



# Employment Court of New Zealand

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## Nel v ASB Bank Limited [2018] NZEmpC 59 (31 May 2018)

Last Updated: 11 June 2018

IN THE EMPLOYMENT COURT  
AUCKLAND

[\[2018\] NZEmpC 59](#)  
EMPC 257/2016

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND IN THE MATTER of an application to exclude evidence  
AND IN THE MATTER of an application for leave to file and  
serve an amended statement of  
defence  
BETWEEN ANDRE NEL  
Plaintiff  
AND ASB BANK LIMITED  
Defendant

EMPC 303/2016  
IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND BETWEEN ASB BANK LIMITED  
Plaintiff  
AND ANDRE NEL  
Defendant

Hearing: (on the papers dated 15, 23, 25, 28 and 29 May  
2018)

Appearances: C W Stewart and C Pallant-Drake, counsel for A  
Nel S Dench and S Kopu, counsel for ASB Bank  
Limited

Judgment: 31 May 2018

### INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B A CORKILL: APPLICATION TO EXCLUDE EVIDENCE; APPLICATION FOR LEAVE TO AMEND STATEMENT OF DEFENCE

ANDRE NEL v ASB BANK LIMITED NZEmpC AUCKLAND [\[2018\] NZEmpC 59](#) [31 May 2018]

#### Introduction

[1] An application has been made to strike out evidence which ASB Bank Ltd (ASB) intends to call; and it applies for leave to amend its statement of defence.

[2] The substantive hearing commences next Tuesday, 5 June 2018. Documents relating to the applications have been filed under a tight timetable. I record that counsel's submissions were thorough and helpful to the Court. I will refer to those later, where relevant.

#### The applications

[3] On 15 May 2018, Mr Andre Nel applied for an order striking out evidence to be led by ASB, referring to events in which he had allegedly been involved. It is contended the evidence is inflammatory, historical, and has not been properly tested, or found to be established by ASB in an employment relations process. The evidence is contained in three briefs of evidence, being all of the proposed evidence of Ms B;<sup>1</sup> and certain paragraphs contained in the briefs of evidence of two other ASB employees, Mr Shaun Reilly, and Ms Tania Restall. An order is also sought preventing the contested matters being referred to in evidence at the hearing which is about to commence.

[4] Essentially, it is asserted that the proposed evidence is not relevant and is therefore inadmissible under [s 7](#) of the [Evidence Act 2006](#) (EA) as it does not relate to an issue raised by ASB in its pleadings; nor is it admissible under [s 7\(3\)](#) of the EA, as it does not have a tendency to prove or disprove anything that is of consequence to the determination of the proceeding; and that the probative value of the evidence is outweighed by the risk that it will be unfairly prejudicial under [s 8](#) of the EA. It is alleged that the evidence was not relied on by ASB when it made its decision to terminate Mr Nel's employment, and cannot be admissible on that ground. Nor does the proposed evidence form part of "all the circumstances at the time of the dismissal",

1. I have anonymised the name of the witness in question, since she reports to a person who has been granted an interim non-publication order, Ms A – see *Nel v ASB Bank Ltd* [\[2017\] NZEmpC 56](#) at [\[5\]](#).

under [s 103A](#) of the [Employment Relations Act 2000](#) (the Act). Mr Nel also says that the proposed evidence was first referred to in briefs of evidence that were served on 24 April 2018.

[5] ASB opposes the application to strike out. It states that the evidence it wishes to adduce is relevant; that its probative value is not outweighed by a risk of unfair prejudicial effect; that it should in any event be admitted in equity and good conscience.

[6] ASB acknowledges that it has not specifically pleaded the facts relating to the incident concerning Ms B. Whilst asserting that the incident is relevant to issues as currently pleaded, it has also applied, from an abundance of caution, for leave to amend its statement of defence to Mr Nel's second amended statement of claim in these terms:

[Then follows a passage which is the subject of a non-publication order, as issued in *Nel v ASB Bank Ltd (No 4)* [\[2018\] NZEmpC 64](#)]

[7] Mr Nel strongly opposes the application for leave on several grounds. Mr Nel says that given previous opportunities for amendment in the course of the proceeding, it would now be unfair to grant leave to amend shortly before the trial; that Mr Reilly was involved in the circumstances giving rise to the termination of Mr Nel's employment, and despite this, there had been no previous reference to the matters concerning Ms B of which he says he has knowledge; and ASB has had more than enough time and previous opportunities to amend its pleadings to include reference to this matter.

## The pleadings

[8] Both parties accept that the pleadings define the ambit of the proceedings and therefore the issues to which questions of relevance must relate.<sup>2</sup>

[9] The pleadings allege that Mr Nel was formerly employed by ASB. By 2015, he had been working there for approximately 18 years and was a manager. Ms A

*2 Airways Corporation New Zealand Ltd v Postles* [\[2002\] NZCA 155](#); [\[2002\] 1 ERNZ 71 \(CA\)](#) at [\[5\]](#).

reported to him. He developed romantic feelings for her. It is alleged he sent her inappropriate emails, culminating in a Facebook message declaring his love for her. She made it clear she did not share Mr Nel's feelings, and he apologised. It is alleged that she lodged a complaint, which culminated in Mr Nel being dismissed on 6 October 2015.<sup>3</sup>

[10] For the purposes of the challenges which are before the Court, Mr Nel pleads that the dismissal was not what a reasonable employer could have done in all the circumstances and that ASB:

- Followed a predetermined cause of action designed to remove him from his employment.
- Misled him in its investigation and failed to put the allegations to him in a full and fair way so that he was aware of their substance, nature and weight.
- Failed to provide Mr Nel with any adequate or real opportunity to comment on ASB's preliminary decision. ASB therefore denied him any opportunity to comment on the dismissal as a disciplinary outcome prior to the ultimate decision being taken and communicated.
- Made a finding and took a step which amounted to disparity of treatment in light of a workplace culture of alcohol abuse, profane language and other incidents involving serious concerns of bullying, use of recreational drugs, sexual and racial harassment and breaches of confidentiality. Sixteen particular examples that allegedly demonstrate

disparity are pleaded.

- Failed adequately to take into account the absence of prior offences of a similar nature despite having managed staff for 12 years, many of whom were young and female.
- Failed to take into account that Mr Nel had a clean work record over an 18-year period of employment, with excellent performance.

3. A more detailed analysis of the pleadings is found in my first interlocutory judgment, above n 1, at [3]-[19].

- Did not adequately consider alternatives to dismissal.
  - Did not take into account Mr Nel's remorse, his acknowledgment of inappropriate behaviour and his assurance that such conduct would not recur.
  - Did not consider that the threshold for serious misconduct was not reached.
  - Failed to consider that the absence of previous warnings or conduct by Mr Nel means that his conduct should not have been treated as serious misconduct under its Code of Conduct.
  - That the foregoing breaches constituted a breach of ASB's obligation of good faith under [s 4](#) of the Act.

[11] Mr Nel seeks an order of reinstatement, lost earnings/salary, and compensation for humiliation, loss of dignity and injury to feelings. He also seeks a declaration that ASB breached its statutory and contractual duties of good faith by failing to engage constructively with Mr Nel and to provide him with relevant information and an opportunity to comment on those matters. He asserts that a penalty for breach of good faith should accordingly be ordered under [s 4A](#) of the Act.

[12] For its part, ASB pleads that it was justified in taking the steps which it did. It denies that it breached any relevant obligation it owed to Mr Nel and pleads that there is no prima facie case of disparity of treatment.

### **The intended evidence**

[13] Before summarising the contested evidence, I make two observations. The first is that although it is necessary to describe that evidence, the Court has not reached any conclusions as to its accuracy, reliability or truth. The testing of that evidence, if admitted, would occur at the substantive hearing.

[14] Second, any comments made regarding the intended evidence should not be seen as a criticism of the persons who might give it. The Court is only concerned with legal concepts at this stage.

[15] Ms B's proposed evidence is as summarised in the proposed additional paragraph, as set out above. It relates to several interactions with Mr Nel, the main one of which concerns a Commercial Manager's Awards function in August 2015, when people attended a bar. [Then follows a passage which is the subject of a non-publication order, as issued in *Nel v ASB Bank Ltd (No 4)* [\[2018\] NZEmpC 64](#). Mr Reilly is an intended witness, and his brief of evidence refers to the same event. Ms Restall, a human resources (HR) professional, also comments on this evidence from an HR perspective. She will say that she was contacted by Ms B on 20 April 2018 about this matter, going on to refer to these and other circumstances for the purposes of expressing an opinion that she believed acceptance of resignation by Mr Nel would not have been appropriate.

[16] Ms B also filed an affidavit stating that she had not come forward prior to her conversation with Ms Restall, because the incident had been unpleasant and she wished to put it behind her. She did so recently, she said, because she was now a colleague of Ms A's, and had recently learned from her about some of the experiences she was going through. She therefore thought it was important that she speak up.

[17] Mr Nel has filed reply evidence, containing testimony he would give if the Court were to rule that the above evidence is admissible. He will deny [then follows a passage which is the subject of a non-publication order, as issued in *Nel v ASB Bank Ltd (No 4)* [\[2018\] NZEmpC 64](#)] and points to what he says are inconsistencies in both her evidence and that of Mr Reilly. He will also say that he does not consider it fair that ASB is raising further issues at this late stage, which have not been pleaded in its statement of defence, and which were never raised with him or ASB during the period of his employment. He will say that he understands Ms A reports to Ms B, and that it seems odd that the person to whom Ms A reports has only now decided to raise a complaint. He also proposes to make material comments concerning the proposed evidence of Mr Reilly and Ms Restall.

### **Relevant principles**

[18] At the heart of Mr Nel's application as to strikeout are [ss 7](#) and [8](#) of the EA, which contain principles relating to the admissibility of relevant evidence, and when evidence may be excluded:

#### **7. Fundamental principle that relevant evidence admissible**

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
  - (a) inadmissible under this Act or any other Act; or
  - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

## 8. General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

- (a) have an unfairly prejudicial effect on the proceeding; or
- (b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[19] However, in this Court, the admissibility of evidence is governed by the more general provision of [s 189](#) of the Act which states:

### 189 Equity and good conscience

(1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

(2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[20] That said, it is well established that the relevant provisions of the general rules of evidence in the EA may guide the Court in the exercise of its broad discretion under

[s 189\(2\)](#) of the Act. Ms Stewart, counsel for Mr Nel, emphasised the sub-section does not, however, permit “evidential open slather”.<sup>4</sup> A principled approach should be adopted. For present purposes, [ss 7](#) and [8](#) of the EA provide the appropriate guidance.

[21] In *Pacific Plastic Recyclers Ltd v Foo*, Goddard CJ set out the applicable principles when leave is sought to file an amended pleading out of time, as here.<sup>5</sup> These are:<sup>6</sup>

- The exercise of the discretion is wide and is not confined to a set of criteria or pre-conditions.
- In seeking the favourable exercise of the discretion, a number of factors must be addressed to the satisfaction of the Court. These include the extent of the delay, the explanation for it, and whether the delay is excusable.
- The discretion must be exercised judicially in accordance with legal principles governing the exercise of discretions generally.
- The overriding consideration is the justice of the case.
- It is necessary to take the whole history of the matter into account.
- Because rules of the Court have not been observed, there must be some material on which the Court can exercise its discretion as otherwise the purpose of the rules would be defeated.
- The party seeking leave must also show merits at least to the extent of showing that the matter that it is sought to advance out of time has some reasonable prospects of success and, if it has not, the discretion ought not to be exercised in favour of allowing the late filing.

[22] I will consider ASB’s application for leave in light of these principles.

## Discussion

[23] It is first necessary to consider whether the proposed disputed evidence could be said to be relevant to the pleadings in their current form.

[24] This assessment should be made in light of reg 20 of the [Employment Court Regulations 2000](#) which includes the requirement that every statement of defence specify matters with sufficient particularity as to fully, fairly and clearly inform the Court and other parties of the nature and details of the defence which has been brought.

<sup>4</sup> *IHC New Zealand Inc v Scott EmpC* Auckland AC45/08, 8 August 2006 at [11].

<sup>5</sup> *Pacific Plastic Recyclers Ltd v Foo* [\[2002\] NZEmpC 64](#); [\[2002\] 2 ERNZ 75 \(EmpC\)](#).

<sup>6</sup> At [24].

[25] The rationale for the provision of proper particulars was explained by the Court of Appeal in *Price Waterhouse v Fortex*

Pleadings which are properly drawn and particularised are, in the case of any complexity, if not in all cases, an essential roadmap for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.

[26] Ms Stewart pointed out that since the inception of Mr Nel's challenge, he had asserted in his pleadings that his interactions with Ms A were a "one-off lapse of judgement". ASB had denied this contention, thereby putting it in issue. However, no particulars of the events which Ms B proposes to describe were ever provided for the purposes of the denial. Ms Stewart contends that details of such a significant event would need to be pleaded. I agree.

[27] Then, Ms Stewart submitted that with regard to the remedies to which Mr Nel has pleaded an entitlement (including reinstatement, reimbursement of lost earnings, and compensation for humiliation, loss of dignity and injury to feelings), ASB had pleaded a general denial, but no reference was made to the incident concerning Ms B for the purposes of remedies. She said such a matter would need to be referred to expressly. Again, I agree.

[28] Mr Dench, counsel for ASB, submits that dicta in *Salt v Fell* is applicable; it refers to the fact that subsequently discovered evidence is admissible and can be relevant to remedies including reinstatement and financial awards.<sup>8</sup> Ms Stewart contests whether this dicta is applicable to the circumstances of this case. However, whether *Salt* might be distinguishable is a point that would have to be resolved at trial on the basis of considered findings of fact.

[29] In this case, both parties have filed detailed pleadings. However, as acknowledged, ASB has not previously referred to the incident regarding Ms B; I do not consider the intended evidence can be said to be relevant in the legal sense to the

7 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17.

8 *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193 at [97]- [98].

points ASB has raised in its current statement of defence. The real question is whether leave to amend should be granted at this late stage.

[30] The main reason which has been advanced for doing so is that Ms B has of course only recently brought the matters which are the subject of her intended evidence to the attention of Ms Restall, and, in turn those who are responsible for advancing ASB's defence to Mr Nel's challenge.

[31] For the purposes of the present interlocutory application, Ms B has not been cross-examined on her affidavit. I therefore accept her reasons for coming forward, but on the basis that her evidence is untested.

[32] It is asserted that Mr Reilly was aware of the incident involving Ms B, and yet when he was involved in the circumstances relating to Ms A, he did not raise the circumstances of the former. This assertion is made to support the submission that ASB, thus apprised of the circumstances relating to Ms B, has had more than enough time to plead them.

[33] In response, Mr Dench submits that Mr Reilly had limited involvement in the investigation concerning Mr Nel. That too is an assertion which has to be accepted on an untested basis.

[34] Having regard to these factors, I find that there is a plausible explanation for the late application.

[35] I next need to consider the issues to which the intended evidence would be relevant.

[36] Ms Stewart noted that ASB was contesting Mr Nel's assertion that his behaviour with regard to Ms A was an isolated example of inappropriate behaviour. She submitted that by introducing the contested evidence concerning Ms B, ASB was attempting to advance propensity or similar fact evidence; and that the evidence was not so strikingly similar as to meet the threshold for admissibility.

[37] Mr Dench clarified in his reply submissions that ASB does not rely on the circumstances relating to Ms B to establish Mr Nel's behaviour with regard to Ms A. He submitted that the intended evidence was for the purposes of showing that Mr Nel acted inappropriately on two occasions, not one. Thus, the intended evidence would be relevant, in a general way, to credibility, and to the assessment of remedies, particularly reinstatement.

[38] Mr Dench thereby confirmed that were leave to amend be granted and the proposed evidence advanced, it would not be led for propensity or similar fact purposes.<sup>9</sup> I accept that assurance. Had it been necessary, I would have found that the proposed evidence is not sufficiently similar to the evidence to be given about the primary events as to meet the test for admissibility of propensity evidence.

[39] Next, Ms Stewart argued that the probative value of the disputed evidence would be outweighed by the risk that it

would have an unfairly prejudicial effect on the proceedings. She noted that the alleged evidence was almost three years old and had never been raised with Mr Nel previously. She pointed to his proposed evidence in reply to the effect that both Ms B and Mr Reilly were intoxicated at the event in question. She submitted that their memories of events which occurred nearly three years ago when they were under the influence of alcohol was likely to be unreliable. She also said there was no contemporaneous evidence to corroborate their allegations, and that ASB's motivation for producing it just prior to trial had to be called into question. She submitted that the evidence had the hallmarks of being a "witch hunt", which could seriously prejudice Mr Nel because of its inflammatory nature.

[40] Whilst these submissions are understandable, the Court is not in a position to make any definitive findings as to what actually occurred, or as to ASB's motivation in raising this evidence now. These are topics which would, were the evidence to be led, be capable of being tested at trial for the purposes of assessing the reliability of that evidence.

9. As to which see the discussion in *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ 257 at [46]- [61] and Mathew Downs (ed) *Cross on Evidence* (online loose-leaf ed, LexisNexis) at [EVA 40.9].

[41] I am satisfied that there has been sufficient notice of the intended allegations to enable Mr Nel to prepare a detailed response. I discern no prejudice on that score.

[42] I agree that the intended evidence is of an inflammatory nature, but the Court is well used to considering assertions of this kind; and indeed, in this case will be required to assess a wide range of alleged inappropriate behaviour. Such allegations pertain not only to Mr Nel, but to 16 other employees.

[43] I am not satisfied that the potential probative value of the evidence would be outweighed by the risk that the evidence would have an unfairly prejudicial effect on the proceedings.

[44] Ms Stewart also submitted that admission of this evidence would needlessly prolong the hearing. I do not think this is a dispositive factor. Given the wide range of issues that are already before the Court, it is inherently unlikely that this one would assume disproportionate importance or significance. I am satisfied that the evidence relating to Ms B's circumstances is capable of being dealt with efficiently at trial and that there need not be an undue focus on it.

## Conclusion

[45] Standing back, I find that the interests of justice require the granting of leave to amend in the terms sought. Consistent with the approach which the Court has adopted throughout these proceedings, which are important to both parties, it is in my view appropriate to permit the amendment to be made so that all potentially relevant issues may be properly considered and assessed.

[46] On the basis of that amendment, the intended evidence will be relevant and admissible under s 7 of the EA, as it will relate to issues raised by ASB in its amended pleading. I find that it may have a tendency to prove matters that are of consequence to the determination of the proceedings, namely, the assessment of Mr Nel's evidence regarding his claims, and as to remedies.

[47] Accordingly, I grant ASB's application for leave to amend, and dismiss Mr Nel's application to strike out evidence. The amended statement of defence is to be filed and served by 4.30 pm on 1 June 2018.

[48] In the circumstances, it is inappropriate to award ASB costs in respect of its successful application. In my view costs in respect of the admissibility application should lie where they fall; although Mr Nel was ultimately unsuccessful, his appreciation brought about ASB's application to amend. In summary, neither party is entitled to costs on either application.

B A Corkill Judge

Judgment signed at 11.40 am on 31 May 2018