IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 131
ARC 34/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RODERICK JOHN YOUNG Plaintiff
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Defendant

Hearing:	By memoranda of submissions filed on 23 May and 14 June 2013
Appearances:	Plaintiff in person No appearance for defendant Guy Caro, counsel for Official Assignee
Judgment:	15 July 2013

INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE G L COLGAN

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[1] This interlocutory judgment concerns the ability in law of the Official Assignee to discontinue or withdraw proceedings or parts of proceedings in this Court, on behalf of a bankrupt.

[2] The plaintiff, Roderick Young, was adjudicated bankrupt on the application of the defendant on 19 November 2012. Whilst his personal grievance was before the Court, on 6 May 2013 the Official Assignee filed a "Notice of discontinuance" which stated materially: "To the extent that the claim vests in the Official Assignee in bankruptcy of the property of Roderick John Young, the Official Assignee discontinues the claim."

[3] Although it is not determinative of the case, the legislation does not provide for the filing of a notice of discontinuance in proceedings. Rather, cl 18 of Schedule

3 to the Employment Relations Act 2000 (the Act) provides for a party to withdraw "any matter … before the court …". This is not the same thing as a discontinuation of a whole proceeding and may, arguably, be done either formally by notice or informally, for example orally at a hearing or by informal written communication to the Registrar.

[4] What is more important, in terms of this case, is sub-cl (2). This provides: "… if a matter is withdrawn under sub-cl (1), it does not affect any other matters before the court that form part of the same proceedings."

[5] This allows for a part or parts of a proceeding to be withdrawn other than on an all-or-nothing basis. So, for example, an applicant or plaintiff may withdraw a claim to a particular remedy or one of a number of causes of action, without affecting the remaining matters. Despite the reference to such withdrawals being able to be made by "the applicant or appellant" (because not only are there no appeals under the current regime, but such parties are referred to almost inevitably as 'plaintiffs'), this must extend relevantly to a defendant bringing a counterclaim who would fall within the broad description of an "applicant".

[6] The Registrar referred the notice of discontinuance to me for directions. By minute dated 7 May 2013 I directed the Registrar not to accept the notice of discontinuance for filing until the Official Assignee was able to persuade the Court either that Mr Young was agreeable to his challenge or parts of it being discontinued or that the Official Assignee was empowered to do so against Mr Young's wishes. I did so because s 217(2) of the Insolvency Act 2006 provides that under Schedule 1, cl (b) of the Act, the Official Assignee can "… discontinue … legal proceedings relating to the property of the bankrupt …".

[7] In the minute of 7 May 2013 I said that even though it was difficult to discern the nature of Mr Young's cause of action in his statement of claim filed on 10 May 2011, it was nevertheless a challenge to a determination of the Employment Relations Authority issued on 12 April 2011.[1] The Authority's determination recorded that Mr Young's claims appeared to be that he was dismissed constructively

[1] [2011] NZERA Auckland 149.

and unjustifiably, for which wrongs he was (and now in this Court, is) seeking[2] reinstatement, compensation for remuneration lost from the date of his dismissal in 2008 until an unspecified date in 2011, compensation for "pain and suffering" (I presume under s 123(1)(c)(i) of the Employment Relations Act 2000), interest on wage arrears compensation, and costs.

[8] I am grateful to the Official Assignee, through counsel, for making submissions on the point.

[9] The Official Assignee says that he did not purport to discontinue the proceeding but, rather, only that part or parts of it that "vested in the Assignee". The Official Assignee did not, however, identify these parts in the notice he filed. The Official Assignee submits that a claim for compensation for lost earnings under the Employment Relations Act 2000 is a claim for damages and is "property" for the purposes of the Insolvency Act 2006 which defines "property" as:

> **property**
> means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise

[10] The Official Assignee submits that under the Insolvency Act 1986 (UK) a bankrupt's income does not vest in his or her trustee in bankruptcy, who must seek what is known as an income payments order if contributions to the estate are to be recovered. The Official Assignee says that this, however, is not the law in New Zealand and that the only exclusions to vesting of property are provided by ss 104, 105 and 158 of the Insolvency Act. He says that social welfare benefits, Maori land interests and accident compensation entitlements are prevented from vesting under s 104 by other applicable statutes, but no statute prevents the vesting of income. So, for example, the Official Assignee says that a claim for recovery of legal costs paid by the bankrupt vests in the Official Assignee as the payments made were the bankrupt's property.

[11] The Official Assignee acknowledges that not all causes of action vest in him. Claims for damages assessed "by immediate reference to injury or pain felt by a

[2] See paras 32-36 of the Statement of Claim filed on 12 May 2011

bankrupt in respect of his body, mind or character and without immediate reference to his rights and property" do not vest in the Official Assignee.[3] He submits that claims for compensation for injury to feelings under s 123(1)(c) of the Act fall into this category of remaining with the bankrupt personally.

[12] The Official Assignee submits that Mr Young's claims for relief under paras 33, 35 and 36 of his statement of claim in this Court vest in the Official Assignee and are therefore able to be discontinued by him. The Official Assignee acknowledges that Mr Young's claims for reinstatement and compensation for pain and suffering may continue to be heard and decided.

[13] Because there is no other case law guiding the Court or the Employment Relations Authority in this area, it may assist those and others if I set out the following about the survival of causes of action in circumstances of bankruptcy.

[14] New Zealand bankruptcy law is largely codified in the Insolvency Act 2006. Section 76(1) provides that, upon an adjudication of bankruptcy, all proceedings to recover any debt provable in the bankruptcy are halted. Section 101(1) makes it clear that all property belonging to, or vesting in, the bankrupt, vests in the Official Assignee as do any powers that the bankrupt could have exercised in, over, or in respect of any property for the bankrupt's own benefit. Section 102(1) further provides that all after-acquired property belonging to the bankrupt vests in the Assignee, as well as any powers that the bankrupt could have exercised in, over, or in respect of that property.

[15] Section 217(2) provides that the Assignee has the power set out in Schedule 1, cl (b) of the Act which provides that the Assignee has the power to "bring, continue, discontinue, and defend legal proceedings relating to the property of the bankrupt".

[16] As already noted at [9], "Property" is defined by the Insolvency Act as consisting of "property of every kind, whether tangible or intangible, real or

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[3] *Heath v Tang* [1993] 1 WLR 1421.

personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise."

[17] The common law has, however, carved out an exception to the broad vesting provisions of bankruptcy statutes with respect to "personal" causes of action. In *Heath v Tang*[4] the House of Lords explained:

> The property which vests in the trustee includes "things in action" …. Despite the breadth of this definition, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character and without immediate reference to his rights of property."...

[18] This common law exception has been endorsed by the New Zealand courts in *Leach v Official Assignee*[5] and *Re Meller*.[6]

[19] Counsel for the Official Assignee in the present case has conceded that Mr Young's claims for reinstatement and those in respect of non-pecuniary loss or damage are of a "personal" nature and remain with the bankrupt. The Official Assignee contends, however, that Mr Young's claims for arrears of wages, interest, and costs now vest with the Assignee who is able in law to discontinue those parts of the plaintiff's proceeding.

[20] This Court has only rarely considered the extent to which bankruptcy may inhibit a litigant's claim. In *Rusk and Finch Ltd v Vanderwaal*[7] the plaintiff sought leave to appeal against a decision of the Employment Tribunal granting leave to the defendant to submit a personal grievance out of time. The defendant was declared bankrupt. Before the hearing of the appeal, the Official Assignee informed the Court that he would appear in opposition. Chief Judge Goddard observed:[8]

> I strongly doubt whether a personal grievance (and I stress the adjective "personal") is property passing to the Official Assignee of a bankrupt former employee, expect perhaps for the limited purpose of recovering remuneration and other pecuniary benefits lost as a result of the grievance.

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[4] [1993] 1 WLR 1421 (UKHL) at 1423 per Hoffman LJ.
[5] [1975] 1 NZLR 83 (SC).
[6] HC Auckland A1247/84, 3 February 1987.
[7] WEC 48/96, 13 August 1996.
[8] At 2.

> In this case, however, it is not the personal grievance as such that is the property said to pass to the Official Assignee but the right of action stemming from the grant of leave by the Employment Tribunal, before the bankruptcy, to commence the personal grievance out of time. In the absence of objection from the employer, I am content to assume, without deciding, that the Official Assignee is entitled to protect, for whatever it may be worth, the decision in the bankrupt employees' favour of the Employment Tribunal. The case would be stronger if the Employment Tribunal's decision was a final decision awarding remedies rather than one conferring a right to seek them but the question whether a personal grievance survives bankruptcy should be fully argued, preferably before a full Court, before it is decided.

[21] The case appears to have ended there but the issue was again considered, albeit briefly, in *Brownie v Fuster*.[9] In that case an adjudicated bankrupt sought to challenge a determination of the Employment Relations Authority. Applying ss 101(1) and 102(1) of the Insolvency Act, the Court noted:[10]

> In this context, "property" includes intangible personal property rights such as the right to litigate. It follows that, as an undischarged bankrupt, Mr Brownie is not entitled to commence proceedings without the consent of the Assignee. There is no suggestion that such consent has been given. In the absence of a right to commence proceedings, an application for an extension of time to do so is therefore pointless. The application currently before the Court is dismissed. …

[22] Although counsel for the Official Assignee asserts that there is no statutory prohibition in New Zealand on the vesting of income to the Assignee, that does not address the common law exceptions which still exist in this country. The case of *Re Roberts*[11] addressed the operation of s 44 of the now defunct Bankruptcy Act 1883 (UK) which was materially similar to the relevant provisions of the New Zealand Insolvency Act, stating that all "property" belonging to the bankrupt would vest in the Assignee. The Master of the Rolls held that although after-acquired earnings of the bankrupt were to vest in the Assignee, the language of the section could not be taken so literally as to deprive the bankrupt of "those fruits of his personal exertions which are necessary to enable him to live". Lindley MR went on to observe:[12]

> After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the

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[9] [2010] NZEmpC 127.
[10] At [11].
[11] [1900] 1 QB 122
[12] At 128.

> extent necessary to support himself and his family. The exception seems to include them.

[23] That statement of the common law in *Re Roberts* was adopted in New Zealand in *Re Burney, ex parte Official Assignee*.[13] Turner J held that the earnings of the bankrupt vest in the Assignee as and when they are acquired by him, but the bankrupt may maintain himself, his wife and his family out of such earnings before holding any balance in trust for the Assignee.

[24] The most authoritative word on this question appears to come from the Court of Appeal in *Re Bertrand*.[14] This case concerned whether an income tax refund, which would ordinarily be deemed "property" under the legislation, vested in the Assignee or would remain with the bankrupt. Critical to the Court of Appeal's decision to uphold *Re Burney* was the operation of s 42(5) of the Insolvency Act 1967. This provision now survives materially in s 105(2) of the Insolvency Act 2006, and states that "Sections 101 to 104 do not affect the operation of any other law that prevents any property from vesting in the Assignee." With respect to this provision, the Court of Appeal noted:[15]

> The precise status of that part of the bankrupt's earnings which are necessary for his maintenance is not altogether clear under the English cases. In New Zealand, however, subs (5) of s 42 of the Insolvency Act 1967 expressly recognises the principle expressed in *Roberts* case, as restated in *Burney*, that a bankrupt is entitled to so much of his earnings after adjudication as is necessary to maintain himself. All after-acquired property vests in the Assignee, as s 42 provides, but earnings, to the extent that they are needed for the bankrupt's living, while notionally vesting in the Official Assignee are subject to the bankrupt's use.
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> There are, of course, practical difficulties in the application of the common law exception. But the matter of what is to be left in the hands of the bankrupt for the maintenance of himself and his family must have been settled amicably enough between the Assignee and the bankrupt in numerous cases.

[25] Cross-checking the New Zealand case law against materially similar provisions in other jurisdictions, I begin with the current position in the United Kingdom. That is governed by the Insolvency Act 1986 (UK). Under its s 283(1)(a), a bankrupt's estate comprises "all property belonging to or vested in the

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[13] [1955] NZLR 1071 (SC).
[14] [1980] 2 NZLR 72 (CA).
[15] At 76.

bankrupt at the commencement of the bankruptcy". Section 306 provides that the bankrupt's estate shall vest in the trustee immediately on the trustee's appointment taking effect. "Property" is defined as consisting of "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent arising out of, or incidental to, property".[16]

[26] The Court of Appeal of England and Wales considered the operation of s 283(1)(a) in an employment related cause of action in *Grady v HM Prison Service.*[17] The appellant was declared bankrupt following the filing of an appeal in the Employment Appeal Tribunal after her claims of unfair and wrongful dismissal were dismissed by an Employment Tribunal. Central to the Court of Appeal's reasoning was the distinction in United Kingdom employment law between causes of action for unfair and wrongful dismissal. For the purposes of the Employment Rights Act 1996 (UK), a wrongful dismissal is one contrary to the contractual terms of employment and is compensable in damages. By contrast, an unfair dismissal is one contrary to the requirements of the Act, with the primary remedy being that of reinstatement or, in default, monetary compensation.

[27] The Court of Appeal found that the claim for wrongful dismissal vested in the trustee upon bankruptcy whereas the claim for unfair dismissal remained with the bankrupt. It noted:

> [22] In our judgment the essential nature of a claim for unfair dismissal is personal, not proprietary. Unlike a claim for wrongful dismissal, which (except in the rare case where specific performance can be granted) is an action for damages for breach of a contract, a claim for unfair dismissal only begins with the employer's fundamental breach … The purpose and effect of the sequential provisions for judgment and redress can fairly be said to be the recognition of a vested interest in a job – something of a different order from the common law's view of a job as a simple contract which can be broken by a party willing to pay the appropriate price for breach.
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> …
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> [25] In our judgment a claim for reinstatement or re-engagement consequent on an unfair dismissal, and indeed a significant element of the compensation which can be awarded in lieu of these, is not a thing in action of the kind which forms part of the bankrupt's estate, even though the eventual fund (if an award is made) may be. It is a claim of a unique kind

[16] Section 436.
[17] [2003] EWCA Civ 257.

> which offers the restoration to the claimant of something which only the claimant can do. To vest it in the trustee in bankruptcy would be of no appreciable benefit to the creditors except to the extent that it might produce a money settlement (which would represent not a concession but a liquidation of the bankrupt's claim to her job). For the rest, the creditors will probably be better served if the bankrupt can get her job back or a similar job in its place, and that is something the trustee cannot do in her stead.

[28] In Australia, bankruptcy law is codified in the Bankruptcy Act 1966 (Cth). The "property of the bankrupt" is defined as consisting of "the property divisible among the bankrupt's creditors" and "any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt".[18]

[29] The "property divisible among creditors" is defined as including for the purposes of s 116(1):

> (a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; and
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> (b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge; …

[30] In an employment case, *Pelechowski v NSW Land and Housing Commission*[19] the plaintiff sought an order for reinstatement in employment from the Industrial Relations Court of Australia for what was alleged to have been an unlawful termination of his employment. That claim was initially denied by a Judicial Registrar and the appellant sought to appeal that decision. However, shortly after filing his appeal, he was adjudicated bankrupt. As to whether a claim for unjustified dismissal was of a personal or proprietary nature, the Federal Court observed:[20]

> There is in reality no claim for anything in the nature of damages which would be "estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of

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[18] Section 5.
[19] [2000] FCA 233.
[20] At [5] per Madgwick J.

> property": see *Cox v Journeaux* (1935) 52 CXLR 713 at 721. The essential element of proceedings for illegal termination of employment under the *Workplace Relations Act 1996 (Cth)*, is that one's economic relations with one's former employer have been disrupted. Those economic relations depend upon contract, or perhaps in the case of a public servant, a statutory relationship, but nevertheless of a contractual or quasi-contractual kind, that is to say, property rights are at the heart of the proceedings.

[31] However, in *Perfection Dairies Pty Ltd v Finn*[21] a full Bench of the Industrial Relations Commission of New South Wales took a different approach, considering itself not bound by the Federal Court in *Pelechowski*. In *Finn* the plaintiff sought to make a claim for unfair dismissal under s 84 of the Industrial Relations Act 1996 (NSW) before being subsequently adjudicated bankrupt.

[32] Addressing the status of a claim for unfair dismissal as a personal or a proprietary right, the Commission focused on the language of the Bankruptcy Act 1966 noting:

> [38] Employment is not usually referred to, or known as, property. Whatever legal "interest" an employee has in his or her employment, it is not a property interest. In any event, it seems clear from reference to the relevant statutory provisions and the case law that, although the expression of "property", and cognate expressions such as "the property of the bankrupt" and "after-acquired property", are to be construed in a very wide sense, the bankrupt's employment is not considered "property" for the purposes of the *Bankruptcy Act.*
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> [39] Indeed, all the pertinent indications in the statute and the case law are to the opposite effect. For example, there are a number of references in the *Bankruptcy Act* to "property divisible among the bankrupt's creditors" … it could not seriously be suggested that the bankrupt's employment, or the bankrupt's rights as to his or her employment could be divisible among the creditors. Indeed, the statute recognises that it is most desirable that the bankrupt be able to earn income during the course of the bankruptcy and also contemplates the likelihood that a bankrupt who was an employee prior to the bankruptcy would continue to be in employment. … we do not detect in the scheme of the Australian statute any provision which would be at odds with the observation in the judgment of the English Court of Appeal in *Ex parte Vine; re Wilson*, where reference was made to the necessary exception to the property of the bankrupt being divisible among his creditors, "in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his living".

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[21] [2006] NSWIRComm 137.

[33] The Federal Court of Australia revisited its decision in *Pelechowski* in *Randall v Deputy Commissioner of Taxation.*[22] A public service employee sought judicial review of the decision to terminate his employment and made a claim for wrongful dismissal. He was declared bankrupt as the consequence of a sequestration order made earlier. In finding (contrary to *Pelechowski*) that a claim for wrongful dismissal was a personal, rather than a proprietary, right, the Federal Court placed considerable emphasis on the recognition in Australian bankruptcy law that, with some exceptions, income and earnings do not form part of the bankrupt's estate. The Court went on to observe:

> [59] If, after bankruptcy, the bankrupt's income became part of the bankrupt's estate by reason of the sequestration order, the bankrupt would be obliged week by week, or how so often he or she were paid, to account to the bankrupt's estate for the whole of that income. The bankrupt would not have the means to support himself or herself and his or her dependents.
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> [61] The bankrupt's income after the bankruptcy only becomes part of the bankrupt's estate to the extent that the legislation demands. When s 131 was the law only that part of the bankrupt's income as the court ordered to be paid by the bankrupt to the trustee for the benefit of the bankrupt's creditors become vested in the bankrupt's trustee. Since s 131 has been repealed, only the assessed contributions form part of the bankrupt's estate.
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> [61] If the bankrupt's income was regarded as property of the bankrupt and therefore property divisible among the bankrupt's creditors, the Act would not have to deal with the bankrupt's income separately.

[34] The Federal Court acknowledged the distinction between Australian and English bankrupt law in that, under the latter (and, by extension, in New Zealand), the bankrupt's earnings do not form part of one's estate except as is necessary for his or her support as per *Re Roberts*. At [75] Lander J concluded:

> In those circumstances, the trustee cannot sue for wages or income due to the bankrupt because those wages or that income have not vested in the trustee … Indeed, even if the Court ordered … or the trustee assessed contributions payable by the bankrupt to the trustee, no right to recover that sum or those sums vests in the trustee against the employer. The liability to pay that sum or those sums is imposed upon the bankrupt.

[35] In Canada the matter has also been addressed by the Supreme Court in an employment context in *Wallace v United Grain Growers Ltd*.[23] The appellant was

[22] [2008] FCA 1939.
[23] [1997] 3 SCR 701 (SCC).

dismissed from his employment but a year before that dismissal he had made a voluntary assignment into personal bankruptcy and remained an undischarged bankrupt at the time of the initiation of proceedings challenging his dismissal. The Bankruptcy and Insolvency Act 1985 s 68(1)(c) provided an exception to the general property vesting provision where a bankrupt is "in receipt of, or is entitled to receive any money as salary, wages, or other remuneration from a person employing the bankrupt". The appellant argued that since the true nature of the proceeds from an action for wrongful dismissal was analogous to "wages or other remuneration", it was not included among the property vested in the trustee and was therefore able to maintain the action in his own name. The respondent contended that a claim for wrongful dismissal was, in reality, a claim for damages and, therefore, did not constitute "wages or other remuneration".

[36] In finding for the appellant that a claim for wrongful dismissal came within the vesting exception of s 68(1)(c) of the Bankruptcy and Insolvency Act, the Supreme Court of Canada observed:

> [66] In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled... The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or pay in lieu of notice. Therefore, in accordance with the exception which is carved out in s 68(1) for "salary, wages or other remuneration", this money is not divisible among a bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.

Decision of the issue

[37] There may be at least three ways in which the issue of vesting of compensation for lost remuneration and associated relief can be decided. Perhaps simplest, and consistent with cases decided previously in this Court, is to treat the claim for unjustified dismissal as one vesting in the Official Assignee because it is not a personal claim based on pain and suffering. Such an approach does, however, ignore the unique nature of the remedy of reinstatement as well as the inter-relationship that a claim for lost wages has with the treatment of income under New

Zealand bankruptcy law. Counsel for the Official Assignee has also conceded that a claim for reinstatement remains with the bankrupt.

[38] Second, the claim for lost wages could be found to vest in the Official Assignee while Mr Young's claims for reinstatement and pain and suffering remain with him. It is, however, complicated by the fact that unlike United Kingdom labour law, reinstatement is (and remains in Mr Young's case) a remedy dependent on the broad practicability of the reinstitution of the employment relationship. It cannot, therefore, be said as confidently as it may have been in the *Grady* case in the United Kingdom, that a claim for unfair or unjustified dismissal is, in effect, a claim to a job. Again, however, counsel for the Official Assignee has considered that reinstatement is, for present purposes, of a "personal" nature.

[39] Finally, the Court could treat all claims for remedies associated with unjustified dismissal as remaining with the bankrupt and not vesting in the Official Assignee. This would accord with the approach adopted in such cases as *Perfection Dairies*, *Randall* and *Wallace*, although there remain differences in bankruptcy laws between jurisdictions. Whereas in Australia and Canada, the income of the bankrupt does not vest in the equivalent of the Official Assignee, by common law in New Zealand a bankrupt's income automatically vests in the Assignee except to the extent necessary to provide immediate financial support.

[40] Because the Official Assignee accepts that some of the remedies claimed by Mr Young in his personal grievance are not "property", only parts of the claim can be discontinued by the Official Assignee. Logically, those discontinuable parts can only be remedies. To allow the plaintiff his entitlement to claim those remedies which cannot be discontinued by the Official Assignee, Mr Young must be able to assert and establish that he was dismissed unjustifiably or that he has another personal grievance. So his cause or causes of action against the defendant cannot be discontinued by the Official Assignee.

[41] According to the Australian and Canadian cases, a claim for wrongful or unjustifiable dismissal is ostensibly a claim for income. Income, under these jurisdictions' bankruptcy laws, remains with the bankrupt and does not vest in the

Assignee. It follows that a claim for wrongful dismissal, being a claim for income, would therefore also remain with the bankrupt.

[42] This reasoning cannot be applied directly in New Zealand due to the local adoption of the narrower *Roberts* rule. It is also significant that the claim in New Zealand is to compensation for lost remuneration which is subject to statutory minima, to judge-made law maxima, to reductions for contributory fault and other adjustments not related directly to the actual loss. It is also subject to reduction where loss is mitigated or ought reasonably to have been mitigated.

[43] It would also seem to be against the policy rationale of *Roberts* were a claim for unjustifiable dismissal to vest in the Official Assignee. An award of compensation for lost remuneration is designed, in part, to recompense the claimant during a period of unemployment.

[44] The scheme of the Insolvency Act 2006 is to vest the property of a bankrupt in the Official Assignee. Exceptions to that general rule may arise either by defining an asset or a benefit as not being "property" or otherwise by applying exceptions recognised by case law, either in interpreting the legislation or a material equivalent, or at common law.

[45] Mr Young's claim is to compensation for remuneration that he says was not paid to him by the defendant in reliance upon his abandonment of his employment which he says was, in law, an unjustified constructive dismissal. If the plaintiff is found to have been dismissed constructively and that the dismissal was unjustified, then he will be entitled to have his claim to lost remuneration considered.

[46] Whether that claim may, for the purposes of this judgment, be subdivided into one for the period before the plaintiff's bankruptcy on 19 November 2012 and into another in respect of the period after that date, may not ultimately make a difference. I will do so in case it does, but the result will probably be the same without such a subdivision.

[47] In respect of the claim for lost remuneration for the period before 19 November 2012, Mr Young will need to establish that, but for his unjustified constructive dismissal, he would have been paid remuneration by the Board. At least a significant proportion of that remuneration would probably have gone on living expenses for Mr Young and his dependent family and for that reason would not have been available as "property" to vest in the Official Assignee on the date of his bankruptcy, 19 November 2012. Although the Insolvency Act does not differentiate between property acquired pre and post bankruptcy, the reality of most employees' situations is that at least a substantial proportion of wages or salaries are expended very soon after their receipt on everyday living costs of the employee and his or her dependent family. Given the availability of monetary credit, it is likely too that a proportion of those wages or salary will already have been expended by the time of their receipt.

[48] To the extent that Mr Young may be entitled to compensation for remuneration which he ought to have been paid by the Board before 19 November 2012, I do not consider that this, or at least all of this, can be categorised as "property" under the Insolvency Act. It follows, therefore, that the Official Assignee cannot discontinue or withdraw Mr Young's claim to the reimbursement to him "of a sum equal to the whole or any part of the wages or other money lost" by him as a result of his grievance under s 123(1)(b) of the Act.

[49] As to any claim to reimbursement of wages or other monies lost that would have been payable to him during the period of his bankruptcy, although I accept that such money constitutes "property" under the Insolvency Act, the extent to which that will vest in the Official Assignee is also subject to the common law exception to full vesting in *Roberts*. Assuming that an award will be made in favour of the plaintiff covering his claim during this period, there will then need to be an apportionment by the Official Assignee as to how much of that award vests in the Official Assignee and how much is left to Mr Young for the financial support of himself and his family.

[50] That is not a reckoning that the Court can undertake, let alone at this point. In order to permit that to happen, however, the Official Assignee should not be permitted to discontinue or withdraw either Mr Young's claim to remuneration

compensation for those periods or even, assuming liability is established against the defendant, to remedies covering those periods. To do as the Official Assignee has purported to do by discontinuing or withdrawing parts of Mr Young's claim will deprive him of the opportunity to establish entitlement to it and to recover for himself and his family such of that property that might otherwise vest in the Official Assignee.

[51] Finally, turning to Mr Young's claim to interest on remuneration arrears and costs, the international case law is unhelpful. However, I would conclude that, if the claim or any part of it is demonstrably of a "personal" nature as I have concluded it may be, any claim for costs consequent upon this should remain with the bankrupt. Similarly, with respect to interest, I do not consider the plaintiff would be precluded from making such a claim, if the claim or a part of it for salary or wages upon which it is based, is of a "personal" nature.

Summary of decision

[52] The remedy of reinstatement is not "property" and cannot be discontinued by the Official Assignee.

[53] The remedy of compensation for "pain and suffering" under s 123(1)(c)(i) of the Act is not "property" and cannot be withdrawn or discontinued by the Official Assignee.

[54] Compensation for lost remuneration may, for the reasons set out in this judgment, be in presently unascertained parts, "property" and personal, and so cannot be discontinued or withdrawn by the Official Assignee at this time.

[55] Interest on compensation for lost remuneration may not, therefore, be "property"alone and so the Official Assignee cannot discontinue or withdraw that claim at this time.

[56] Finally, Mr Young's claim to costs will, unless he has incurred legal costs for advice in connection with his grievance because he has not been represented in its

prosecution, be limited to reimbursement of outgoings paid and so is not "property". The Official Assignee is not able to withdraw or discontinue Mr Young's claim to costs.

[57] For the foregoing reasons the Registrar is not to accept for filing the Official Assignee's Notice of Discontinuance of such claims as he asserts will vest in him.

Where to from here?

[58] I accept that the question as to whether compensation for remuneration lost as a result of unjustified dismissal is "property" and, therefore, may be the subject of withdrawal or discontinuance by the Official Assignee, is a controversial question. Although it is possible that the Official Assignee may wish it to be determined more authoritatively, I nevertheless consider that questions of liability and uncontroversial remedies at least, can and should now be got on with by the parties.

[59] I note that on 27 July 2012 the defendant applied to the Court to strike out Mr Young's challenge on the grounds that he had failed to advance his claim in a proactive and timely way and that, in particular, his payments in satisfaction of the Court's order for security or costs meant that, at their current rate, the case would be unlikely to be heard for several years.

[60] I recorded in a minute of 5 September 2012 that it did not then appear that either party had made any submissions to the Registrar as to how the security order should be given and neither had applied to the Court for a variation of the order made at [15] of the Court's judgment of 20 July 2011[24] in which security for costs was ordered. I then invited the defendant to consider undertaking one of those suggested courses.

[61] On 2 November 2012 Mr Young applied for a variation to the order for security for costs made on 20 July 2011. That application was opposed by the defendant. By that time, and as I recorded in a minute issued on 3 December 2012, advice of Mr Young's declaration of bankruptcy by the High Court had been given to

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[24] [2011] NZEmpC 89.

this Court. At para 6 of my minute of 3 December 2012 I recorded that I was then not prepared to direct that the Board's application to strike out for want of prosecution should be brought on for hearing unless or until matters surrounding Mr Young's bankruptcy had been confirmed and sorted out.

[62] That has now occurred and the next steps in the proceeding should be to set down Mr Young's application to vary the order for security for costs and the Board's application to strike out the challenge.

[63] I invite counsel for the defendant to submit a memorandum within 21 days of the date of this judgment, proposing a timetable for dealing with those interlocutory matters to which Mr Young should have an opportunity to respond by memorandum within 21 days of his receipt of the memorandum from counsel for the Board.

[64] In view of the nature of the matters dealt with in this judgment, I do not propose to make any order for costs in relation to it.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Monday 15 July 2013