Employment Court of New Zealand

Kim v Thermosash Commercial Limited [2011] NZEmpC 169 (14 December 2011)

Last Updated: 5 January 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 169

ARC 54/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application to strike out the claim

BETWEEN WILSON KIM Plaintiff

AND THERMOSASH COMMERCIAL LIMITED

Defendant

Hearing: 18 November 2011 (Heard at Auckland)

Counsel: Plaintiff in person

Jenni-Marie Trotman and Jo Douglas, counsel for defendant

Judgment: 14 December 2011

INTERLOCUTORY JUDGMENT OF JUDGE C INGLIS

Introduction

[1] Mr Kim was employed by Thermosash Commercial Limited (Thermosash) in October 2000. He suffered an injury in 2007 and was assessed as being medically unfit for work on 24 October 2007. He remained off work for some time. Thermosash advised Mr Kim that the company could not keep his job open for him, and his employment was terminated on 31 January 2008.

[2] Mr Kim subsequently raised a personal grievance. In the Employment

Relations Authority Thermosash argued that the claim was barred by s 317(1) of the

Accident Compensation Act 2001 (the Act). The Authority held that Mr Kim was

entitled to a determination as to whether he had a personal grievance, although it was possible the outcome would be that remedies or compensation and lost wages were unavailable to him because of the Accident Compensation scheme.

[3] In the event Mr Kim's personal grievance was dismissed. The Authority held that the actions of the defendant company, and how it acted, were what a fair and reasonable employer would have done in all of the circumstances at the time the dismissal and action occurred.

[4] The plaintiff filed a challenge in this Court against the whole of the Authority's determination on a de novo basis. He pleads that Thermosash is obliged to pay him a week's wages and claims $50,000 compensation for negligence and unethical behaviour which caused emotional harm and permanent physical injuries, and that his employer failed to respond appropriately to a request for extra assistance in October 2007.

[5] The defendant has filed an application to strike out the statement of claim in its entirety. The application is advanced on two principal grounds. Firstly, that the statement of claim discloses no reasonably arguable cause of action and secondly, that the plaintiff's claim for damages and loss of wages arises directly or indirectly out of a personal injury covered by the Accident Compensation legislation and is accordingly barred by s 317 of the Act.

[6] The strike-out application is opposed.

Strike-out principles

[7] The Court's approach to strike out applications is well settled.1 In summary, pleaded facts are assumed to be true. The cause of action complained about must clearly be untenable. The jurisdiction is to be used sparingly and only in clear cases. Striking out a claim is a draconian step. The Court may receive affidavit evidence

but will not attempt to resolve genuinely disputed issues of fact and will generally

1 *Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725 (SC); *Attorney-General v Prince &Gardiner* [1998]

1 NZLR 262, 267 (CA).

limit evidence to what is not in dispute. Where a defect in pleading, challenged as disclosing no reasonably arguable cause of action, can be cured by amendment which the plaintiff is willing to make, the Court will almost always permit amendment rather than striking out.

What is not in dispute

[8] On 24 October 2007 Mr Kim provided Thermosash with a medical certificate which stated that he had suffered an injury during a basketball game and that he had run into another player and twisted his lower back. Mr Kim was diagnosed as having a lumbar sprain and was assessed as being unfit for work for seven days.

[9] A further medical certificate was issued on 30 October 2007. Mr Kim was placed off work for a 14 day period. On 1 November 2007 Thermosash received a letter from ACC advising that Mr Kim had applied for weekly compensation to cover an injury sustained on 14 September 2007. Thermosash replied saying that it was not a work related accident and that the basketball game referred to had occurred on

31 August 2007 rather than on 14 September 2007.

[10] An ACC form dated 12 November 2007 cites the date of accident giving rise to the injury as being 23 October 2007 and that its cause was loading heavy windows and doors. Mr Kim was assessed as being unfit for work for four weeks. Further medical certificates followed on 20 November 2007, 7 January 2008 and 31 January

2008.

[11] Following receipt of the 7 January 2008 medical certificate Thermosash wrote to Mr Kim advising that, if he could not return to work at the end of the period of the medical certificate, consideration would be given to terminating his employment. Thermosash met with Mr Kim and on 25 January 2008 an occupational therapist from ACC attended the workplace to assess his fitness for light duties. The company determined that there were no light duties available for him.

[12] The decision to terminate was made on 31 January 2008. Thermosash said it could not keep Mr Kim's job open any longer and light duties were not an option. Mr Kim asked Thermosash to reconsider its decision. A further discussion took place but the decision to terminate was confirmed. Mr Kim raised a personal grievance on 12 February 2008.

[13] Mr Kim's injury was assessed by ACC as being non work-related. He received ACC coverage for his injury. Thermosash did not pay his first week's wages. Its position was (and remains) that Mr Kim's injuries were non work-related.

The pleadings

[14] The plaintiff's statement of claim is deficient in a number of material respects. It is required, under reg 11 of the Employment Court Regulations 2000, to set out the full nature and details of the claim, the facts relied on, and the relief sought. The statement of claim does not make clear what is or are the plaintiff's causes of action. It is unclear whether the plaintiff claims to have a personal grievance for unjustified disadvantage and/or dismissal. Nor is it clear whether it is claimed that the defendant breached the employment agreement and, if so, what the terms and conditions are that he alleges were breached by the defendant. It is unclear how the remedies claimed relate to any unjustified action or breach by the defendant. These deficiencies were raised with Mr Kim at an early judicial directions conference. Despite matters being

adjourned to enable Mr Kim to take advice, and to reflect on the difficulties that had been identified, his claim remains in its original form.

[15] What can be discerned from the statement of claim is that the plaintiff alleges that he suffered a serious back injury as a result of the heavy lifting work he says he was required to do by his employer. He alleges that Thermosash failed to adequately respond to a request for assistance and proper equipment. The statement of claim also refers to concerns about the way in which Thermosash responded to a request Mr Kim says he made in relation to the way in which his accident was recorded, and the reasons underlying that (which he characterises as ―unethical‖ and as a means of covering up the company's wrong-doing). It is also plain that Mr Kim seeks

compensation both for a permanent injury said to have been suffered to his back and leg and also for emotional stress, hardship and damage to pride.

[16] While not pleaded in the statement of claim, documents filed in opposition to the strike-out application made reference to Thermosash ―discriminating‖ against him. Counsel for the defendant took issue with this, submitting that any claim of discrimination was not made out on the alleged facts and had not been pleaded. However it soon became apparent during the course of submissions that Mr Kim was not seeking to pursue a separate claim of discrimination. Rather he was seeking to explain why he considered the defendant had breached the terms of its agreement with him to provide a safe workplace, and why he considered he had suffered unjustified disadvantage and been unjustifiably dismissed (because of alleged procedural and substantive errors relating to the decision to dismiss). The plaintiff accepted that his pleadings were deficient and sought an opportunity to file an amended statement of claim.

[17] The plaintiff also accepted during the course of hearing that aspects of his claim, as currently pleaded, were problematic in terms of the Accident Compensation legislation. The difficulties arise by virtue of s 317 of the Act, which provides as follows:

317 Proceedings for personal injury

(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—

(a) personal injury covered by this Act; or

(b) personal injury covered by the former Acts.

(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—

(a) any damage to property; or

(b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act

1998); or

(c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.

(3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).

[18] The effect of s 317 is to prevent a person from claiming compensation in relation to a personal grievance where the person has suffered a personal injury covered by the Act. Whether a person has cover under the Act is regulated by s 20. Section 20(1) provides that:

(1) A person has cover for a personal injury if—

(a) he or she suffers the personal injury in New Zealand on or after 1 April 2002; and

(b) the personal injury is any of the kinds of injuries described

in section 26(1)(a) or (b) or (c) or (e); and

(c) the personal injury is described in any of the paragraphs in subsection (2).

[19] Section 26 defines personal injury as including physical injuries suffered by a person, including a strain or a sprain.2 Mr Kim alleges in his statement of claim that he suffered a ―very serious back injury due to heavy work load lifting up glazed frames‖ and a permanent injury to his ―back and right side leg‖. Mr Kim had been diagnosed as having a lumbar sprain,

and as being medically unfit for work, on 24

October 2007.

[20] There is no dispute that Mr Kim's injury was accepted for cover by the Accident Compensation Corporation, and that he received compensatory payments in that regard. Counsel for the defendant argued that Mr Kim's claim could not possibly succeed, because of the application of s 317 and referring to *Brittain v Telecom Corporation of New Zealand Ltd*3 in support. I do not accept that submission.

[21] The Accident Compensation legislation replaced the common law action for damages for personal injury with a statutory compensation scheme. As Blanchard J observed in *Wilding v Attorney-General*4 the philosophy of the personal injury compensation legislation is to substitute an entitlement to claim compensation, capped as to amount, on a no-fault basis, for a right to bring court proceedings for damages for the injury. Its purpose is to prevent persons who have suffered personal injury being compensated twice over, not to prevent them from recovering

compensation at all.

2 Section 26(1)(b).

3 [2001] ERNZ 647 (CA).

4 [2003] NZCA 205; [2003] 3 NZLR 787, 791 (CA).

[22] A distinction must accordingly be drawn between injury which is covered and injury or loss which is not. In *Attorney-General v B* the Court of Appeal held:5

We accept that in principle an employer may be liable for breach of duties to an ill or injured employee. There may, for example, be discriminatory conduct towards an injured employee; or in a case like *Bint* the method of dismissal of an injured employee may cause damage for which compensation is not available under the Accident Compensation legislation by reason of its cause being entirely disjunctive of the injury.

[23] Although poorly pleaded, there are elements of Mr Kim's claim that are arguably disjunctive of the injury he suffered. Mr Kim made it clear that he is claiming that he was unjustifiably disadvantaged by Thermosash and unjustifiably dismissed from his employment. He alleges that Thermosash failed to respond appropriately to a request for extra assistance and for proper lifting gear. He further alleges that there was a failure to record his work accident in the accident record book and that Thermosash falsely said it was an accident arising out of a basketball game to avoid an ACC investigation. He says that Thermosash failed to follow a proper procedure leading up to his dismissal, and that the decision to dismiss on medical grounds was substantively unjustified. He claims that he suffered emotional harm as a result of his employer's alleged default. If the facts are made out, Mr Kim may be able to recover compensation for humiliation, loss of dignity, and injury to feelings pursuant to s 123(1)(c) of the Employment Relations Act 2000 in relation to a claim of unjustifiable disadvantage and dismissal. Such compensation is not available under the Accident Compensation legislation and accordingly would not fall within s 317(3) of the Act.

[24] Mr Kim claims compensation for loss of his first week of wages. He says that his injury was work-related and that Thermosash was obliged to make that payment to him, which it has not done. Counsel for the defendant submits that this aspect of the claim is also barred by s 317 and that any dispute as to the correct classification of an injury is a matter for review under the Act, rather than for this

Court. I do not consider that the issue is as clear-cut as counsel suggests.

5 [2002] NZAR 809, at [20]. See also *Mitchell v Blue Star Print Group (NZ) Ltd* [2008] ERNZ 594, [77], [84].

[25] Mr Kim's injury was classified as being non work-related. An employer is only obliged to pay first week compensation to an employee who has suffered a work-related personal injury.6 An employer commits an offence if they fail to do so.7

[26] Part 5 of the Act sets out a number of provisions relating to dispute resolution, including reviews. Section 134 specifies who may apply to the Corporation for a review. A claimant may apply to the Corporation for review of

—any of its decisions on the claim‖8 and any delay in processing the claim for

entitlement that the claimant believes is an unreasonable delay.9 —Decision or Corporation's decision‖ is defined as including —a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury).‖10 Entitlement is defined in s 6 as meaning an entitlement described or referred to in s 69. Section 69 includes first week compensation.11

[27] It appears that if Mr Kim was dissatisfied with the way in which the Corporation had classified his injury (as non work-related, rather than work-related) the appropriate course would have been to apply for a review in accordance with the

process set out in the Act. His present claim essentially invites this Court to revisit the classification issue – a task which, on its face, appears to have been statutorily conferred on the Accident Compensation Corporation.

[28] However, the employment institutions have exclusive jurisdiction in relation to employment relationship problems, including the recovery of wages under s 131 of the Employment Relations Act. Section 99 of the Accident Compensation Act makes it clear that first week compensation constitutes —wages‖ for the purposes of s

131.

[29] There are a limited number of cases in which the Employment Relations

Authority has determined that it has jurisdiction to compensate for first week wages.

6 Section 98(1).

7 Section 98(3).

8 Section 134(1)(a).

9 Section 134(1)(b).

10 Section 6(1).

11 Section 69(1)(b).

These cases have arisen in the context of an employer's refusal to pay first week wages where the employee's injury had been classified as work-related.12 That is not the situation in the present case. The issue as to whether the employment institutions have jurisdiction to determine the cause of an injury (as work or non work-related), for the purposes of establishing entitlement to first week wages, does not appear to have been the subject of any judicial consideration.

[30] While Mr Kim's claim to first week compensation may face jurisdictional difficulties I am not prepared to strike it out at this stage without the benefit of full argument.

[31] Mr Kim accepted during the course of hearing that he cannot proceed with a claim for compensation in relation to the physical injury he suffered. That aspect of his claim is struck out.

[32] While the plaintiff's residual pleadings lack precision and clarity, they are not beyond salvage and nor can they be said to be hopeless. They are capable of amendment, and it is appropriate that Mr Kim be given an opportunity to re-plead. Any amended statement of claim is to comply with reg 11 of the Employment Court Regulations. As was made clear to Mr Kim at hearing, the defendant has a right to know the nature of the claim being levelled against it, the relief being sought, and the facts that are said to support each aspect of the claim.

Result

[33] Thermosash has been partially successful on its application. Those parts of paragraph 4f that relate to compensation for physical injury to Mr Kim's back and leg are struck out, as disclosing no reasonable cause of action.

[34] The remainder of Mr Kim's pleadings are unsatisfactory. However, they can be re-pleaded and Mr Kim ought to be given an opportunity to do so. This will

12 See, for example, *Bettridge v Whitehead t/a Kauri Coast Honey* AA104/07, 5 April 2007; *Muncey v*

Redican Allwood Ltd WA148/06, 30 October 2006.

enable the Court to deal with the real issues between the parties on a de novo challenge.

[35] Mr Kim is to file an amended statement of claim with 28 days of the date of this judgment. The amended statement of claim is to comply with reg 11 of the Employment Court Regulations. In particular, it is to clearly set out the nature of each claim against Thermosash, the facts that Mr Kim says support each claim being advanced, and the relief being sought in relation to each claim.

[36] The defendant will have the usual timeframe to respond to the plaintiff's

amended statement of claim.

Costs

[37] Costs are reserved.

Judge C Inglis

Judge

Judgment signed at 10 am on Wednesday 14 December 2011
