IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 154
ARC 85/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of interlocutory application for non-party discovery
AND IN THE MATTER	of an application to strike out proceedings
BETWEEN	BRIAN ALEXANDER WEBB Plaintiff
AND	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES' UNION INCORPORATED Defendant

Hearing: 10 July 2013
(Heard at Auckland)

Appearances: Paul Carrucan, advocate for plaintiff
Simon Mitchell, counsel for defendant

Judgment: 16 August 2013

JUDGMENT OF JUDGE M E PERKINS

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[1] These proceedings were commenced by the filing of a statement of claim on 26 November 2008. The plaintiff challenges the findings of the Employment Relations Authority (the Authority) in a determination dated 29 October 2008.[1] In that determination the Authority made certain findings as to the validity of membership of Mr Gary Froggatt and Mr Peter Cross in the New Zealand Tramways and Public Passenger Transport Employees' Union Incorporated (the Union) and their eligibility to hold office in the Union. Their election to office in the defendant

[1] ERA Auckland AA 370/08, 29 October 2008.

Union is also the subject of the challenge by the plaintiff. There were proceedings commenced earlier by Mr Webb for leave to challenge out of time an earlier determination of the Authority, in relation to similar issues. In a judgment of this Court under ARC 69/08 dated 18 September 2008,[2] Mr Webb was unsuccessful.

[2] As a result of a further judgment in the present matter dated 26 March 2009,[3] certain parts of the statement of claim filed by Mr Webb were struck out. Judge Travis, who delivered that decision, indicated that in view of the strike out of the portions of the statement of claim there were other paragraphs in the statement of claim which would need to be omitted as they were no longer appropriate. Judge Travis, in that decision, also made comments generally about the pleadings, which he held did not comply with the requirements of the Employment Relations Act 2000 (the Act). He directed that if the plaintiff was to continue with these proceedings, any statement of claim would have to comply with the provisions of the Act.

[3] On 30 March 2009, and in view of his findings in the earlier judgment, Judge Travis set timetabling for the filing of further pleadings. On 24 April 2009, the plaintiff accordingly filed an amended statement of claim. The challenge to the determination dated 29 October 2008 is maintained. In summary the pleadings criticise the findings of the Authority as to the membership of the two individuals concerned in the Union, their election to office and the procedures adopted by the Union in that process allegedly in breach of its own rules. The pleadings also challenge the fact that the Authority failed to exercise its discretion to intervene in the Union's affairs, even though discrepancies in behaviour and procedure were found to have occurred.

[4] The remedies now sought in the amended statement of claim are as follows:

> a) A referral to mediation with the reconvened Tramways Union National Council to be facilitated by the Department of Labour mediation service by a mediator acceptable to both parties.
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> b) A judgment by the Court on the questions of law as it relates to the union's 1990 Rules whether:

[2] EMC Auckland AC35/08, 18 September 2008.
[3] EMC Auckland AC 10/09, 26 March 2009.

i) Froggatt is entitled to be a member of the Tramway Union Auckland Branch;

ii) Cross and Froggatt are entitled to hold Auckland Branch positions if at the time they stood for and were elected for those branch they were not members of the Auckland Members of the Tramways Union;

iii) A person being elected to a position of National Office with the union qualifies them for branch membership and if so what Branch of the Union are they deemed to belong;

iv) A person who is not eligible for branch membership can be made a life member of a branch of the union;

v) The principle established under *Barrett v Ortiz* (1945) 70 CLR 141 at 151 applies and a sustained departure from the union rules, as detailed in this matter, does not of itself validate the practice to provide a union with the discretion [to] not follow [its] rules.

c) A judgment on whether the conflicting [positions]presented by Froggatt and Cross in regards to the alleged continuous payment of union fees and membership held represent misleading and deceptive behaviour and a breach of the code of good faith.

d) Where the Court finds in breach of the code of good faith has occurred and has considered it sustained and deliberate that suitable fines be imposed.

[5] As can be seen the relief sought in the proceedings is somewhat convoluted but it needs to be remembered that Mr Webb and his advocate are lay persons. The relief sought is probably sufficiently particularised for both counsel for the defendant and the Court to ascertain the remedies being sought and the basis for them. Whether the Court has jurisdiction to make the referral to mediation outside the scope of the challenge to the determination is a point which may be in dispute if this matter were to proceed further.

[6] The defendant filed an amended statement of defence to the amended statement of claim on 22 May 2009. The Union maintains that the individuals concerned, Messrs Froggatt and Cross, were entitled to stand for office in the Union in accordance with its rules. Even if it they were not entitled to stand (which the Union denies), the Authority was correct, upon the defendant's pleadings, in not acceding to the request for a compliance order. The Union also maintains that the allegation that the individuals concerned were not financial members cannot be

sustained on the evidence. Allegations in the amended statement of claim as to financial irregularities are refuted by the Union and in any event irrelevant as not being an issue covered by the Authority's determination. Similarly, the Union refutes the plaintiff's contentions on categories of membership within the Union and the plaintiff's further assertions in that regard. Finally, the defendant in its pleadings accepts the ability of the Authority to intervene in union elections but that in this case it was correct in deciding not to do so. In turn, the defendant disputes the finding of the Authority as to irregularities on the Union's part and seeks a declaration that the determination was incorrect, particularly in finding that Mr Cross was not entitled to stand for positions. Alternatively, the defendant pleads that if it is wrong in its contention as to the determination, the Court should nevertheless exercise its discretion and not provide the remedies sought by the plaintiff.

[7] The substantive proceedings as they remained after the close of pleadings were then the subject of further timetabling in a minute of Judge Travis following a chambers hearing on 19 June 2009. The proceedings then became bogged down with issues of disclosure. Interlocutory judgments were issued on 15 September 2009[4] and 9 March 2010[5] dealing with these disputed issues of disclosure and verification. The issues relate mainly to banking records of the Union, which the plaintiff alleges might disclose that Messrs Froggatt and Cross had not met their financial obligations for membership of the Union in any event.

[8] Following those judgments the proceedings appeared to remain in abeyance for a period. On 26 September 2011, the plaintiff filed an application for non-party discovery against the ASB Bank and the Union's auditor. The defendant responded with a notice of opposition to such applications. At the same time the defendant also filed an application to strike out the proceedings. Those applications are now before the Court for determination. The applications of the plaintiff were served on the defendant and the non-parties. Some delay was occasioned with the filing of proof of such service. Following a recent telephone directions conference with advocate for the plaintiff and counsel for the defendant, a hearing on 10 July 2013 was

[4] EMC Auckland AC 10A/09, 15 September 2009.
[5] [2010] NZEmpC 19.

allocated for the outstanding interlocutory applications. The non-parties have taken no steps in the proceedings and did not then appear at the hearing.

[9] Insofar as the plaintiff's application for non-party disclosure is concerned the position reached at the hearing is that:

a) The auditor does not have any documents relevant to the proceedings. Nevertheless, if the proceedings continued, he is to verify that position by affidavit;

b) Mr Cross has no documents. The defendant is no longer able to provide evidence as to his membership of the Union at the time in question;

c) The defendant is prepared to make available for inspection its bank statements for the years 1990-2008, so long as that and the verification required is at the plaintiff's expense. Confidentiality is to be maintained. To this end it was suggested that the bank be asked to provide copies of the statements to Mr Mitchell as counsel for the defendant. The plaintiff Mr Webb and Mr Carrucan may then inspect them at Mr Mitchell's chambers. No copies are to be taken; the statements are then to be returned to the bank. Again this procedure would only operate if the proceedings continued.

d) Mr Mitchell confirmed during the hearing that all relevant documents have been disclosed to the plaintiff in compliance with the previous orders of the Court. This included the wage book. This document can be viewed again if required, and Mr Mitchell has stated that he will make it available. I did not perceive Mr Carrucan to be disputing that position. Mr Webb, in his affidavit in support of his application, sworn on 7 September 2011, also confirmed that all documents subject to the orders have been disclosed.

[10] Since the hearing on 10 July 2013, Mr Carrucan has written to the Court indicating that Mr Webb would prefer to view the statements at the bank premises.

That would impose an unwarranted obligation on bank officers. Mr Mitchell in a letter in reply, set out the facilities available at his chambers and I consider it appropriate that if this matter were going to proceed further the procedure agreed at the hearing should be adopted. The disagreement in the correspondence, filed subsequently to the hearing, dealing with the interpretation to be placed on previous statements by the defendant against documents available, is not part of the present applications and it was inappropriate for Mr Carrucan to raise that retrospectively.

[11] In view of the position as to final disclosure now presented and upon which there is in the main unanimity, there is very little else the Court can do to accommodate the plaintiff's request. In view of the findings of the Authority Member in his determination, the plaintiff's persistence in wanting to view the bank records would appear to be nothing other than an unwarranted fishing expedition to shore up evidence for the challenge. However, the position on disclosure becomes academic if the defendant's application to strike out the proceedings is successful. I have mentioned the disclosure issues first because they have some relevance also to the strike out application. I now turn to consider that application.

[12] Mr Mitchell argued that a strike out is now appropriate as the undisputed evidence discloses that both Messrs Froggatt and Cross have, in an election subsequent to that in 2008, now been validly elected to their position in the Union. Mr Froggatt stated in his affidavit in support of the strike out application, that the rules of the Union have been legally changed. Mr Froggatt was elected President and Mr Cross to the position of Secretary of the Auckland branch of the Union at an election dated 11 April 2013. Since the determination, Mr Webb's position has changed. He is no longer a member and has had no involvement with the Union since early 2010.

[13] Mr Mitchell made two main submissions in support of the application to strike out:

a) The issues now pursued by Mr Webb are moot.

b) The proceedings constitute an abuse of process if allowed to continue.

[14] Mr Carrucan conceded during the hearing that Mr Webb would gain nothing in real terms from the proceedings even if he were successful. However, he submitted that the challenge is valid and should be allowed to continue. Mr Webb wishes to have the declaration he seeks and to have a penalty imposed. Mr Webb alleged there is evidence of bad faith on the part of Messrs Froggatt and Cross with conflicting statements they have made. However, in respect of that allegation, which had been raised earlier and was repeated at the hearing, the point needs to be made that neither Messrs Froggatt nor Cross are parties to these proceedings. The Union is the only named party as defendant. No remedy is pursued in the pleadings in respect of these allegations against Messrs Froggatt and Cross personally.

[15] This matter is to be dealt with, pursuant to reg 6 of the Employment Court Regulations 2000, as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting applications to strike out proceedings. No specific rule is contained in either the Act or its Regulations dealing with such matters. As Mr Mitchell has submitted the matter is to now be dealt with pursuant to r 15.1 of the High Court Rules which states:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
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> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
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> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[16] Mr Mitchell clearly relied upon subss (1)(d) and (2) that to allow the proceedings to continue would otherwise be an abuse of the process of the Courts

and they should be dismissed. In the submission he referred to three authorities dealing with what may, in such circumstances, amount to an abuse of process and a consideration of principles to be applied where there are no longer outstanding issues between the parties or that the points in issue are moot.

[17] In *Te Runanga O Ngai Tahu Ltd v Durie*,[6] the High Court noted:

> Proceedings are termed in law an "abuse of process" in a range of situations, including situations where there is no intention or is no capacity to take such to trial. Sometimes that situation exists at outset (eg "gagging" writs). Sometimes the situation develops after proceedings have issued, with conditions changing or second thoughts prevailing. That has happened here. Conditions have changed from those which prevailed at the time of issue, and indeed at the time of first adjournment in June 1996. A fresh refusal or delay could warrant fresh proceedings, but that is not the test. The label "abuse" is a technical one, not necessarily pejorative. It is not pejorative here. The proceedings have simply outlived their time…

[18] In *Simpson v Whakatane District Court* (No 2)[7] the High Court stated:

> [22] It is a well recognised common law principle that it is contrary to public policy for the Courts to entertain proceedings where there is no actual outstanding issue in existence between the parties. The Courts are not, in general terms, available to provide a free or subsidised opinion service to the public. Court time is a precious commodity, and cannot sensibly be spent on deciding matters that only have academic interest, or which prove a point of opinion rather than resolve a dispute…

[19] Mr Mitchell accepted that in *Simpson* the Court held that there is nevertheless discretion to consider a moot issue. The principle is not absolute. As the Court stated:

> [25] The principle that the Court will not determine issues which are moot is not absolute. It is recognised that on occasions the public interest may dictate a determination of an important point, and it may be convenient to do so even when there is no lis. This was stated in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450…:

[20] This principle had earlier been applied in the public law context in *Director of Proceedings v I*:[8]

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[6] [1998] 2 NZLR 103 (HC) at 107.
[7] [2006] NZAR 247 (HC).
[8] [2004] 17 PRNZ 390 (CA).

> [23] There are, however, good reasons why caution should be shown about entertaining a moot appeal. The assumption which underpins our legal system is that legal propositions are best developed by the Courts in the context of real controversies. The facts and apparent merits of particular cases are not necessarily controlling considerations, as indicated by the maxim that hard cases make bad law. But, they do provide a reality check for Judges. In addition, there are resource considerations. The scarce resource of judicial time is perhaps better utilised in the resolution of real disputes.

[21] Returning to *Simpson,* Mr Mitchell then referred to two further paragraphs to submit that in respect of the present proceedings there is no pressing or important public interest reason why the proceedings should be allowed to continue. The Court stated in [28] and [30] of the decision as follows:

> [28] It is an abuse of the process of this Court for it to receive and determine claims where the decision will have no utility. The effect is that Court resources are wasted. The direct result may be that causes which have utility are delayed.
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> …
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> [30] I bear in mind that it does not automatically follow that because there is no longer a live issue between parties, that the proceeding should be struck out. There will be occasions where there may be a good reason in the public interest to allow the cause of action to proceed even when it is moot, particularly where there is no detailed consideration of facts required, and where the issue is likely to require resolution in the near future.

[22] As Mr Mitchell submitted there is now no live issue for the Court to determine in this matter. Events have moved on considerably. The rules of the Union have been changed so that both Messrs Froggatt and Cross are entitled to be members of the Union without question and have been appropriately elected to positions in the Auckland branch. There is therefore no point in allowing the proceedings to continue. Added to that is the fact that, as Mr Carrucan has conceded, Mr Webb has nothing to gain in real terms even if he is successful with these proceedings. He is no longer a member of the Union and no longer has standing pursuant to s 29(b) of the Act to bring any similar proceedings before the Court. It is correct that Mr Webb is seeking a penalty (he refers to it as "fines" in the pleadings) in respect of the actions he alleged were carried out by the Union in 2008. However, from the submissions of Mr Carrucan, it appears that Mr Webb is primarily focussing on the actions and statements of Messrs Froggatt and Cross. Their actions personally would not lead to the Court being able to impose a penalty

on the defendant union. In order for Mr Webb to establish that a penalty is appropriate against the defendant Union, he would need to establish that the defendant Union, rather than Messrs Froggatt or Cross, had failed to comply with the duty of good faith and that it was deliberate, serious and sustained, or was intended to undermine employment relationships. The findings Mr Webb is seeking in this matter, as stated by Mr Carrucan in his submissions, mean he is going to have some difficulty in persuading the Court to impose a penalty in this case.

[23] In his submissions in answer to the application to strike out, Mr Carrucan referred to the history of the proceedings leading to the present application. He submitted that the matter is not moot and that the challenge should be allowed to continue. However, once again, in his written submissions he concentrated on the actions of Messrs Froggatt and Cross and the allegation as to conflicting statements made by them. However, if as Mr Webb seems to be alleging, Messrs Froggatt and/or Cross have somehow perjured themselves before the Authority, that is a matter to be pursued in another forum.

[24] The plaintiff has already had the benefit of a full investigation before the Authority. Following that investigation the Authority Member gave a fully reasoned determination. Within a short time of the election, which Mr Webb is disputing, he filed a challenge to that determination. Since that time, however, the proceedings in this Court have been allowed to languish such that in the interim the Union has remedied deficiencies in its rules and there have been further valid elections with Messrs Froggatt and Cross being elected to positions within the Union. Mr Webb is not in a position to dispute that subsequent election.

[25] If this matter is to proceed it will no doubt require substantial attendances and expense. The application from Mr Webb for non-party disclosure, gives an indication that Mr Webb is now fishing for documents in an endeavour to shore up the evidence, which he was able to present at the investigation before the Authority. Even if he is allowed to proceed with the challenge, Mr Carrucan has conceded that all he can gain are declarations unless he is able to persuade the Court to impose a penalty. Upon the inferential case that is presently presented, Mr Webb will have considerable difficulty in persuading the Court to impose a penalty against the

Union. That is particularly so in circumstances where Mr Webb is persisting with allegations against Messrs Froggatt and Cross personally. It may well be that Mr Webb is substantially disaffected over what transpired in 2008. However, in view of what has transpired in the interim, to allow these proceedings to continue now will at best result in a decision, which will have no utility and will result in not only the resources of the Court being wasted but also of the parties themselves. There is no issue of wider public interest in the matter such as that referred to in *Simpson*.

[26] In all the circumstances it is appropriate that the pleadings be struck out and there is an order dismissing the proceedings in their entirety. In the circumstances, therefore, there is no need to go on to deal further with the application for non-party disclosure. That again would have resulted in substantial inconvenience with the bank concerned. I am not satisfied that Mr Webb established appropriate grounds to put the bank to that inconvenience. It would simply be on the basis that he has a perception that there are documents disclosing some information to enhance his allegations.

[27] In view of the order striking out the proceedings they are now at an end. There is an issue of costs remaining. Costs normally follow the event. If the defendant wishes to pursue an order for costs, it may file a memorandum dealing with such an application within 14 days. Mr Webb will have 14 days thereafter to file any answer. The Court will then deal with any issue of an award of costs.

M E Perkins
Judge

Judgment signed at 1 pm on 16 August 2013