



# Employment Court of New Zealand

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## Holman v CTC Aviation Training (NZ) Limited [2016] NZEmpC 15 (26 February 2016)

Last Updated: 2 March 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 15](#)

EMPC 313/2015

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  
an amended statement of  
defence

BETWEEN TREVOR HOLMAN Plaintiff

AND CTC AVIATION TRAINING (NZ)  
LIMITED  
Defendant

Hearing: On the papers filed by the defendant on 17 and by the  
plaintiff  
on 24 February 2016

Appearances: R McCabe, counsel for plaintiff  
E Burke, counsel for defendant

Judgment: 26 February 2016

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

[1] These proceedings involve a non de novo challenge against parts of a determination of the Employment Relations Authority (the Authority) dated 28

September 2015.<sup>1</sup>

[2] In the determination the Authority held that CTC Aviation Training (NZ) Ltd (CTC) was not entitled to recover a sum of \$6,457.50 against Mr Holman on the basis that the Authority lacked jurisdiction to consider such a claim. Counter-claims by Mr Holman against CTC that he was entitled to recover money as being a premium on employment or on the basis of a contractual misrepresentation were also

declined. It is those parts of the determination dealing with Holman's counterclaims

<sup>1</sup> *CTC Aviation Training (NZ) Ltd v Holman* [2015] NZERA Auckland 297.

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15 [26 February 2016]

which are now the subject of the challenge by Mr Holman to this Court. CTC has filed no challenge to the finding against it.

[3] A fixture has been allocated in the Employment Court sitting in Hamilton on

14 March 2016 for the hearing of Mr Holman's challenge. The matter was set down

for a fixture after counsel agreed that pleadings were complete.

[4] Belatedly the defendant has now applied for leave to amend its statement of defence so that two references in the original statement of defence to Fringe Benefit Tax are changed to refer to a claim for interest.

[5] The plaintiff opposes the application for amendment primarily on the basis that it will allow the defendant to substantially depart in the pleadings from the factual position which it presented at the Authority and upon which the plaintiff has based his challenge on a non de novo basis. Counsel agreed that the present application could be dealt with on the papers. Accordingly, I directed the filing of submissions by counsel and these have now been received.

[6] In their submissions counsel have perhaps traversed too substantially the factual controversies existing in this case. The disputed facts and the discrepancies in evidence between what CTC presented before the Authority and what is now to be presented to the Court will be matters to be dealt with at the fixture when it proceeds and will no doubt now lead to issues of credibility. Presently the Court needs to only consider whether the defendant should be granted leave to amend its statement of defence at this late stage after the proceedings have been set down.

[7] The principles applying to such applications are now well established. In this Court in *Rooney Earthmoving Ltd v McTague*,<sup>2</sup> Judge Travis set out the following as applicable principles to be applied to an application for leave to amend which he had taken from *Pegasus Group Ltd v QBE Insurance (International) Ltd*:<sup>3</sup>

a. The discretion to grant leave will be exercised in a way that will best achieve justice;

<sup>2</sup> *Rooney Earthmoving Ltd v McTague* [2010] NZEmpC 55.

<sup>3</sup> *Pegasus Group Ltd v QBE Insurance (International) Ltd* HC Auckland CIV-2006-404-6941,

6 March 2009 at [8].

b. There must be some basis or material upon which the court could exercise its discretion;

c. The court will weigh injustice to the defendant/plaintiff to see where the justice lies;

d. The reasons for not making application before setting down will be considered;

e. The court will consider whether irreparable damage will be suffered by the applicant if the order is not made.

[8] In addition Judge Travis considered *Thornton Hall Manufacturing Ltd v*

*Shanton Apparel Ltd*<sup>4</sup> where the Court of Appeal stated:

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.

[9] He also cited from *Tawhiwhirangi v Attorney-General in respect of the Chief- Executive, Department of Justice*,<sup>5</sup> which stated that a plaintiff is "entitled to have leave to amend so that the pleadings will conform to the evidence". The same principle would apply to a defendant seeking leave to amend the statement of defence.

[10] These principles were also discussed in *Hally Labels Ltd v Powell*<sup>6</sup> which Ms Burke has referred to in her submissions. In that case the Court considered as part of its reasoning the following statement of Duffy J in *Whakatane District Council v Bay of Plenty Regional Council* as follows:<sup>7</sup>

It is clear from these cases that an application for leave to permit late amendments to a pleading requires the Courts to conduct a balancing exercise between the general concern that parties to litigation comply properly with procedural requirements and the particular interest in each case of ensuring that the case is justly determined.

[11] These principles apply in the present case. Ms Burke in her submissions has indicated that the error, which the defendant alleges is presently contained in its statement of defence, has arisen from a misunderstanding on the defendant's part as

to the true position set out in some of the documentary evidence. The consequences

<sup>4</sup> *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] NZCA 159; [1989] 3 NZLR 304 (CA) at 309.

<sup>5</sup> *Tawhiwhirangi v Attorney-General in respect of the Chief-Executive, Department of Justice* [1994]

1 ERNZ 459 (EmpC) at 464.

<sup>6</sup> *Hally Labels Ltd v Powell* [2015] NZEmpC 92.

<sup>7</sup> *Whakatane District Council v Bay of Plenty Regional Council* [2008] NZHC 340; (2008) 19 PRNZ 91 (HC) at [10].

of the proposed amendments, which will inevitably give rise to issues of credibility, have already been discussed. However, it is

necessary that when the Court hears this matter the real controversy between the parties is properly presented in evidence so that the Court can issue a judgment which is just and fair and will lead to a final resolution of the dispute. The amendments which are sought involve quite minor amendments to the statement of defence but obviously raise a significant point upon which the parties are in dispute.

[12] From the submissions, which have now been presented by Mr McCabe in support of the opposition, it is clear that the plaintiff alleges that he will be prejudiced by this amendment because he has prepared for proceeding to the fixture on its present pleadings and prepared evidence accordingly. I can understand Mr McCabe's submission that if leave is granted the plaintiff would need to seek an adjournment of the fixture to enable him to consider any re-emphasis or variation which may be required in his evidence and also the potential need to amend his statement of claim. Mr McCabe has also suggested the need for further particulars as a result of the amended basis for the defendant's defence. That is reasonable.

[13] There would be considerable prejudice to the plaintiff if the amendment is granted and the plaintiff was then forced to participate in the fixture with such short notice of the allowed amendments. However, that is a matter which can be dealt with by way of an adjournment and costs.

[14] I have given careful consideration to those matters raised by Judge Travis in the *Rooney* case and weighed up the respective positions of the parties. On balance in the present case I consider that on the basis of the principles discussed and for the purposes of allowing the real controversy in this matter to be determined, the defendant's application to amend pleadings should be granted. Accordingly, the application for leave to amend the statement of defence is granted.

[15] For these reasons the following directions are made:

(a) The fixture allocated for 14 March 2016 is vacated.

(b) The defendant is to file and serve its amended statement of defence as proposed on or before 3 March 2016.

(c) The defendant is to provide the plaintiff with further and better particulars concerning the new claim regarding interest, including how that interest was calculated and on what basis, and referring to and providing any necessary documents which confirm that allegation now to be made on the defendant's behalf.

(d) Once those further and better particulars have been provided, the plaintiff may file and serve an amended statement of claim within

14 days of the provision of such particulars.

(e) If the plaintiff does file an amended statement of claim then the defendant is to file and serve any statement of defence to amended statement of claim within 14 days following the service of the amended statement of claim.

(f) After any amended pleadings are completed, a further directions conference is to be scheduled for the purposes of further timetabling for setting down of a new fixture date.

[16] Insofar as costs are concerned, it is appropriate that the plaintiff receive an award of costs in any event in respect of the defendant's application and the need to abandon the fixture which had been set. There will be an order for costs against the defendant in any event. The quantum of such costs will be determined when costs

are finally considered in respect of this entire matter.

Judgment signed at 12 noon on 26 February 2016

M E Perkins  
Judge