IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 148
ARC 75/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
IN THE MATTER OF	interlocutory applications
BETWEEN	ROBERT WADE LEWIS Plaintiff
AND	JPMORGAN CHASE BANK N.A. Defendant

Hearing:	30 July 2013 (Heard at Auckland)
Appearances:	Michael O'Brien, counsel, and Benjamin Nicholson, advocate for plaintiff Rob Towner and Anna Holland, counsel for defendant
Judgment:	5 September 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

---

[1] What was a relatively simple case in the Employment Relations Authority, brought by Robert Lewis without the assistance of a representative, has blossomed into full-blown adversarial litigation in this Court. This interlocutory judgment decides seven preliminary issues, three advanced by Mr Lewis and four by the defendant, JPMorgan Chase Bank Limited N.A. (the Bank).

[2] Without opposition from the plaintiff, I make an order on the defendant's application that the content of an agreement entered into between the parties on 4 March 2010 not be published except to the extent that information about that agreement and its contents may be contained in this judgment. This non-publication order is made pursuant to cl 12 of Schedule 3 to the Employment Relations Act 2000

(the Act). There is a further order that the Court file may not be searched by any person except the parties or their representatives, without the consent of a Judge.

[3] As in all matters of this sort but particularly in this case where there are so many preliminary issues, it is essential at the outset to describe the nature and scope of the proceedings from the latest pleadings filed. These are the plaintiff's second amended statement of claim (dated 18 April 2013) and the defendant's statement of defence (dated 20 March 2013) to the plaintiff's first amended statement of claim.

[4] Mr Lewis was formerly the Chief Executive Officer (CEO) of the New Zealand branch of the Bank. During 2009 there was a deterioration in that relationship involving the actions of another senior bank officer.

[5] Other events at the Bank at about the same time resulted in Mr Lewis raising a personal grievance alleging that he had been disadvantaged unjustifiably in his employment.

[6] On 4 March 2010 the parties entered into an agreement which the plaintiff claims was a variation to his employment agreement but which the defendant categorises as an agreement settling his grievance including the terms on which he would leave his employment. The terms of this agreement, which took effect with the plaintiff's resignation on 5 March 2013, included what are described as "agreed announcement" and "non-disparaging" clauses. The announcement clause included the form of the public announcement to be made by the defendant of Mr Lewis's departure, thanking him for his services as its CEO in New Zealand since August 2008. The non-disparaging clause required that neither party would make any disparaging comment about the other party to any third party and that the Bank would inform the members of its relevant professional body of that obligation.

[7] The agreement covers two issues. The first is that it settled Mr Lewis's personal grievance upon terms that do not need to be elaborated upon here. The second feature of the agreement, although not unconnected with the first, is that it provided for Mr Lewis's resignation from his employment with effect from the following day, Friday 5 March 2010. The plaintiff's individual employment

agreement has not been made available to the Court. However, counsel did not disagree with my proposition that in all the circumstances, the employment agreement would have been terminable by either of the parties to it upon a considerably longer period of notice than one day (or upon reasonable notice which would also have been considerably longer than one day), except perhaps in circumstances of serious misconduct by Mr Lewis of which there is no suggestion in this case.

[8] The agreement of 4 March 2010 also waived restraint of trade provisions in Mr Lewis's employment agreement with the Bank, confirmed his compliance with his employment agreement's obligations to return bank property to it, and confirmed that he would continue to be bound by information confidentiality provisions in his employment agreement.

[9] The agreement of 4 March 2010 included a provision (the agreed "public announcement" that the Bank would, within seven days, announce internally that:

> JPM announced today that Mr Rob Lewis would leave the Bank to seek other external opportunities following the Bank's decision to move its principal New Zealand office from Auckland to Wellington as a result of the recent acquisition [of] ANZ's sub-custody operations. The Bank wishes to thank Mr Lewis for serving as its CEO in New Zealand since August 2008 and wishes him well in his future endeavours.

[10] The next clause (the non-disparaging clause) in the agreement of 4 March 2010 was that:

> Neither party will make any disparaging comment about the other to any third party. The Bank will inform the members of the Australia and New Zealand Executive and Operating Committees of this obligation.

[11] Clause 10 of the agreement provided:

> This settlement is in full and final settlement of any claims (whether or not yet contemplated) of any nature whatsoever the Bank (which includes in this clause any and all related or affiliated entities of the Bank, whether in New Zealand or internationally) or Mr Lewis has or may have against the other relating to Mr Lewis' employment with the Bank or with the termination of that employment, and the Bank and Mr Lewis (subject to the indemnification of Mr Lewis pursuant to clause 11) release each other from any further liability to the other whatsoever (save for a breach of this Agreement).

[12] Clause 18 of the agreement provided:

> This agreement constitutes the entire agreement of the parties relating to this agreement, which supersedes all and any prior understandings, negotiations, agreements written or oral express or implied.

[13] Mr Lewis claims that the defendant breached those obligations in a number of particularised respects including in connection with prospective alternative employment. The relief sought by Mr Lewis includes declarations that he was the defendant's CEO from August 2008 until March 2010, of breach by the defendant of his individual employment agreement (and, in particular, the document said to evidence a variation to that agreement), compensatory damages, and special damages.

[14] From the pleadings, it appears that the case will focus on two broad issues. The first is whether the agreement entered into between the parties in early March 2010 was either a variation to Mr Lewis's individual employment agreement, breach of which is justiciable in the Employment Relations Authority and this Court, or, as the defendant contends, that it was not an employment agreement but, rather, an agreement to end employment, claims in respect of which are not justiciable here.

[15] The second broad issue, assuming that the plaintiff is successful on the first, is whether the acts or omissions of the defendant breached that agreement and, if so, what should be the remedies for breach.

[16] Mr Lewis was unrepresented before the Authority (as he was entitled to be). Mr Towner then acted for the defendant. Mr Lewis has subsequently instructed counsel and I think it is fair to say that he has received professional advice which has resulted in his own original statement of claim filed in November 2012 being expanded and improved significantly by a statement of claim prepared by his solicitors and filed on 18 February 2013, and two subsequent refinements of that by first and second amended statements of claim.

[17] Parties are permitted to file and serve amended pleadings and, indeed, it is often beneficial that they do so to identify clearly the real issues between them. That is especially so where pleadings are filed originally by unrepresented litigants.

There cannot be much, if any, criticism directed at the plaintiff for his amended pleadings in these circumstances including, as the defendant does at least obliquely, by reference to the changes effected to those statements of claim after the plaintiff's solicitors became involved for him.

[18] The foregoing is the context in which each of the following seven separate interlocutory matters must now be decided.

[19] First, the defendant has applied to strike out the plaintiff's claims against it which are set out in Mr Lewis's second amended statement of claim dated 18 April 2013.

[20] Second, assuming that the plaintiff's proceeding is not struck out completely, the defendant asks that the Court strike out certain identified paragraphs of the plaintiff's second amended statement of claim.

[21] Third, the defendant has applied for orders requiring further particulars of the plaintiff's second amended statement of claim and/or that the plaintiff file a further and more explicit statement of claim.

[22] Fourth, if the plaintiff's claim or any relevant parts of it survives, the defendant next seeks to have the Court determine a preliminary question of law. That is whether the parties' agreement of 4 March 2010 upon which the plaintiff's allegations of breaches are founded, was in law a variation to, and therefore a part of, Mr Lewis's employment agreement with the defendant. If it was, the proceeding was properly before the Employment Relations Authority and the plaintiff's challenge is properly before this Court. If it was not, however, the defendant's case is that Mr Lewis's claim was not properly before the Authority, his challenge is not lawfully before this Court, and any remedy that he seeks for a breach of that agreement by the defendant can only be claimed in the courts of ordinary jurisdiction.

[23] Fifth, the Court must deal with the plaintiff's challenge to the defendant's objection to disclosure (discovery) of certain documents.

[24] The sixth matter dealt with is the plaintiff's application for a verification order under reg 46 of the Employment Court Regulations 2000 (the Regulations) requiring the defendant to make an affidavit stating whether the specified documents or categories of documents are, or have at any time, been in its possession, custody or control and, if such document or documents is or are no longer in the defendant's possession, custody or control, when that occurred and what has become of the document or documents.

[25] The seventh and final issue is the defendant's application for a verification order in respect of the plaintiff's disclosure of documents.

The Employment Relations Authority's determination

[26] This proceeding is a challenge to determinations of the Employment Relations Authority, statutory appeals under s 179 of the Act. Those two Authority determinations are known as *Lewis v J P Morgan Chase Bank, N.A.* (the substantive determination)[1] and *Lewis v JP Morgan Chase Bank, N.A.* (the costs determination).[2]

[27] The plaintiff has elected to challenge these determinations by hearing de novo under s 179 of the Act, that is by asking the Court to reconsider all the matters that were before, and decided by, the Employment Relations Authority.

[28] The Authority did not conduct an investigation meeting but dealt with Mr Lewis's claims on papers filed, and in summary fashion consistent with Mr Lewis's unassisted presentation of his case.

[29] The Authority identified Mr Lewis's claim as being one for a breach of a settlement agreement with his former employer, the defendant. That was denied by the Bank. Mediation was unsuccessful and various interlocutory steps were then taken in the Authority which do not need to be detailed here. The Authority recorded the parties' agreement that the matter should be dealt with on the papers and a timetable was provided for the filing of written submissions. As recorded by the

---

[1] [2012] NZERA Auckland 355.
[2] [2013] NZERA Auckland 18.

Authority, one of Mr Lewis's concerns was that the Bank refused to confirm his role as its local CEO and he wished the Authority to award damages against the Bank for breach by it of the settlement agreement.

[30] The Authority identified what it described as a preliminary issue about the availability of the relief sought by Mr Lewis. It held that it was bound by its express statutory empowering provisions which included a compliance order under s 151 of the Act but, in such cases, only where the terms of a settlement had been reached and witnessed by a mediator employed by the former Department of Labour.[3] As the Authority expressed it, the practical effect of this provision was to give it power to "require the erring party to complete its part of the bargain entered into by the settlement agreement".[4] The Authority held:[5]

> But that provision is not available in the present case because the settlement agreement between the parties did not fall within the terms of s. 151 of the Act. The Authority does have a wide power to order compliance with *any provision of any employment agreement* pursuant to s. 137 (1) (a) (i) of the Act. But a settlement agreement is not a provision of an employment agreement but rather relates to an employment agreement. It follows that the Authority has no jurisdiction to make a compliance order in the present case.

[31] The Authority also expressed the view that it had no jurisdiction to award damages for breach of a settlement agreement because there is no such power in the Act. Further, the Authority said that there was no evidence before it that the settlement agreement had been breached.

[32] Turning to the settlement agreement, the Authority found that it included an agreed statement for general publication about the circumstances in which Mr Lewis left the Bank's service. The Authority described this as "characteristically bland" but noted that the statement described Mr Lewis as "the Chief Executive Officer of the Bank". The Authority continued:[6]

> That being the position, it is difficult to see how Mr Lewis can succeed in his contention that he is being represented in the marketplace in an inaccurate fashion. Indeed, on the basis of the settlement agreement itself, the reverse would appear to be the case.

---

[3] Now the Ministry of Business, Innovation and Employment.
[4] At [9].
[5] At [10].
[6] At [17].

[33] The Authority Member recorded Mr Lewis's concern that his position as CEO of the Bank in New Zealand was particularly important within the banking industry because of the Bank's relationship with the Reserve Bank of New Zealand. The Authority recorded that the Reserve Bank has a statutory obligation to satisfy itself that the person holding the position of CEO of a registered bank trading in New Zealand is, in effect, a fit and proper person to hold that role.

[34] In these circumstances the Authority dismissed Mr Lewis's claims.

The pleadings in this Court

[35] These focus on the plaintiff's second amended statement of claim, his latest pleading.

[36] Omitting the background detail pleaded by Mr Lewis, he claims that on 4 March 2010 the parties entered into an agreement to vary his employment agreement which had taken effect from 15 September 2008. The variation is said to have been an agreement, on conditions, that Mr Lewis's employment would end by resignation on 5 March 2013.

[37] Mr Lewis claims that the defendant breached the employment agreement (as varied) on 18 March 2010 when he telephoned the Bank's human resources free phone and was "advised that the defendant's records did not record him as being CEO of the New Zealand branch". Mr Lewis says that on the same day he advised the defendant of this erroneous description of him in its records and "put the defendant on notice that he was likely to suffer damage if it was not corrected".

[38] Mr Lewis says that on 29 March 2010 he was advised by the defendant's head of human resources that the appropriate correction had been made to its records, whereas he claims that in fact this had not occurred.

[39] Mr Lewis claims that in a subsequent application for a position with another bank, he advised that other bank that he had previously been CEO of the defendant's

New Zealand branch. He claims that when the Bank to which he applied sought confirmation that he had been the defendant's CEO, the defendant denied this.

[40] Mr Lewis claims that despite at least one subsequent request of the defendant that its records be corrected, he both lost the opportunity for employment and suffered distress during the further period of six months before he found employment. He says that despite his requests, the defendant refused to correct its records to show that he had been the New Zealand CEO.

[41] Mr Lewis says that these acts or omissions by the defendant were breaches of:

- clause 8 of the variation agreement by not upholding the agreed announcement after it was made;
- clause 9 of the variation agreement by discrediting him to the other bank following his representation to it that he had been the defendant's CEO;
- the implied obligation of his employment that his employer would keep accurate records relating to that; and
- the implied obligation that his employer would not deny that he was its New Zealand CEO.

[42] As relief, Mr Lewis seeks:

- a declaration that he was the defendant's CEO in New Zealand from August 2008 until March 2010;
- a declaration that the defendant breached his employment agreement as varied;
- compensatory damages of $50,000 for injury, distress and reputational damage suffered by him;

- special damages of $120,000 for lost income arising from his non-appointment to new employment;

- interests on these amounts; and

- costs.

[43] Separately, Mr Lewis challenges the Authority's determination which, on 21 January 2013, awarded the defendant costs of $15,000. He says that the Authority misunderstood his claim for relief in the Authority, that costs of $15,000 were excessive for a claim determined on the papers without an investigation, and that this award was significantly more than the Authority's usual tariff approach and amounted to punitive costs. Mr Lewis says that the parties should be left to meet their own costs of representation in the Authority.

The power to strike out proceedings or parts of them

[44] There is no dispute that the Employment Court possesses the same power to strike out proceedings or parts of them, as does the High Court. That is because, in the absence of a specific regulation or rule enabling this, reg 6 of the Employment Court Regulations 2000 allows the Court to apply the appropriate High Court Rules. There is a long established, although rarely exercised, practice of strikings-out in this Court. The case law, including appellate judgments of the Court of Appeal, confirms the same approach to such applications as in the courts of ordinary jurisdiction.[7]

[45] The tests, with which I did not understand the defendant to disagree, are well and conveniently summarised in the judgment of this Court in *Newick v Working In Ltd.*[8] In approaching an application to strike out, the Court will assume that the pleaded facts are correct. The proceeding or cause of action must be so clearly untenable that it cannot possibly succeed. The power is to be exercised sparingly, although is not necessarily excluded where the claim includes difficult questions of law requiring extensive argument. The Court should be slow to strike out a claim in

---

[7] See, for example, *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union Inc* [2005] ERNZ 1053 (CA).
[8] [2012] NZEmpC 156 at [2]-[4].

a developing area of law. A pleading may be struck out not only because it does not constitute a cause of action known to the law but also where it constitutes an abuse of the Court's process.

The strike-out applications

[46] These are two. First, the defendant says that the plaintiff's second amended statement of claim now rests on a new cause of action which was not the same as he brought to the Authority or, indeed, as was originally pleaded on this challenge in the plaintiff's (self-drafted) statement of claim dated 2 November 2012. The defendant says that the matter in the Authority was the alleged breach by the defendant of a settlement agreement entered into between the parties which resolved Mr Lewis's claims against his former employer. It says that his claim is now based on a breach of a variation to his employment agreement with the defendant.

[47] The defendant also says that the challenge should be struck out because the Court cannot award damages, as the plaintiff claims, for breach of a settlement agreement in any event.

[48] As a further alternative to a striking out of the whole of the challenge, the defendant seeks an order that paras 7, 8, 14-20, 34(a)(iii) and (iv) and the words "and the implied terms outlined at paragraph 7 above" at the end of paragraph 35(b) of the plaintiff's second amended statement of claim, be struck out. The defendant says that paras 7, 8, 34(a)(iii) and (iv) and 35(b) introduce new allegations that were not raised by the plaintiff before the Authority, addressed by the Authority in its determination, and/or included in the plaintiff's original statement of claim of 2 November 2012. The defendant says that in these circumstances the Court is without jurisdiction to entertain Mr Lewis's challenge in respect of those issues. The defendant says that paras 14-20 of the second amended statement of claim amount to an abuse of process because the paragraphs contain allegations which are irrelevant and purport to re-litigate issues that were fully and finally settled in a settlement agreement constituting accord and satisfaction.

[49] The defendant's broad submission is that the subject matter of Mr Lewis's claim as now pleaded is so different to that which was before, and decided by, the Authority, that this is not encompassed by s 179 of the Act which specifies what may be the subject of the challenge. It provides materially:

> (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

[50] What was the "matter", or the nature of Mr Lewis's complaint, that he brought to the Authority for determination? It was that his former employer had not abided by the agreement that the parties had reached that he would cease employment with the Bank and how this was to be done and notified publicly.

[51] There is well established case law as to what can be encompassed on a challenge to a determination of the Employment Relations Authority under s 179 of the Act. This starts with the judgment in *Sibly v Christchurch City Council*[9] where the full Court wrote:[10]

> We therefore agree with Mr Lawson's submissions that a broad approach to the meaning of "a matter" in s 179(1) is to be taken. If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

[52] This was followed by another full Court in *Abernethy v Dynea New Zealand Ltd (No 1)*[11] but with the reservation that the reference in the passage in [47] of *Sibly* to "any other matter" in respect of which the Authority has jurisdiction, was too broad. The full Court in *Abernethy* held that the scope of a challenge to the Court is limited to a "matter before the Authority".[12]

[53] So long as a matter was before the Authority, it is within the Court's jurisdiction under s 179 and can be re-formulated as a new cause of action on a challenge: see also *Newick*[13] in which it was held that issues relating to an alleged promise of payment that were before the Authority could be pursued as a cause of

---

[9] [2002] 1 ERNZ 476.
[10] At [47].
[11] [2007] ERNZ 271.
[12] At [33].
[13] At [25]-[27].

action in estoppel before the Court even although estoppel had not been raised as such in the Authority. There are other cases to like effect.

[54] Comparing the substance of what Mr Lewis claimed in the Authority, and what he now says are justiciable causes of action, both allege that the defendant breached the agreement reached between the parties on 4 March 2010. That this agreement may have been described as a "settlement agreement" in the Authority, but is now described by the plaintiff as an agreement varying their individual employment agreement, is a difference of description. The same agreement, and allegations of its breach, are still in issue. The plaintiff is entitled, particularly with the benefit of legal advice and representation that he now has, to advance alternative legal grounds in support of essentially the same proposition in reliance on the same transactions. The second amended statement of claim addresses the same "matter" as was before the Authority. No strike-out of the proceedings is warranted on this ground.

Strike-out of proceeding for absence of relief in damages

[55] Nor does the assertion that the plaintiff cannot claim an award of damages for breach of this agreement, assist the defendant. Even if the agreement was not in the nature of a variation of the employment agreement, an action for its breach and, if warranted, damages for breach, are not so clearly excluded that the claim to relief should be struck out. If the agreement is categorised as a variation to the employment agreement, a claim for damages for breach of an employment agreement is open to be brought by the plaintiff so long as he does not rely on a cause of action in dismissal:[14] see s 113. Mr Lewis does not do so. The agreement provided for his resignation which he does not assert was a constructive dismissal. The Authority (and the Court derivatively) can and do determine claims for damages for breaches of employment agreements: see, for example, proceedings for breaches of covenants in restraint of competitive commercial activity, or claims by employers for damages for abandonment of employment without notice by employees.

---

[14] See: s 113.

[56] It is arguable that the 4 March 2010 agreement constituted, at least in part, a variation to Mr Lewis's employment agreement by altering the essential nature of its termination. The employment agreement continued in effect until the following day in all respects and, arguably, also beyond the cessation of work by the plaintiff in some respects. So the plaintiff is entitled to call in aid of a claim for breach of that agreement, such implied terms as he has alleged and that can be established at trial.

[57] Obligations on the employer to maintain accurate records of the plaintiff's employment and to not deny that Mr Lewis was its New Zealand CEO at relevant times, may be the manifestations in practice of implied obligations of trust, confidence and fair dealing. The 4 March 2010 agreement's post-employment obligations on the employer about how it dealt with Mr Lewis's departure, may arguably have continued to attract those implied obligations. Whether that is so is not for decision here: all that needs to be determined to avoid their being struck out is that these are arguable or tenable issues in the proceeding which I find they are.

Case law on 'settlement agreements' and variations of employment agreements

[58] I have considered all of those cases relied on by both parties but need only to refer to a few that assist in determining this issue.

[59] Mr Towner submitted that the judgment in *Kerr v Associated Aviation (Wellington) Ltd*[15] which supports the plaintiff's position on this issue, was wrongly decided. To ask the Court to agree with that proposition on a strike-out application which, to succeed, would require such a finding (and, indeed, similar findings in respect of other cases), is a bold step. It is one which, in my conclusion, not only weakens the strike-out argument but supports the issue going to trial.

[60] *Kerr* was a case of a former employee who brought proceedings against his former employer for breach of contract and wrongful dismissal believing that he was unable to gain employment in his field because of his former employer's influence over prospective employers. Those proceedings were settled between the former employer and the former employee in an agreement which included that its

[15] [2005] ERNZ 632.

provisions would remain confidential and that the "parties also agree not to speak ill of each other". When the plaintiff continued to have difficulties finding new employment and was then dismissed from that which he eventually found, he believed that he lost his job because of his former employer's unfavourable comments. He brought a claim in the Employment Court against the former employer for breach of the settlement agreement. The plaintiff sought damages for breach as well as cancellation of the settlement agreement. The plaintiff asserted that if the settlement agreement was an employment contract or agreement or was a variation to such a contract or agreement, enforcement of it was within the jurisdiction of the Employment Court including under s 162 of the Act. On the preliminary jurisdictional question whether the settlement agreement was enforceable in the Employment Court, Judge Shaw wrote:[16]

> … the short answer to the jurisdictional point is that since the Employment Relations Act 2000 there is no longer necessity for the almost artificial categorisation of a settlement which does not conform with s 149 of the Employment Relations Act 2000 as an employment contract or variation to a contract which was resorted to under the Employment Contracts Act 1991 by the Employment Court and the Court of Appeal (*Hunt v Forklift Specialists* and *Shaffer v Gisborne Boys' High School Board of Trustees*. This has been resolved by the jurisdiction conferred on the Authority by s 161(l)(r) of the Employment Relations Act 2000 which includes:
>
> > (r) any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):
>
> [32] I hold that the agreement relates to an employment relationship even though it is two stages removed from it. This is because when the employment relationship between the parties ended the plaintiff brought proceedings complaining of the fact and manner of that termination. Those proceedings were resolved by settlement and the present proceedings relate to an alleged breach of that settlement.
>
> [33] I conclude that the fact that the settlement had its origins in the employment relationship is sufficient to give the Authority jurisdiction under s 161(l)(r). The Court's jurisdiction lies in its power to determine challenges from the Authority.

[61] At [61] under the heading "***Is the plaintiff entitled to damages?***", the Judge recorded:

---

[16] At [31].

> The consequence of non-cancellation of the agreement is that pursuant to s 9 of the Contractual Remedies Act 1979 no damages are payable to the plaintiff. Even if they were, it would be almost impossible to quantify the damage arising from the defendant's breach as a result of the phone call from Mr Fletcher. The situation was entirely hypothetical, there was no job at stake for the plaintiff, and he lost no position as a result of the phone call.

[62] I read that conclusion as not excluding the possibility of an award of damages in an appropriate case although the Judge determined that the case before her was not in that category for the reasons set out in the quoted passage.

[63] A number of the judgments relied on by the defendant in support of its strike-out application are distinguishable or are otherwise not sufficiently on point to dictate irrevocably which way the same issue would be decided at trial in this case.

[64] In *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack*[17] an employee, who had fallen out with professional colleagues, agreed to resign from her employment in return for payment of a sum of money. An agreement recording these terms of settlement was drawn up and posted to the Employment Tribunal where it was signed and sealed by a Tribunal Member, as requested, and returned to the parties. Among the agreement's terms was that it constituted "full and final settlement" of all matters relating to the employee's employment. The agreement also provided for "an agreed statement" to be sent to the employee's professional body and a draft to this effect was prepared by the employer but not agreed to by the employee. No statement was sent to the professional body. The employee nevertheless received and banked a cheque for the full amount of the financial settlement but subsequently wrote to the professional body complaining formally of the unprofessional conduct of her former colleagues.

[65] The full Court determined that the interpretation of the settlement agreement was a matter of ascertaining the parties' intentions derived from the plain words of the document. The Court held that even although no agreed statement was sent to the professional body, it was still possible for that term to be perfected by the parties themselves. The judgment contains a comment that:

---

[17] [2000] 1 ERNZ 518.

> … although there was no challenge to the jurisdiction to make the orders claimed by the [employer], the matter was addressed because it was uncertain. Jurisdiction could not be conferred by consent of the parties. The settlement reached by the parties themselves without invoking the personal grievance procedure in the First Schedule to the Employment Contracts Act 1991 ("ECA"), let alone the assistance of the Tribunal or a Tribunal member by subsequent steps under that personal grievance procedure, could not be said to be an order, determination, direction, or requirement under s 55(1)(b) ECA.

[66] At [19] the Court noted:

> Although [counsel for the employer] submitted that the terms of settlement, which his client sought to enforce, were the evidence of a variation to [the employee's] employment contract (other elements of which had ceased with her resignation effective from 1 December, some time before the execution of the settlement document), we have reservations that this is the correct categorisation of the settlement agreement. A contract by which an employment contract is brought to an end can only, with difficulty, be categorised as an employment contract or even a variation of the contract that has been ended by it but surviving the termination of the main contract. [Counsel for the employer] submitted that cls 1, 2, 4, and 5 of the memorandum of terms of settlement provided ongoing obligations and that is true. Whether, however, those were obligations of an employment contract or of an accord and satisfaction by which the employment contract was terminated, we think is not clear.

[67] Those remarks were, however, obiter dicta and do not rule out the possibility that such an agreement may amount, in an appropriate case and according to its terms and circumstances, to a variation to an employment agreement.

[68] Turning to a case decided under the current legislation (*Musa v Whanganui District Health Board*)[18] the Employment Court addressed an agreement made between an employer and employee settling a personal grievance. The Court determined that this settlement agreement was not an employment agreement as defined in the legislation. It wrote:[19]

> Some of its provisions may have amounted to variations of Mr Musa's employment agreement with the Board and, in particular, the provision by which his employment would end …. But the settlement agreement was a separate contract, an accord and satisfaction as the law sometimes terms it. Not only was it not an employment agreement but in some respects it was the antithesis of an employment agreement. It is an agreement that provided for the end of employment on terms.

---

[18] [2010] ERNZ 236.
[19] At [79].

[69] The judgment in *Musa* left open the possibility that an agreement in settlement of a personal grievance of a current employee may contain elements varying that ongoing employment agreement.

[70] In *Wade v Hume Pack-N-Cool Ltd*[20] a settlement of a grievance had been the subject of the Mediation Service's certification process in s 149 of the Act. An application was made to the Court to enforce the settlement. The Court concluded:[21]

> Except where a settlement such as this may have been certified by a mediator under s 149 of the Act, there is no power for the Authority to order compliance with settlement agreements between parties to an employment relationship for non or short-paid remuneration or expenses' reimbursement or other like monies. Such an agreement is a debt enforceable as such in the same way as other monetary debts, that is through the District Court, without the necessity of bringing proceedings in the Authority. The Authority simply had no power under s 137 or otherwise to adjudicate on the application for compliance that Mr Wade brought to it although it purported to do so and subsequent proceedings have assumed that this was lawful. Although it is possible for the Authority to determine the amount of money due by an employer to an employee, enforcement of payment of this would be in the District Court under s 141 of the Act in any event.

And:[22]

> The reference in Authority determinations, which appear to go both ways on this question, to s 161(1)(r) as giving it the power to enforce settlements of employment disputes which have not been the subject of Mediation Service certification, must be of at least dubious validity. That is because it begs the question how the Authority is to enforce such settlements, even if it is seized of proceedings in which that is an issue. Logically, the only answer can be by compliance order but s 137 does not permit the enforcement by compliance order of non-certified settlements. There is no point in permitting an application to be made to the Authority to enforce settlement if it cannot do so and this, in turn, must cast doubt on the Authority's assumption of jurisdiction by reference to s 161(1)(r).

[71] In *Wade* the Court also addressed the question of whether a settlement agreement could amount to a variation of the employment agreement. At [14] the Court wrote:

> In cases where, for example, an employee has been dismissed and there has been a subsequent agreement reached settling the employee's claim to unjustified dismissal but this is not certified by the Mediation Service, such

[20] [2012] NZEmpC 64.
[21] At [11].
[22] At [12].

> an agreement would be very difficult to categorise as a variation to an employment agreement that was already spent. Its categorisation would be an accord and satisfaction of the claim to unjustified dismissal but unless this was certified by the Mediation Service, it would not be enforceable by compliance order in the Employment Relations Authority.

[72] There are two important distinguishing characteristics between the *Wade* case and this. First, it turned on the power of the Authority to enforce a settlement by compliance order. That is not an issue in this case where damages for breach are claimed. The remedy of damages was not addressed in *Wade*. The second distinguishing factor is that the remarks at [14] of the *Wade* judgment relate to whether a settlement agreement entered into after the employment agreement has ended can amount to a variation of that employment agreement. That was what was said to be "very difficult to categorise as a variation to an employment agreement that was already spent". In this case, however, the settlement agreement was reached while the employment agreement was still on foot and in fact the latter continued to operate, albeit for a short period, after execution of the settlement agreement.

[73] Addressing the question of whether the Authority and the Court can award damages for breach of a non s 149 certified settlement agreement, Mr Towner argued that to do so would be at odds with the judgment of the full Court in *South Tranz Ltd v Strait Freight Ltd.*[23] In that case, the parties entered into a mediated settlement certified in accordance with s 149 of the Act under which the former employee was subject to a two year restraint of trade. In proceedings issued in the Authority alleging breach by the plaintiff (as the new employer of the former employee), the Authority assumed jurisdiction and made both a compliance order and directed that the plaintiff account with interest for its profits attributable to the breach. At [38] the Court wrote:

> We find the scheme of the Employment Relations Act 2000 as it applies to this case to be clear. Where parties have concluded an agreement which is enforceable under s 149(3), the only means of enforcement available are those provided for in s 151. Where, as in this case, the term of the agreement which is found to have been broken does not require the payment of money, the only remedy available to the Authority is to order compliance with the term in question. No other remedies are permitted under s 151 and the effect of s 149(3)(b) is that the agreement may not be the subject of any form of proceedings other than enforcement proceedings. A compliance order is an order made under s 137 and is limited to an order of the type specifically

[23] [2007] ERNZ 704.

> provided for in s 137(2). It cannot be made to include an order for damages or any order related to an order for damage such as an account of profits.

[74] This judgment is, however, distinguishable in that it deals with the remedy of compliance order and whether damages or like remedies could also be sought. The prohibition on the Authority making awards of damages for breaches of such agreements does not necessarily extend to settlement agreements reached otherwise than by reference to s 149.

[75] There are three significant features of the foregoing analysis of the case law which persuade me that these issues should go to trial rather than being decided summarily now by the proceeding (or any part of it) being struck out. The first is that the tests under the Employment Contracts Act 1991, by which a number of the cases were decided, are significantly different to those under the current legislation. Second, cases decided under the Employment Relations Act 2000 have at least left open and, in some cases endorsed, the proposition that an agreement such as that between these parties of 4 March 2010 may not only settle a personal grievance and bring employment to an end, but also vary the parties' employment agreement at least for its future, both before and after the employee's resignation. The third ground for considering that these questions should go to trial arises from the very recent judgment of the Court of Appeal on very different facts but which, nevertheless, addresses whether the Employment Relations Authority is the appropriate forum in which to bring proceedings. That judgment is *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc.*[24] At [21] and [24] of that judgment the Court of Appeal stated:

> [21] An "employment relationship problem" is not confined to disputes between parties to an "employment relationship". It has a more expansive map, including "… a *dispute*, and any other problem *relating to* or *arising out of* an employment relationship" (emphasis added).
>
> [24] The [Employment Relations Act 2000] confers jurisdiction on the Authority to determine any dispute relating to or arising out of an employment relationship. The underlying dispute about the [Secretary's] compliance with cl 3 of the collective agreement relates to or arises out of the employment relationship between boards and teachers. In our judgment that is sufficient to vest the Authority with jurisdiction to hear this dispute.

---

[24] [2013] NZCA 272.

[76] Although in that case the Court of Appeal was dealing with a dispute about a collective agreement and s 129 of the Act in particular, s 161 ("Jurisdiction") sets out the Employment Relations Authority's "exclusive jurisdiction to make determinations about employment relationship problems generally including … any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship … (other than an action founded on tort).[25] This judgment of the Court of Appeal will be influential in deciding this jurisdictional question and its existence militates against a strike-out at this stage.

[77] Not only are there not good grounds on which to strike out the plaintiff's proceeding but an action for damages for breach of the agreement of 4 March 2010 and/or the parties' employment agreement is very arguably an action arising from or related to the employment relationship.

[78] I decline, for these reasons, to strike out the plaintiff's challenge.

Application to strike out specified parts of claim

[79] Although Mr Lewis seeks, as a head of relief in this proceeding, a declaration that he was the defendant's CEO in New Zealand from August 2008 until March 2010, Mr O'Brien conceded that the plaintiff's wish is really for a finding by the Court to this effect. That is, however, an undisputed matter, at least now, because the defendant accepts without reservation and formally on its pleadings, that Mr Lewis was its CEO in New Zealand between those dates and, indeed, it says that he held other senior managerial roles. If Mr Lewis seeks a vindication of his position that he held that role between those dates, then he has this already on admission by the defendant.

[80] It is arguable also that if, as the plaintiff alleges, the defendant either failed to confirm upon inquiry that he had been its New Zealand CEO, or asserted that its records did not so confirm, this may have amounted to a "disparaging comment" about Mr Lewis to a third party and, therefore, a breach of cl 9 of the agreement of 4

[25] Section 161(1)(r).

March 2010. Whether that is so will be a matter for trial, but I do not think it can be said that such advice did not amount to the making of a disparaging comment to the necessarily high standard required before Mr Lewis should be disqualified from going to trial on that issue.

[81] The defendant seeks an order striking out paras 14-20 (inclusive), 7, 8, 34(a)(iii) and (iv), and 35(b) of the plaintiff's second amended statement of claim. The defendant says that paras 7, 8, 34(a)(iii) and (iv), and 35(b) raise new allegations that were not before the Authority or addressed in its determination and are therefore matters that the Court has no jurisdiction to entertain.

[82] In relation to paras 14-20 of the second amended statement of claim, these are said to be an abuse of process because they contain allegations which are irrelevant and which purport to re-litigate issues that were fully and finally settled between the parties on 4 March 2010, constituting an accord and satisfaction.

[83] Paragraphs 14-20 (inclusive) deal with events during 2009 which do not constitute a cause of action in the plaintiff's proceeding that has not already been settled. That is because they led to an agreement between the parties, the justification for which is not challenged but the breach of which by the defendant constitutes Mr Lewis's cause of action. Although the allegations set out in paras 14-20 (inclusive) may form background information leading or contributing to the interpretation of the agreement into which the parties entered on 4 March 2010, they do not need to be pleaded and particularised and should not have been. They should be deleted from the further amended statement of claim that I will direct to be filed and served.

[84] Paragraphs 7-8 of the second amended statement of claim allege the existence of implied terms in Mr Lewis's individual employment agreement that are alleged to relate to the periods both of and following his employment. There is no cause for them to be struck out of the second amended statement of claim. Whether they survive the trial process will be a contested issue but that is not a matter of strike-out at a preliminary stage.

[85] Paragraphs 34(a)(iii) and (iv) particularise the plaintiff's claim to breach of the employment agreement by saying that the defendant breached the implied obligations pleaded in paras 7(a) and (b). I have just refused to strike out the contents of para 7 so it would be illogical to now strike out particulars of what are allowed. I decline to do so.

[86] As to para 35(b) of the second amended statement of claim, this is the second prayer for relief and seeks a declaration that the defendant breached the individual agreement including cls 8-9 of the variation and the implied terms set out at para 7. For the same reason set out above refusing to strike out paras 7 and parts of para 34, I decline to do so in respect of para 35(b). It is the logical successor to the allegations of breach of para 7 which I have refused to strike out. I decline to do so in respect of para 35(b) for the same reason.

Defendant's application for further particulars/further and more explicit statement of claim

[87] This is the third issue for decision summarised at para 21. It relates to a number of paragraphs in the plaintiff's second amended statement of claim. I will deal with each sequentially.

[88] Paragraph 25 of the plaintiff's second amended statement of claim asserts that on 18 March 2010 the plaintiff advised the defendant that its records failed erroneously to describe him as having been CEO of the defendant's New Zealand branch and says that he put the defendant on notice that he was likely to suffer damage if this error was not corrected. The second amended statement of claim contains some particulars in support of that assertion. These include:

- that Mr Lewis emailed Ms Simpson, the defendant's head of human resources;

- that he relayed to Ms Simpson a conversation that he said he had had with an operator on the defendant's access HR 0800 telephone number;

- that he emphasised to Ms Simpson that he was making approaches to potential employers; and

- that it would seriously damage his ability to obtain employment if the defendant failed to confirm that he had been CEO of the New Zealand branch.

[89] The defendant says:

- that the plaintiff should be required to identify all the potential employers that the plaintiff had approached including those to whom he had applied for work between the date his employment ended with the defendant and the date on which he was employed by a new employer;

- what positions he applied for;

- the dates on which his applications were made;

- whether any of the plaintiff's approaches were made through a recruitment agency; and

- if so, which one and starting when.

[90] Paragraph 25 asserts, however, what Mr Lewis says he said to Ms Simpson. It does not assert that he in fact did those things that he says he asserted to Ms Simpson. He should not be required to particularise statements that are not claims in his proceeding. That is not to say that Mr Lewis cannot be cross-examined on the accuracy of what he told Ms Simpson but that is not the same as providing particulars in support of his claim. That application for further particularisation is refused.

[91] Next, the defendant says that the plaintiff should be required to provide further and better particulars of para 28 of his second amended statement of claim.

This says that in April 2010 the plaintiff applied for a position with the Westpac Banking Corporation (Westpac) and, as part of his application, he advised Westpac that he had previously been the CEO of the defendant's New Zealand branch. The defendant calls on Mr Lewis to identify the position at Westpac for which the plaintiff applied and the date on which he did so.

[92] On the basis that the plaintiff's claim for damages asserts that the defendant's breach resulted in loss to him, those are particulars to which the defendant is entitled and they must be supplied by the plaintiff according to the methodology which I will describe at the conclusion of this judgment.

[93] The next claim for further and better particulars relates to para 29 of the plaintiff's second amended statement of claim. This alleges that between 29 March 2010 and August 2010 Westpac approached the defendant for confirmation that Mr Lewis had been its CEO of the New Zealand branch but that the defendant denied this. Mr Lewis has already given a number of particulars of this allegation, saying that in or around August 2010 he called the defendant's access HR 0800 number, asked the phone operator whether anyone had contacted the defendant to inquire about him. He says he was told that the defendant had been contacted by a third party with whom Mr Lewis had applied for a role. Mr Lewis says that he asked the defendant's operator if it had confirmed that he had been CEO of the New Zealand branch and was told by that person that the defendant's computer system did not record that he had been CEO of its New Zealand branch and that if it had been asked whether that was so, the defendant would have denied this.

[94] The particulars sought by the defendant include:

- the identity of the person at Westpac who approached him for confirmation that he had been the defendant's CEO;

- whether this approach was the telephone discussion which Mr Lewis says he had with the defendant's access HR 0800 operator in or around August 2010; and

- if so, whether the operator informed the plaintiff that the party referred to was Westpac.

[95] Those impress me as particulars which the plaintiff should provide as part of his claim and they, too, will need to be included in the further amended statement of claim that I will direct be filed.

[96] The next application for further and better particulars relates to para 30 of the plaintiff's second amended statement of claim. He says, I infer as a result of the telephone discussions that he says in para 29 of his second amended statement of claim took place, that he again requested that the error in the defendant's system be corrected.

[97] The defendant asks that the plaintiff particularise to whom he addressed that request, on what date it was made, and whether it was made orally or in writing.

[98] Those are also proper particulars which the plaintiff must give pursuant to the mechanism described at the conclusion of this judgment.

[99] The next application for further and better particulars relates to para 31 of the plaintiff's second amended statement of claim. This says that Mr Lewis was unsuccessful in his application to Westpac and was unable to find other employment for a further six months.

[100] The particulars that the defendant seeks in respect of this pleading are as follows. First, it calls on the plaintiff to provide particulars of the advice he received from Westpac including when and how he was advised that his application had been unsuccessful and whether he was told why this was so. Next, the defendant asks that Mr Lewis particularise what other job applications he made and when, after being advised by Westpac that his application was unsuccessful. Third, the defendant calls on the plaintiff to provide particulars of any reasons provided to him by prospective employers during the six month period referred to, about why his application or applications to those prospective employers were unsuccessful and the dates on which those communications took place. Next, the defendant calls upon Mr Lewis

to identify the employer that employed him after the six month period to which he refers. He is then asked to specify the date on which he commenced employment with that employer and his position with that employer. Finally in this regard, Mr Lewis is asked to specify his salary upon commencement with that employer.

[101] I agree that each of those particulars should be provided by the plaintiff according to the mechanism for doing so outlined at the conclusion of this judgment.

[102] The next claim for further particulars relates to para 37 of the plaintiff's second amended statement of claim. That is part of his prayer for relief and seeks special damages of $120,000 for the losses of income suffered by Mr Lewis as a result of Westpac not progressing his application for employment.

[103] The defendant asks that Mr Lewis explain the basis of the calculation of the figure of $120,000 and to describe what steps he took to mitigate his loss arising from his non-appointment to the Westpac position. This should include whether he contacted Westpac or a relevant recruitment agency following the telephone discussions with the defendant's access HR 0800 operator referred to in para 29 of the plaintiff's second amended statement of claim.

[104] Those, too, are particulars to which I consider the defendant is entitled and must be provided by the plaintiff according to the formula set out at the conclusion of this judgment. Regulation 11 of the Regulations requires a statement of claim to specify how a money claim is calculated.

Separate determination of preliminary question?

[105] This is the fourth issue for decision referred to at [22]. The defendant says that the Court should determine, as a preliminary question, whether an agreement in full and final settlement, although not signed by a mediator pursuant to s 149 of the Act, amounts to a variation of an employment agreement. The defendant says that a determination of this preliminary issue would be an appropriate and effective procedure by which the Court might clarify whether any remedies are available to the plaintiff.

[106] What the defendant seeks to have determined as a preliminary issue is essentially the same question which it said is fatal to the plaintiff's claim, at least in this Court, and was its ground for striking out the whole proceeding. In these circumstances I will not revisit my conclusions that the decision of this question is not so unarguable that it will dispose of Mr Lewis's claim and that, indeed, he has an arguable case on his pleadings. It is significant, also, as I have concluded already, that even if the agreement of 4 March 2010 did not vary the parties' employment agreement, but was only an agreement to settle a personal grievance alone, s 161(1)(r) may allow a claim for damages for breach of a settlement agreement to be brought in this Court. The final factor against dealing with this issue as a preliminary question is that the nature of the agreement will be affected by the circumstances surrounding its entry and the parties' intentions so that little, if anything, will be saved by a preliminary hearing, including such evidence that will have to be given.

[107] For those reasons, I do not consider it would be expedient or just to direct that they be the subject of a preliminary hearing and judgment. The questions can, and no doubt will, be a live issue at trial, the answers to which will depend, at least partly, on the evidence surrounding the agreement's execution.

Plaintiff's challenge to defendant's objection to disclosure

[108] In the course of the hearing Mr O'Brien did not pursue the plaintiff's challenge to the defendant's objection to disclosing the documents specified at para 1(a) and (b) of the plaintiff's notice requiring disclosure (dated 16 May 2013). Those documents relate to Mr Lewis's appointment as CEO of the defendant which is not a relevant issue in the proceeding.

[109] As to para 1(c) of the notice, I accept that documents relating to the named employee of the defendant, who the plaintiff alleges did the things affecting the plaintiff that led to the plaintiff's disadvantage personal grievance in 2009, are or may be relevant to the issues for trial and must be disclosed. So, too, are the documents referred to in para 1(d) of the notice which are or may be relevant for the

same reason. These are documents evidencing the involvement of any of the other employees of, or contractors to, the defendant in auctioning these matters.

[110] I accept that documents falling within the description in 1(g) and (h) of the notice are relevant in the proceeding and must be disclosed. These include documents relating to Ms Simpson's actions and communications following the receipt by her of the plaintiff's email of 18 March 2010 and any communications following Ms Simpson's receipt of Mr Lewis's email of 26 March 2010, including her advice on 29 March 2010 that the correction to the defendant's systems had been made.

[111] That leaves only the documents sought in 1(i) of the notice. Mr O'Brien advised me that the plaintiff had sought employment at one other bank in New Zealand. In these circumstances the requirement to disclose is of any communications between the defendant and Westpac and the other bank (the identity of which will be made known by Mr O'Brien to Mr Towner) in the period between March 2010 and August 2010, relating to the plaintiff.

[112] No time for making disclosure of the documents by the defendant to the plaintiff was requested or proposed and it is difficult to know how accessible they may be. In these circumstances one month should be allowed for their disclosure and inspection, but if there are problems with this period leave is reserved to apply for an extension.

The parties' applications for verification orders

[113] These are the sixth and seventh issues summarised at paras 24 and 25. The plaintiff does not oppose the defendant's application for a verification order as sought and his affidavit pursuant to Reg 46 is to be filed and served within 14 days of this judgment.

[114] The plaintiff's own application for a verification order is opposed by the defendant. I agree with Mr Towner that no evidence has been adduced by the plaintiff upon which the Court might be satisfied of the probable existence of the

documents specified, a necessary requirement under reg 47. It follows that no order can be made, at least on this application as it stands at present.

Method of particularisation/further and better statement of claim

[115] The plaintiff must now file a third amended statement of claim. He will have 30 days from the date of this judgment to do so and to serve it on the defendant. The defendant will have the further period of 30 days from service on it of the third amended statement of claim to file and serve a statement of defence to that further pleading.

[116] Leave is reserved for either party to apply for any further interlocutory orders or directions that may arise out of these amended pleadings. Once the pleadings are settled and the parties agree that there are no further interlocutory applications, the Registrar should arrange a telephone directions conference to progress the case to a hearing. I commend to the parties the facility of a judicial settlement conference if they might consider this to be a preferable way to resolve this litigation than by judgment after trial. That is a matter that can be taken up with the Judge who chairs the directions conference, or beforehand if the parties desire.

[117] In accordance with the wishes of both parties, I reserve costs on these applications which occupied between one-half and one full sitting day in court.

GL Colgan
Chief Judge

Judgment signed at 3.15 pm on Thursday 5 September 2013