IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO. 1748/2022**

BETWEEN **MARTHALINA JOANNA NOOARE TUAINE**
Plaintiff

AND **BANK OF THE COOK ISLANDS**
Respondent

On the Papers

Counsel: Mr N George for Plaintiff
Mr B Marshall for Respondent

Judgment: 23 December 2024

JUDGMENT [2] OF KEANE CJ

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[1] On 11 July 2024, I struck out as untenable Ms Tuaine's first three causes of action (malicious prosecution, defamation, negligence). I held her fourth, wrongful dismissal answerable in damages, open at common law, but required more as to tenability.

[2] In the Cook Islands, I held, the common law action of wrongful dismissal, answerable in damages, is not subsumed by the Employment Relations Act 2012. It remains open where any dismissal constitutes a breach of any employment contract. Such a breach, I held, remains answerable in damages: (i) for salary foregone during any specified notice period; (ii) for injury to reputation, distress and the like.

[3] I could not then assess the tenability of this cause of action. The terms of any employment contract were not pleaded or in evidence. Nor were any salient features of her pre-termination interviews leading to her dismissal. Nor any letter of dismissal. I asked for more.

[4] In a submission, dated 30 August 2024, BCI contends that an action for breach of contract at common law is not presently pleaded; and, if it were, could not possibly succeed on the presently pleaded facts. In any case, BCI contends, any such common law claim is now time barred.

[5] In an application, dated 13 September 2024, and submission, Ms Tuaine seeks to amend her statement of claim to plead wrongful dismissal answerable in $55,000 damages. And that gives rise to two issues. Is the amended claim proposed time barred? If not, is it so clearly untenable the application ought to be declined?

Statutory time bar

[6] In essence, BCI contends, Ms Tuaine seeks to pursue at common law a personal grievance for unjustifiable dismissal, which under the ERA 2012 became time barred 60 days after her dismissal. That erodes the statutory regime and ought not to be countenanced.

[7] The 60 day time limit, BCI contends, is essential to the central purpose of the ERA 2012, a 'speedy and low cost resolution'. And BCI relies what the NZ Supreme Court has said as to the 90 day limit in the Employment Relations Act 2000 (NZ):[1]

> … Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and, in addition, the overall justice of the case (which includes taking account of the position of an employer facing a late claim) so requires.

[8] BCI also accepts, however, as I held in my primary decision, that Ms Tuaine may pursue at common law an action for wrongful dismissal in breach of contract.[2]And that right, as I then held, is altogether independent of her right to pursue a personal grievance under the ERA 2012.

[9] In my primary decision I adopted as apposite to the ERA 2012, McKay J's analysis in this respect of the Employment Contracts Act 1991 (NZ):

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1 *Creedy v Commissioner of Police* [2008] NZSC 31, [33].
2 *Ogilvy Mather (New Zealand) Ltd v Turner* [1994] 1 NZLR 641 (CA).

> There is nothing in the Act to suggest that Parliament intended, by mere implication, to take away the employee's previous right to full compensation for loss suffered as a result of the employer's breach of contract. That would be a major inroad into contractual rights, and should not be read into an Act which emphasises the freedom of the parties to negotiate their own individual contracts. There is no restriction on the employer's right to recover full damages for any breach by the employee, and I can see no justification for reading down the wide jurisdiction conferred on the [Employment] Court … so as to restrict the recovery of damages by the employee for breach by the employer.

[10] The NZ Supreme Court's statement concerning the 90 day time limit (here 60 days) on which BCI now relies, relates by contrast to the Employment Relations Act 2000 (NZ), which does look to subsume the common law action.[3]

[11] Section 113 of the ERA 2000 (NZ) is entitled, 'Personal grievance provisions only way to challenge dismissal'; and subs (1) says:

> If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance.

A personal grievance, moreover, as subs (2) says, may include an action to recover wages relating to any period of notice, actual or alleged; any wages owing prior to dismissal; and any other money payable on dismissal.

[12] Absent such an unequivocal statement in the ERA 2012 (CI), as I held in my primary decision, an action at common law in the Cook Islands for wrongful dismissal remains a claim for breach of contract, subject only to the Limitation Act 1950. It must be brought within 6 years of the alleged breach.[4]

[13] Ms Tuaine claims she was wrongfully dismissed on 27 January 2021. She remains well within time to pursue her claim at common law. The question of tenability remains.

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3 *Creedy v Commissioner of Police* (supra), [22]

4 Limitation Act 1950, s 4(1)(a).

Tenability of claim

[14] Ms Tuaine's present statement of claim may not, as BCI contends, sufficiently plead wrongful dismissal in breach of her contract of employment. The issue is whether she may, and can, reframe her claim tenably by amendment.

[15] In striking out Ms Tuaine's first three causes of action I looked, highly unusually, beyond her pleadings to their substance in fact because they could be set against the evidence at her criminal trial. As to this cause of action, not then foreshadowed, I must confine myself to her pleadings, assumed to be true.

[16] As I said in my primary decision, moreover, where tenability is in question on a strike out application, strike out is a last resort. If a claim can be made tenable by amendment that will almost always be allowed. Rule 150, Code of Civil Procedure, enables the Court to make, with or without application:

> … all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties … upon such terms as to costs and otherwise as the Court thinks fit … .

[17] A plaintiff may, moreover, under r 153, 'file and serve an amended statement of claim … at any time before the day of hearing without any order … and may increase (their) claim …'. The Court may at the hearing disallow the amendment. A new cause of action always requires leave, and the Court may make orders to protect or compensate a defendant. But a plaintiff does still have that degree of latitude.

[18] The intent of these rules is clear. It is to ensure that pleadings identify claims in their essence and in sufficient detail. That they expose what is truly in issue and against what context. That they evolve as they need to, consistent with the principles of natural justice. That they are not what they once were, an intractable straitjacket.

[19] Against those principles, I grant Ms Tuaine leave to amend her pleadings but not as she presently wishes to do. She is to file a further draft statement of claim for me to consider, which must include the following, succinctly stated:

(a) Her contract of employment: its date, its term, her salary, any grounds for termination without notice, any period of notice applying otherwise.

(b) Her pre-termination interviews: the dates, the interviewers, the subject matter, any grounds on which she contends they were deficient.

(c) Her letter of termination if any, and any ground on which she contends it was deficient.

(d) Her grounds, in summary, for contending on the date she was dismissed her dismissal was in breach of her contract.

(e) Her damages claim ($55,000) divided into: wages lost during any notice period foregone, and any sum for undue mental distress, humiliation and the like.

[20] I emphasise this. In her revised statement of claim Ms Tuaine must identify succinctly why she contends BCI wrongfully dismissed her, in breach of her contract of employment, on the very day on which it dismissed her.

[21] At that date she had just been charged, if indeed she had been, and her trial lay well in the future. The focus now must be on whether, on the day BCI dismissed her without notice, it had any safe basis to conclude she had stolen the deposits attributed to her.

[22] I direct Ms Tuaine to file her draft statement of claim by 20 January 2025. I will issue any directions called for before or at the civil call over on 24 January 2025.

Keane CJ.

P J Keane, CJ