] I also observe that the plaintiff's application contradicts his earlier position on sch 3A. The plaintiff pleaded and presented evidence at the hearing in support of his claim that the Authority's finding, that sch 3A of the Act was not engaged, was a mistake of law.11 However, the plaintiff's application for further submissions now states:

The submission will also argue that Schedule 3A (3) (b) does not apply to the applicant because his termination was for failure to agree to be subject to a RAT test as a condition of employment.

This is entirely at odds with the case put forward by the plaintiff at the hearing. Allowing the plaintiff to file legal submissions contradicting the submissions he made

9. *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] NZEmpC 32; [2004] 1 ERNZ 614 (EmpC). See also *Maritime Union of New Zealand Inc TLNZ Ltd* [2007] NZEmpC 168; (2007) 5 NZELR 87; and *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197.

10 At [179-180].

11 Employment Relations Act 2000, sch 3A (repealed) was introduced through the COVID-19 Response (Vaccinations) Legislation Act 2021, it provided a statutory framework allowing employers to mandate vaccination for certain work and to terminate employment where those requirements were not met.

at the hearing, given the advanced stage of this proceeding would be inconsistent with the principles of equity and good conscience that guide the Court, as well as the principles of natural justice.12

[24] Lastly, I observe that *Idea Services Ltd* was determined in a materially different legislative context and carries little relevance to the issues in this proceeding. It serves primarily as a defence for employers charged with breaching health and safety legislation, and specifically breaches that lead to employees being exposed to Hepatitis

B.13 It does not assist in addressing the plaintiff's claims of unjustified dismissal and disadvantage. That would involve an assessment of justification under s 103A of the Act,14 a legal test which *Idea Services Ltd* does not consider.

[25] Standing back and considering the plaintiff's submissions as a whole, I find that the *Idea Services Ltd* judgment is not binding or persuasive. Allowing the plaintiff to make new legal arguments after the case has been heard would be inequitable and a breach of natural justice. The plaintiff had ample opportunity to present legal authorities and arguments during the hearing. The submissions the plaintiff seeks to make do not justify a re-opening of that process.

Outcome

[26] The plaintiff has not identified any exceptional circumstances that would justify further submissions being filed, and I consider that it would be inequitable for such leave to be granted.

[27] The plaintiff's application to file further submissions is declined.

[28] Costs are reserved.

Judgment signed at 2.45 pm on 7 August 2025

M S King Judge

12 The principles of natural justice are common law principles that in summary impose a requirement for decision makers to act fairly and reasonably; see *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

13 *WorkSafe New Zealand v Rentokil Initial Ltd* [2016] NZDC 21294 at [73]

14 Employment Relations Act 2000, s 103A.
