Lyttelton Port Co Ltd v Pender

[2019] NZEmpC 86

Employment Court, Christchurch (EMPC 331/2018) 29, 30 April;
Chief Judge Inglis 26 July 2019

Challenge — Personal grievance — Unjustifiable disadvantage — Cargo handler — Internal advertisement posted inviting cargo handlers to apply to be trained as crane drivers — Defendant's application was unsuccessful — Collective employment agreement — Terms and conditions — Whether plaintiff had breached statutory duty of good faith — Interlocutory application seeking orders that certain paragraphs of proposed evidence filed be ruled inadmissible on basis of irrelevance — Approach to evidence objections in employment jurisdiction — Evidence Act 2006, s 6.

The defendant, Mr Pender (P), was a cargo handler at Lyttelton Port Co Ltd. Cargo handlers were organised into four groups: A, B, C and D. A number of cargo handlers within each group were trained as crane drivers. Crane driving was well-regarded and sought after work at the Port, and it also attracted an allowance. Upon the successful completion of their training programme cargo handlers were able to undertake crane driving duties, which they did in conjunction with their cargo handling work.

In April 2017, the company embarked on a recruitment round to boost crane driver numbers. P was one of the applicants. Two crane drivers were needed in Group B, P's group. Due to P being placed third within his group following the assessment process, his application was unsuccessful.

P became aware that larger numbers of applicants had been accepted for training in other groups, and that some of them had lower overall assessment scores than he had achieved. He pursued a grievance claiming that he had been unjustifiably disadvantaged by the company's approach to the application process.

In April 2018, just prior to the Employment Relations Authority's investigation meeting, a crane driver in P's group resigned from his position. P viewed this as a vacancy to which he should be appointed. However, the company did not view things in this way. P surmised that this was because he was pursuing a personal grievance. The April 2018 issue formed the basis for a second claim of unjustifiable disadvantage.

In summary, P's complaints were: (i) the company breached his employment agreement by failing to afford him the same opportunities for training as other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances (the cl 1.5 complaint); (ii) the company breached his employment agreement by failing to increase his skill levels and job satisfaction (the cl 5.4 complaint); (iii) he was unjustifiably disadvantaged because he was not given the opportunity to train as a crane driver in accordance with the advertisement (the complaint about the wording of the advertisement); (iv) he was unjustifiably disadvantaged by the company's failure to appoint him as a crane driver when an opening arose in Group B in April 2018 (the April 2018 complaint); and (v) the company breached its statutory duty of good faith.

Shortly before the hearing, the plaintiff filed an interlocutory application seeking orders that certain paragraphs of the proposed evidence filed on P's behalf be ruled inadmissible on the basis of irrelevance, prejudice and hearsay. P opposed the application. Following argument at the outset of the hearing, the plaintiff's application was dismissed, costs were reserved, and reasons were to follow.

Held, (1) the way in which the company approached P's application for training did not breach cl 1.5 of the collective agreement. Though this was a broad brush provision, it did not go so far as conferring a right to training on all employees, or a right to be appointed to a particular position. The evidence showed that P had an opportunity to apply, and that his application was assessed in the same way as other applications. The only reason it failed was because the company accepted applicants for training within, rather than across, groups. Other provisions in the agreement, including cl 2.2.2, emphasised the importance of maintaining a balance of skills within each group. This was reinforced by the fact that the company did not, as a matter of practice, appoint across groups. (paras 27-29)

(2) The way in which the company approached P's application for training did not breach cl 5.4 of the agreement. Though this clause expressed a mutual objective to increase the skill levels and job satisfaction of individuals, it also provided for balancing this objective against the objective of ensuring the company operated efficiently. The process was plainly designed to achieve this balance by adopting the within-group approach; according each employee an opportunity to apply to increase their skills, but to assess the application within their own roster group. The company reserved the right to require cross-group movement in the event that became necessary or desirable for operational reasons. In this particular case, it did not become necessary, as there were a sufficient number of applicants within each group who had been assessed as meeting the requisite level of competency. (paras 30, 31)

(3) P's claim that he was unjustifiably disadvantaged because he was not given the opportunity to train as a crane driver in accordance with the advertisement required words to be read into the advertisement which were not there. He was not given the opportunity to train as a crane driver because his assessment score was below the cut-off for Group B. The wording of the advertisement did not, of itself, undermine this result, particularly when viewed within the broader operational context. (para 34)

(4) P's argument regarding the alleged vacancy that arose in April 2018 when one of the crane drivers in Group B resigned, erroneously presupposed that the resignation gave rise to a vacancy that had to be filled. It did not. Rather, the company decided against training any more cargo handlers as crane drivers following the previous employee's departure. Even if the resignation had given rise to a vacancy to be filled, the company was not obliged, by virtue of P's place in the assessment table one year earlier, to appoint him, regardless of any change in circumstances that might have arisen in the intervening period. The Court was not satisfied on the basis of the evidence before it that the failure to appoint P in April 2018 was linked to the fact that he was, by that time, pursuing a personal grievance. Nor, that the company's actions and/or inactions in April 2018 amounted to an unjustifiable disadvantage. (paras 35-37)

(5) The assessment of whether or not the standard for the statutory duty of good faith had been met, or fallen short, was to be made within the particular framework and the particular circumstances. The advertisement made it clear that the company might require a move to another roster group and that applicants were welcome to nominate a group, but this could not be guaranteed (the decision resting with the company, for operational reasons). Though P did advise his preference and this was noted, the company did not need to exercise its discretion to move any applicants

between roster groups. It was difficult to see what the company could have said by way of clarification, other than confirming that offering to move groups was not necessarily going to assist an application. While the advertisement could have been better drafted, its formulation did not put the company in breach of its good faith obligations. Nor could it be accepted that P's email advising that he was happy to change roles, required (in good faith) a clarifying response from the company in the circumstances. It could not be accepted that what was done, and not done, amounted to a breach of good faith in the circumstances. Based on the evidence before the Court, the Court was not otherwise satisfied that the company had breached its obligations of good faith, including in relation to the way requests for information were handled. (paras 38-44)

(6) Consideration of whether or not evidence and/or information should be "admitted", "accepted" or "called for" in the Employment Court would be informed by a broader inquiry than simply whether the proposed evidence and/or information would be admissible in the High Court. The starting point was the Court's broad discretion in s 189 of the Employment Relations Act 2000. The twin principles of equity and good conscience must also be looked to for the guiding light in exercising the Court's discretion under s 189. In order to determine the extent to which proposed evidence may or may not be relevant, it was necessary to consider the matters at issue in the proceedings. This was because relevant evidence had a tendency to prove or disprove anything that was of consequence to the determination of the proceeding. The Court assessed the matters P wished to refer to, and which the plaintiff objected to as irrelevant, as more broadly relevant by way of background context and of possible relevance to costs. In the circumstances, the Court did not consider that admitting the evidence would cast an unfair burden on the plaintiff — quite the opposite. It was a burden it was well-placed to shoulder. Accordingly, the plaintiff's interlocutory application for orders excluding various parts of the defendant's evidence was dismissed. The plaintiff's application for leave to call Mr Ireton, P's manager, to give evidence was granted. (paras 53, 55, 60, 61)

Cases referred to

Public Trust v Cornelius [2009] NZFLR 514 (HC)

Challenge

This was a successful challenge to an Employment Relations Authority determination, which found in favour of the defendant, and the Employment Relations Authority issuing what was described as a "good faith order" requiring the company to train the defendant as a crane driver.

T Mackenzie, counsel for plaintiff (Lyttelton Port Co Ltd)
J Goldstein and *L Ryder*, counsel for defendant (Carl Francis Pender)

Cur adv vult

CHIEF JUDGE INGLIS

Introduction

[1] Mr Pender is a cargo handler at Lyttelton Port Co Ltd. Cargo handlers are organised into four groups (Groups A, B, C and D). A number of cargo handlers within each group are trained as crane drivers. Once their training programme has been successfully completed they are able to undertake crane driving duties, which they do in conjunction with their cargo handling work. Crane driving attracts an allowance. It is well regarded and sought after work at the Port.

[2] The company embarked on a recruitment round in April 2017 to boost crane driver numbers. An internal advertisement was posted, inviting cargo handlers to apply. Mr Pender was one of the applicants. The company determined that two crane drivers were needed in Mr Pender's group (Group B). He was placed third within his group following the assessment process. Mr Pender was advised that his application had been unsuccessful.

[3] Mr Pender became aware that larger numbers of applicants had been accepted for training in other groups, and that some of them had lower overall assessment scores than he had achieved. Mr Pender pursued a grievance claiming that he had been unjustifiably disadvantaged by the company's approach to the application process. His grievance was set down for an investigation meeting in the Employment Relations Authority. In April 2018, just prior to the investigation meeting, a crane driver resigned from his position within Mr Pender's group. Mr Pender viewed this as a vacancy to which he should be appointed. The company did not view things in this way. Mr Pender surmised that this was because he was pursuing a personal grievance. The April 2018 issue formed the basis for a second claim of unjustifiable disadvantage.

[4] The Authority upheld Mr Pender's claim, awarded him $800 by way of reimbursement for lost wages and $12,500 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000, and issued what it described as a "good faith order", requiring the company to "train Mr Pender as a crane driver."[1] The company challenges the determination. It says, in relation to the initial application, that Mr Pender was effectively requiring the company to move him to another group to ensure that his application succeeded. It says that there was no obligation on it to accede to this given its express contractual and common law discretion as an employer. In relation to the April 2018 issue, it denies any suggestion that it acted inappropriately and says that the departure of one of its crane drivers did not give rise to a requirement to facilitate Mr Pender's move into that role. It seeks orders that the Authority's determination be set aside and replaced with judgment in its favour. The parties agreed that the plaintiff's challenge to costs should be deferred pending the outcome of this challenge.

The collective agreement

[5] The parties' submissions focussed on provisions in the collective agreement dated 2017-2020. It is convenient to set them out at this point.

[6] The functions undertaken by cargo handlers are described as varied but include the driving and operation of mechanical equipment, including cranes.[2]

[7] Clause 1.5 provides:

> The intent of this Agreement is to afford to each employee the same terms of employment, conditions of work and opportunities for training, promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances.

[8] Work performance is dealt with under cl 5. It provides:

> 5.1 Every employee employed under this Agreement shall, as required by the employer, be interchangeable at any time to perform any of the work of the employer provided that the employee concerned has the qualification, competency and/or is adequately trained to perform the work involved.
>
> …

1 *Pender v Lyttelton Port Co Ltd* [2019] NZERA Christchurch 137.

2 See cl 1.2.

> 5.4 The mutual objective of the parties to this Agreement is to increase the skill levels and job satisfaction of individuals and to ensure that the efficiencies of the operations are continually improved to enable the Company to serve its economic purpose in the most efficient manner available.

[9] A degree of managerial prerogative is built into the agreement. Clause 6 ("MANNING AND FLEXIBILITY") provides that, except where otherwise agreed by the parties:

> 6.1 The number of employees required to perform the work of the employer and the work to be performed will be determined by the employer having regard to acceptable safety standards.
>
> …
>
> 6.4 Some areas of employment will require permanent allocation of employees whilst others will require permanent employees to be rostered on either a regular allocation or on an as required basis to meet operational requirements.

[10] And cl 10 of the Cargo Handling Schedule ("MANNING") provides:

> Manning levels will be adopted to efficiently meet customer requirements and productivity expectations, with due regard to the health and safety of workers. Operations may be on a continuous or discontinuous basis.

[11] The Cargo Handling Schedule to the agreement sets out a number of general provisions, including in relation to the rosters for cargo handlers. Clause 2.2.2 provides that: "Four operational groups of similar size will be established with a balance of skills in each group." Employees are assigned by the company to a particular group (A, B, C or D). The groups work to a four-week cycle.

[12] Clause 15 of the Cargo Handling Schedule deals with progression. It provides:

> Appointment to any vacancy within the rostered and PRP classifications shall be on the basis of competency. The Work Place Team (WPT) will determine the competency criteria. In general, selection shall be made from the preceding classification, however an internal/external applicant who was not previously employed in the preceding classification may be appointed.

Chronology of events

[13] As I have said, an internal advertisement was posted in March 2017. It was couched in the following terms:

> Crane Drivers
>
> Applications are invited from full time *Cargo Handlers who would like to expand upon their skill base to train as a Crane Driver* and Signalperson. *We are recruiting for additional Drivers in Groups A, B, C & D.*
>
> *Whilst a preference of Groups can be taken into consideration, this cannot be guaranteed and some successful applicants may be required to shift Groups to ensure the appropriate level of resource is able to be provided at all times.*
>
> Requirements for the role are:
>
> - Proven competent and current operational experience in LCT machinery
> - Must be experienced (or willing to train immediately following Crane Driver Training) in the Signalperson role
> - An ability to respond immediately and calmly in a crisis situation
> - A good level of comfort with working at heights
> - Excellent visual ability
> - High level of Health and Safety awareness
>
> The process for untrained applicants will be as follows:
>
> - Expressions of interest by way of an on-line application via our careers website (link below)
> - A physical and practical assessment to the crane operation which includes climbing the crane and a short drive of the crane to assess ability and accuracy

- Foreman feedback and competency assessment for each applicant from which suitable applicants will be identified and progressed to a pre-employment medical and drug test
- The successful applicants will undertake a specific training programme that will provide them with the necessary skills to carry out this role.

If you are interested in joining the Crane Driver team, please hit the "apply now" button below. *Please state your preferred work group — A, B, C, D.* (Emphasis added)

[14] Mr Pender had wanted to become a crane driver for some time. He tried to apply online but encountered difficulties in doing so. Human Resources assisted him in the process. He did not specify a preferred group. Mr Pender says that he had a conversation with a tutor (Mr Rush) which led him to believe that there were only 12 training positions available and that the applicants would need to be available to change groups to ensure that the individuals with the best scores were appointed. Mr Rush did not recall matters in precisely the same way. He said that his understanding was that candidates were going to be assessed on competency and could be moved between groups but only if they wanted to move. He thought that he might have mentioned this to Mr Pender. The details of the conversation remain unclear. What is however clear is that Mr Pender subsequently emailed his manager, Mr Ireton, advising:

> … just a message regards crane jobs I understand that part of the process is if you are happy to change groups and that is a possibility for me if it helps get job …

[15] Mr Ireton responded: "Thanks Carl. Have noted that."

[16] A Work Place Team was set up and that group undertook the assessment process, using a competency form provided by Human Resources for the purpose. Each member of the assessment team filled in the form for each applicant. The scores were then transferred into a table which allocated percentage ratings as against the identified competencies and an overall rating for each applicant within their particular roster group. There were 13 applicants within Group B. The top rating was 82.50 per cent; the lowest 64.64 per cent. Mr Pender's assessment was 80.93 per cent. That score placed him at fourth ranking in the list for Group B. Only two applicants from Group B were successful. One of those subsequently dropped out. Mr Pender accordingly moved to third on the list. Had he been in Group C, for example, he would not have missed out. That is because six applicants were successful in that group, and four of those applicants achieved lower percentage scores than Mr Pender had. He would also have succeeded in Groups A and D (he had a higher score than any of the successful applicants in these groups).

[17] Mr Pender gave evidence about a conversation he says he had with a trainer, Mr Jones, during the selection process. He says that Mr Jones told him that applicants for training positions would no longer be able to change groups in order to secure a training opportunity. Mr Jones could not recall making these statements and did not see any reason why he would have done so. He has been with the company for 15 years and is experienced in recruitment processes. He said that the company did not have a practice of moving people between groups unless they could not find a suitable candidate within the group being recruited for. I preferred his evidence, which was not challenged in cross examination.

[18] Mr Pender was concerned that his application had not been successful and raised this with his union. The concerns were set out in an email from Mr Horan (MUNZ official) to Mr Ireton on 23 August 2017:[3]

3 It emerged in evidence that an earlier email had bounced back, after having been sent to an incorrect address.

> Carl was placed 3rd in his group of the applicants who had applied for the position. This was after [another applicant] withdrew his application.
>
> The idea was to bring the number of drivers up to 12 per group but 1 of the other groups has gone up to 13 drivers. *Carl was prepared to shift groups if this facilitated in him being trained as a crane driver.*
>
> *Is Carl next in line to go on the crane driving roster if the numbers are increased or someone leaves?*
>
> The process has in the past has (sic) been fraught with problems and has greatly improved lately. Carl has said he has had open and frank discussions with management over this matter and is keen to be trained as a crane diver. (Emphasis added)

[19] I pause to note that the email did not traverse the concerns now being raised about the process, and nor does it reflect what Mr Pender says he took from the advertisement at the time. Rather, the focus was on Mr Pender's preparedness to shift groups and a query whether he was now "next in line".

[20] Mr Pender says that his attempts to engage with Mr Ireton about the process went largely ignored. Mr Ireton agreed that Mr Pender was clearly unhappy about the process. He says that they had a conversation in which he told Mr Pender that he was willing to receive feedback and to discuss matters but Mr Pender indicated that he was simply interested in a change of decision. That was not something that Mr Ireton was prepared to entertain. I am not satisfied that he ignored Mr Pender's expressed concerns. Rather, he did not respond to them in the way Mr Pender would have wished.

[21] The next step in the chronology of events was a letter from Mr Pender's lawyers raising a personal grievance for unjustified disadvantage in relation to the alleged unfair selection process which was said to have resulted in Mr Pender "missing out on a promotion". Information relating to the decision not to "promote" Mr Pender and/or which would be relied on by the company in regard to that decision was requested. In fact, Mr Pender had missed out on the opportunity to enter a training programme which, if completed successfully, would have led to him becoming qualified as a crane driver. The opportunity to undertake crane driving duties was accordingly contingent on successful completion of the training.

[22] The company responded by way of letter dated 6 October 2017. It rejected the grievance, advising that the crane driving position was separate and distinct from cargo handling and an opportunity for promotion was accordingly not part of the latter role. It was also said that Mr Pender was not treated unfairly — the advertisement called for applications and then went on to simply warn that a successful applicant may be moved groups; success, however, had to come first. It was said that there was no representation made to Mr Pender that if he was willing to move groups then he would automatically be accepted for training, and no successful applicants were moved between groups in any event.

[23] A claim was filed in the Employment Relations Authority and was set down for an investigation meeting on 20 June 2018. On 11 April 2018 Mr Pender's lawyers wrote to the company's representative advising that Mr Pender had become aware that another employee who had been accepted for crane driver training in the 2017 round had resigned and, in addition, a number of crane drivers had recently been seconded elsewhere. A request was made "to appoint [Mr Pender] to a crane driver immediately" or, alternatively, the company undertake not to appoint anyone else until after the Authority had dealt with the matter. The company did not take up the request and a second unjustified disadvantage grievance was raised by way of letter dated 12 June 2018.

[24] On 14 August 2018 the company posted a notice that three crane driver vacancies existed. This time there was a call for applications from full-time cargo handlers in a specified group only (namely Group B). That was because, as Mr Parker (the Container Terminal Manager) said in evidence, that was the only group which the company assessed as requiring additional drivers at the time. The selection process was set out, including that an assessment would be undertaken against specified criteria; that the assessment would be undertaken by trainers, Work Place Teams, a logistics shift manager and a human resources representative; and that shortlisted applicants would undergo a practical assessment. The advertisement stated: "If you are currently a member of Group B and are interested in joining the Crane Driver team please apply online … ".

[25] Mr Pender again had difficulties with his online application. Mr Horan contacted Mr Parker asking that the company accept a handwritten application that Mr Pender had prepared. Mr Parker agreed to this request. Mr Pender was offered training as a crane driver for Group B on 15 November 2018, which he accepted. He went on to successfully complete his training, became qualified, and has been driving cranes in Group B ever since.

Mr Pender's complaints about the process

[26] Mr Pender's complaints can be summarised as follows:

- The company breached his employment agreement by failing to afford him the same opportunities for training as other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances (the cl 1.5 complaint).
- The company breached his employment agreement by failing to increase his skill levels and job satisfaction (the cl 5.4 complaint).
- He was unjustifiably disadvantaged because he was not given the opportunity to train as a crane driver in accordance with the advertisement (the complaint about the wording of the advertisement).
- He was unjustifiably disadvantaged by the company's failure to appoint him as a crane driver when an opening arose in Group B in April 2018 (the April 2018 complaint).
- The company breached its statutory duty of good faith.

Clause 1.5 complaint

[27] Clause 1.5 is a broad-brush provision reflecting an equal opportunity approach to employment, conditions of work, and opportunities for training, promotion and transfer. The provision does not go so far as conferring a right to training on all employees, or a right to be appointed to a particular position. While cl 1.5 did not entitle Mr Pender to automatically access training as a crane driver, it did require the company to ensure that he had an equal opportunity, along with other applicants for training, to have his application considered. The crux of the issue falls on whether cl 1.5 required the company to adopt an assessment process spanning all of the roster groups, rather than to provide access to training according to merit assessed within each group. Mr Pender's argument hinges on the former. The evidence shows that he did have an opportunity to apply and that his application was assessed in the same way as other applications. The only reason it failed was because the company accepted applicants for training within, rather than across, groups.

[28] While, at first blush, it might appear odd (and contrary to the stated intent of cl 1.5 and the competency assessment framework) to undertake a process within each group, it is not odd when the provision is viewed in light of the organisational structure (repeated in other provisions of the agreement, including the four-group/

four-week cycle) and the relevant operational context. As Mr Parker explained, conducting an approach across groups would likely give rise to significant difficulties, having regard to the disruptive impact on each roster and the fact that crane driver duties comprised part, but not all, of the role. His evidence, which I accept, was reinforced by other provisions of the agreement, including cl 2.2.2, which emphasised the importance of maintaining a balance of skills within each group.[4] Mr Parker's evidence was also reinforced by the fact that the company did not, as a matter of practice, appoint across groups — a point confirmed by Mr Jones who gave unchallenged evidence in this regard.

[29] The way in which the company approached Mr Pender's application for training did not breach cl 1.5.

Clause 5.4 complaint

[30] Clause 5.4 expresses a mutual objective to increase the skill levels and job satisfaction of individuals. The clause, however, also expressly provides that this objective is to be balanced against the objective of ensuring the company operates efficiently. The process was plainly designed to achieve this balance by adopting the within-group approach, according each employee an opportunity to apply to increase their skills but to assess the application within their own roster group (for the reasons Mr Parker explained). The company reserved to itself the right to require cross-group movement in the event that became necessary or desirable for operational reasons. It did not become necessary because there was a sufficient number of applicants within each group who had been assessed as meeting the requisite level of competency.

[31] The way in which the company approached Mr Pender's application for training did not breach cl 5.4.

The original advertisement complaint

[32] Was Mr Pender unjustifiably disadvantaged because he was not given the opportunity to train as a crane driver in accordance with the original advertisement? That depends on what the original advertisement, when read in context, said and what Mr Pender could reasonably have taken from it.

[33] The advertisement made it tolerably clear that there were vacancies in each of the four groups; that an assessment process would be followed; that applicants were welcome to express a preference in terms of group; but that ultimately it would be up to the company to decide, for operational reasons, if a shift in groups would be required. It did not state that applications would be ranked across groups and those with the highest scores would be offered training, no matter which group they belonged to; nor did it expressly say that applications would be ranked within each group. An informed reader would, more likely than not, draw the conclusion that the within-group approach would apply, including having regard to the structural and operational issues I have already referred to, and the prior practice adopted in relation to appointment processes within groups.

[34] Mr Pender's claim that he was unjustifiably disadvantaged because he was not given the opportunity to train as a crane driver in accordance with the advertisement requires words to be read into the advertisement which are not there. He was not given the opportunity to train as a crane driver because his assessment score was below the cut-off for Group B. The wording of the advertisement does not, of itself, undermine this result, particularly when viewed within the broader operational context.

4 "Four operational groups of similar size will be established with a balance of skills in each group."

April 2018 "vacancy"

[35] I turn to consider the alleged vacancy that arose in April 2018 when one of the crane drivers in Group B resigned. Mr Pender argues that he should have been appointed as a crane driver at this point. There are a number of difficulties with that argument, including that it bunny-hops over the need to have successfully completed training. Most fundamentally it presupposes, erroneously, that the resignation gave rise to a vacancy that had to be filled. It did not. Rather, the company decided against training any more cargo handlers as crane drivers following the previous employee's departure. As Mr Parker explained, that decision was reached for valid operational reasons. Even if the resignation had given rise to a vacancy to be filled, the company was not obliged, by virtue of Mr Pender's place in the assessment table one year earlier, to appoint him, regardless of any change in circumstances that might have arisen in the intervening period. The corollary of the argument advanced on Mr Pender's behalf is that the next-in-line process would carry on until the last person who had applied was appointed, however many years down the track that might be. It would also likely adversely impact on other employees, including any new recruits, who had not applied at the time but subsequently wished to do so.

[36] While the evidence is that Mr Pender sought agreement from the company to appoint him as crane driver in April 2018, there is nothing to suggest that the company undertook to do so and then reneged on that undertaking. Nor am I satisfied on the basis of the evidence before the Court that the failure to appoint Mr Pender in April 2018 was linked to the fact that he was, by that time, pursuing a personal grievance.

[37] I do not accept that the company's actions and/or inactions in April 2018 amounted to an unjustifiable disadvantage.

Good faith

[38] Good faith is the standard which applies to all employer/employee interactions. The assessment of whether or not the standard has been met, or fallen short of, is to be made within the particular contractual framework and the particular circumstances. It is not a one-size-fits-all approach. It requires evaluation of the alleged breach in its human dimension. Context is all.

[39] I understood the claim of breach of the statutory duty of good faith to be focussed on an alleged failure to be communicative and open in terms of the original advertisement and an associated failure to disabuse Mr Pender of his alleged view that he could move groups to facilitate a successful application. At this point it is convenient to note that the defendant's pleadings on the company's challenge sought to maintain the orders and awards made by the Authority. In respect of good faith, the Authority made an order requiring the company to train Mr Pender. That relief has now been overtaken because Mr Pender has been trained as a crane driver. The Authority did not impose penalties for breach of good faith. It follows that what is now being sought in respect of the alleged breach of good faith is declaratory relief only.

[40] The reality is that the advertisement made it clear that the company might require a move to another roster group and that applicants were welcome to nominate a group but this could not be guaranteed (the decision resting with the company, for operational reasons). Mr Pender did advise his preference and this was noted. In the event, the company did not need to exercise its discretion to move any applicants between roster groups. It is difficult to see what the company could have said by way of clarification, other than confirming that offering to move groups was not necessarily going to assist an application.

[41] If the company could have read Mr Pender's mind, and discerned what he says he thought the assessment process involved, it could have gone back to him to clarify the position. It is not, however, a breach of good faith not to be a mind-reader. Nor is it necessarily a breach of good faith to express yourself in a way that could, with the benefit of hindsight, be clearer. While the advertisement could have been better drafted, I do not think that its formulation put the company in breach of its good faith obligations.

[42] Nor do I accept that Mr Pender's email, advising that he was happy to change roles, required (in good faith) a clarifying response from the company in the circumstances. Mr Pender simply said that he understood that "part of the process is if you are happy to change groups" and that changing groups was a possibility for him if it helped him get the job. That contemporaneous expression of understanding tends to reflect that he appreciated the group orientated nature of the process which was, as I have said, consistent with previous practice. It does not reflect an assumption that all applicants across all groups would be ranked and positions offered accordingly. In the event Mr Ireton did respond to the email, advising Mr Pender that he had noted his message. The evidence is that he did precisely that. As it happened there was no need for the company to explore the option of requiring people to move groups, so Mr Pender's indication that he would be happy to move if that would help him secure a position was never triggered.

[43] I do not accept that what was done, and what was not done, amounted to a breach of good faith in the circumstances. At worst, it reflects communications which could, with the benefit of hindsight, have been expressed more clearly — on both sides. For completeness, I record that I was not otherwise satisfied, based on the evidence before the Court, that the company breached its obligations of good faith, including in relation to the way requests for information were handled.

[44] Finally, I leave open the question of whether, had I been satisfied a breach of good faith had occurred, a "good faith order" of the sort imposed by the Authority, is available as a matter of law.

Clause 32

[45] Clause 32 of the agreement featured in the evidence and submissions. The clause deals with appointment processes and provides (amongst other things) for the involvement of Work Place Teams. I understood the company to argue that the Authority erred in its conclusion that cl 32 did not apply to the training "vacancy" in the present case.[5] I understood the defendant to argue that cl 32 did not apply but if it did, it had not been complied with.

[46] The application of cl 32 is not straightforward. The provision stipulates a process by which "all appointments to vacancies" covered by the agreement are to be made. It is certainly arguable that the training opportunity in the present case was not a "vacancy" in the usual sense of the word and cl 32 was accordingly not engaged. Having said that, the advertisement referred to crane driver "vacancies", reflecting the fact that the company considered that a greater number of trained and qualified drivers were required within the four groups to undertake crane driving duties (alongside their cargo handling duties). Training is a precursor to crane driving; the latter cannot be undertaken without the former. All of this may be taken to support an argument that, when read purposively, cl 32 was applicable.

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5 *Pender v Lyttelton Port Co Ltd*, above n 1, at [24].

[47] I agree with Mr Mackenzie (counsel for the company) that the cl 32 issue became something of a red herring during the course of the hearing. I have not found it necessary to reach a concluded view on the point in order to determine the challenge, and do not consider that it would be particularly helpful if I did.

What is the approach to evidence objections in the employment jurisdiction?

[48] For completeness, I record that shortly before the hearing, the company filed an interlocutory application seeking orders that certain paragraphs of the proposed evidence filed on Mr Pender's behalf be ruled inadmissible on the basis of irrelevance, prejudice and hearsay. The defendant opposed the application. Following argument at the outset of the hearing, I dismissed the plaintiff's application, reserved costs, and said that my reasons would follow.

[49] The arguments advanced by the parties threw into focus an ongoing issue in this jurisdiction, namely the extent to which the rules of evidence contained within the Evidence Act 2006 apply to determining admissibility issues. As Mr Mackenzie pointed out, it appears that the tendency has been to look to the Evidence Act as a one stop shop to resolve admissibility issues. In this regard it is difficult, if not impossible, to find a case in which evidence has been admitted under s 189 despite a finding that it would have been ruled inadmissible under the Evidence Act. But if the discretion as to evidence contained within s 189 is to be exercised simply by applying the rules in the Evidence Act (despite the fact that the Employment Court is not included in the definition of "court" in s 4 of that Act), it begs the question.

[50] As it happens, these questions are not new. Similar issues have been raised in respect of other specialist jurisdictions, notably in the Family Court, where there was a debate as to the nature and scope of the broad powers of that Court to admit evidence. That power was contained within a suite of statutes relating to Family Court proceedings and was couched in the following terms:[6]

> In all proceedings under this Act (other than criminal proceedings, but including appeals or other proceedings), the Court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law.

[51] This became pejoratively known as the "any evidence" rule.[7] Its application over time gave rise to concerns about the quality of evidence being presented by parties in family litigation. The rules of evidence contained within the Evidence Act were increasingly seen as a means to curb the ill-discipline which many Judges and commentators perceived.[8] The interrelationship between the Evidence Act and the "any evidence" rule was resolved by the enactment of s 12A(4) of the Family Court Act 1980.[9]

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6 See, for example, Family Proceedings Act 1980 s 164 (repealed); Oranga Tamariki Act 1989, s 195 (repealed); Child Support Act 1991, s 228; Domestic Violence Act 1995, s 84 (repealed); Mental Health (Compulsory Assessment and Treatment) Act 1992, s 22; Property (Relationships) Act 1976, s 36 (repealed); Protection of Personal and Property Rights Act 1988, s 77 (repealed).

7 Helen Cull "Rules of evidence in the Family Court" (paper presented to New Zealand Law Society Family Law Conference, September 2009) 155 at 156.

8 See, for example, *Public Trust v Cornelius* [2009] NZFLR 514 (HC).

9 Section 12A inserted on 31 March 2014 by the Family Courts Amendment Act 2013, s 5. It provides:

> 12A Evidence
>
> …
>
> (4) The effect of section 5(3) of the Evidence Act 2006 is that that Act applies to the proceeding. However, the court hearing the proceeding may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

[52] Section 189 makes it plain that the Employment Court is not bound by the strict rules of evidence applying in some other courts and that the Court may: "admit, accept and call for such evidence and information as in equity and good conscience it sees fit." The references to "evidence" and "information", and the power to not only admit evidence and information but "accept" and "call for" it, indicate a clear Parliamentary intention that the Employment Court be empowered to undertake a much fuller inquiry than would be possible under strict rules of evidence. It follows that it is not enough that the Court be satisfied that a brief of evidence contains a hearsay statement and that none of the exceptions in the Evidence Act applies.

[53] To put it another way, consideration of whether or not evidence and/or information should be "admitted", "accepted" or "called for" in this Court will be informed by a broader inquiry than simply whether the proposed evidence and/or information would be admissible in the High Court, although the principles expressed in the Evidence Act, including those in s 6,[10] may assist in the assessment process. The starting point is, however, the Court's broad discretion in s 189, and it is the twin principles of equity and good conscience which must be looked to for the guiding light in exercising the Court's discretion under that provision.

[54] An example might illustrate the point. An employee is representing herself in an unjustified disadvantage case against her employer, a large national company represented by a large national law firm. The employee prepares a brief of evidence and serves it on the employer. The brief sets out statements said to have been made by one of the employer company's key clients. The Employment Court has directed the sequential exchange of briefs. The employer files one brief of evidence from the employee's direct manager, coupling it with an objection to the employee's proposed evidence, seeking orders that the statements be ruled inadmissible. Depending on the circumstances, the Court might conclude that it was consistent with equity and good conscience to allow such evidence to be given. That might, in part, be informed by the fact that the well-resourced employer was best placed, if it took issue with the employee's version of events, to lead relevant evidence through its own witnesses. Ultimately the Court's task is to do justice as a matter of equity and good conscience — and the route to a just and equitable outcome may vary from case to case.

[55] I return to the plaintiff's objections in the present case, one of the key ones being relevance. In order to determine the extent to which proposed evidence may or may not be relevant, it is necessary to consider the matters at issue in the proceedings. That is because relevant evidence has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[56] The plaintiff objected to evidence being given in respect of why Mr Pender had pursued a claim and his perception of the fairness or otherwise of the company's stance in bringing the challenge. It is true, as Mr Mackenzie pointed out, that the company is entitled to bring a challenge and that Mr Pender has chosen to defend

10 **6 Purpose**

The purpose of this Act is to help secure the just determination of proceedings by—

(a) providing for facts to be established by the application of logical rules; and

(b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and

(c) promoting fairness to parties and witnesses; and

(d) protecting rights of confidentiality and other important public interests; and

(e) avoiding unjustifiable expense and delay; and

(f) enhancing access to the law of evidence.

the challenge. That does not mean that evidence relating to why the claim was brought in the first place, and is now the subject of a challenge by the company, is irrelevant. I assessed the matters Mr Pender wished to refer to, and which the plaintiff objected to as irrelevant, as more broadly relevant by way of background context and of possible relevance to costs (the latter point now having been "parked" with the agreement of the parties).

[57] The plaintiff also objected to particular paragraphs of the proposed briefs of evidence on the basis that they contained hearsay. The main concern about hearsay evidence is the inability to test the evidence through cross-examination. As it transpired, part of the plaintiff's objection dissolved away as, in the event, Mr Rush and Mr Jones were called to give evidence.

[58] The plaintiff pursued its objection to para 12 of Mr Horan's proposed brief of evidence. The first sentence referred to an email that Mr Horan sent Mr Ireton on 23 August 2017 following what he says was an earlier email in March 2017. The 23 August email was incorporated in the bundle of documents. It refers to Mr Pender's concerns about the process that was followed in respect of crane driver training. The second sentence refers to a verbal statement Mr Ireton was said to have made to Mr Horan that he would "look into it". The third sentence confirmed that Mr Horan never received a response. The first and last sentences are not hearsay. The second sentence centred on a statement made by a person (Mr Ireton) who was not giving evidence. The statement related to the way in which Mr Pender's concerns were dealt with by the company, and appeared to be directed at supporting a contention that the company breached its obligations of good faith and/or failed to be sufficiently communicative and responsive.

[59] Depending on the purpose of the statement contained within the second sentence, it might be said to be hearsay. However, I considered it appropriate to allow it. Part of Mr Pender's case was that his concerns were not satisfactorily responded to by the company. The email of 23 August 2017, which was in the bundle of documents, was sent by Mr Horan to Mr Ireton. It set out Mr Pender's concerns and invited a response which appeared, at least from the bundle of documents, not to have been forthcoming. I concluded that the company would have an opportunity to respond to the proposed evidence about the sequence of events in cross-examination and could hardly be said to be prejudiced by inclusion of the evidence in the second sentence. The Court was likely to be assisted by the evidence in order to gain a fuller picture of what steps the company did and did not take, and remained able to place such weight as is appropriate on the evidence at trial. The plaintiff's objection to para 48 of Mr Pender's intended evidence was approached on the same basis.

[60] As I pointed out during the course of argument, there was no suggestion that Mr Ireton was unavailable. Mr Pender could have called him to give evidence; alternatively, the company could have called its senior manager itself to respond to a claim that its employee was making and of which it was well aware before trial. In the circumstances I did not consider that admitting the evidence would cast an unfair burden on the plaintiff — quite the opposite. It was a burden it was well-placed to shoulder. My ruling in turn gave rise to an application (which was not opposed) by the plaintiff to call Mr Ireton. I granted the application and he attended Court at short notice to give direct evidence as to the nature and extent of the conversation that Mr Pender referred to.

[61] I accordingly dismissed the plaintiff's interlocutory application for orders excluding various parts of the defendant's evidence. I then granted the plaintiff's application for leave to call Mr Ireton to give evidence. Costs were reserved.

Conclusion

[62] The plaintiff's challenge against the Authority's substantive determination succeeds. The determination is set aside and this judgment stands in its place.

[63] The company's challenge to the Authority's costs award has not been determined. It was agreed that this would be deferred until after the substantive challenge had been dealt with.

[64] The parties should consider matters, confer and file memoranda as to what (if any) further directions or orders are required from the Court, to deal with costs in the Authority, costs on the substantive challenge and the monies paid into Court.

Challenge successful; Employment Relations Authority determination set aside and this judgment substituted; plaintiff's challenge to Employment Relations Authority's costs award not determined and was to be deferred until after the substantive challenge had been dealt with