IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 195
EMPC 315/2018

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out proceeding
BETWEEN	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Plaintiff
AND	JCE Defendant

Hearing: On the papers

Appearances: K Radich, counsel for plaintiff
A Toohey, counsel for defendant

Judgment: 19 December 2019

JUDGMENT OF JUDGE K G SMITH
(Application to strike out proceeding)

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[1] In June 2012 the defendant was assaulted while working at the Otago Corrections Facility. The assault was extremely serious. Belatedly, well after the defendant returned to work, he was diagnosed as suffering from post-traumatic stress disorder (PTSD) and a depressive illness caused by the assault.

[2] A series of events stemming from the PTSD, and depression, led to an agreement between him and the Chief Executive of the Department of Corrections to

end his employment on 5 October 2015. The agreement was called a medical retirement.

[3] The defendant successfully pursued a personal grievance against the department, alleging unjustified action causing him an unjustified disadvantage. As well as those grievances the defendant pursued claims against the department for failing to meet an implied contractual duty and statutory duty to provide a safe workplace.[1] The department was ordered to pay him lost remuneration and compensation for humiliation, loss of dignity and injury to feelings.[2]

[4] At the time of the assault the defendant was working in a part of the Otago Corrections Facility called J wing. It is a unit housing high security prisoners and he was supervising ten unlocked prisoners on his own. Part of the Authority's consideration of the duties owed to the defendant was an analysis of staffing requirements in the wing by reference to three departmental documents; a Workplace Development Project, a Resource Allocation Model for Corrections Officers issued on 29 June 2012 and a document labelled Workplace Development Staff Resourcing Model User Guide from August 2002 (collectively described as User Guides).

[5] The Authority concluded that the department did not meet the staffing ratios for corrections officers in J wing prior to the assault. A finding of fact was made that the defendant was alone when there should have been two corrections officers available.

[6] The department did not accept the Authority's analysis, or the conclusion reached about staffing in J wing at the time of the assault. It challenged the determination but only on a discrete point about the Authority's findings relating to staffing requirements in the wing.

Non-publication

[7] The Authority made an order pursuant to cl 10 of sch 2 to the Employment Relations Act 2000 (the Act) prohibiting from publication the name of the defendant

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1 *JCE v The Chief Executive of the Department of Corrections* [2018] NZERA Christchurch 130.
2 Pursuant to ss 123(1)(b), 128 and 123(1)(c)(i) of the Employment Relations Act 2000.

or any information that might identify him. I am satisfied that it is appropriate for non-publication to continue and, pursuant to cl 12 of sch 3 to the Act order accordingly. For consistency this judgment uses the same descriptor for the defendant as the Authority used for him.

The challenge

[8] The department's proceeding elected a non-de novo challenge and did not seek to remove, or reduce, the remedies the Authority ordered it to pay to the defendant.[3]

[9] The department's election meant it was required to plead those parts of the determination it claimed contained any error of law or fact, or any question of law or fact to be resolved.[4] The errors alleged to have been made were confined to two paragraphs in the determination at [58] and [59]. Those paragraphs read:[5]

> [58] The conclusion I draw from this information is that a yard in which prisoners are supervised is distinct from a cluster group of prisoners. What this means is staffing ratios for the cluster group in J wing does not include any Corrections Officers in the yard adjacent to J wing.
>
> [59] On this basis, I find that Corrections did not meet the staffing ratios for Corrections Officers for J wing prior to the assault on JCE. CO1 was in the yard and CO3 was not in J wing - JCE was alone in J wing and there should have been two Corrections Officers.

[10] The relief sought by the department was an order declaring that the Authority had erred in relation to those paragraphs and a declaration that the department's interpretation of the User Guides was correct.

[11] Initially, JCE participated in this proceeding by filing a statement of defence. In a general way he sought to uphold the Authority's findings but has now applied to strike out the proceeding.

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3 Employment Relations Act 2000, subs 179(1) and (4).
4 Employment Relations Act 2000, subs 179(3)(a) and (4).
5 *JCE v The Chief Executive of the Department of Corrections*, above n 1. The references to "CO" are short-hand for corrections officers.

The application to strike out

[12] JCE sought to strike out the proceeding because he considered it to be an abuse of process for the following reasons:

(a) the challenge is moot because the outcome will have no practical effect on the parties before the Court; and

(b) there are no circumstances that would allow a challenge that is otherwise moot to be permitted to proceed.

[13] The application contained two supplementary grounds. One of them was that it would be a breach of natural justice to allow the proceeding to continue, because the outcome may affect other corrections officers, and their unions, but they are not parties to it. The second ground was about the defendant's ongoing illness and lack of money to mount a defence even if he wanted to continue.

[14] The application relied on r 15.1 of the High Court Rules 2016 and the department's concession that it does not intend its challenge to affect anything other than the conclusions reached at paragraphs [58] and [59].

[15] The department opposed the application. Its grounds of opposition fell into two broad but related parts. In the first part the grounds were that the challenge was not moot and the department had a right to have it heard and decided. This ground disputed the appropriateness of relying on the High Court Rules, so that only challenges that are frivolous and vexatious could be struck out. In the second part, as an alternative, the department invited the Court to use its discretion to allow the proceeding to be continued because of the importance of its subject matter.

Issues

[16] Three issues are raised by the application:

(a) Does the Court have jurisdiction to strike out the department's proceeding?

(b) If it does have jurisdiction, is the proceeding moot?

(c) If it is moot, should it be allowed to proceed anyway?

Jurisdiction

[17] The application, and Ms Toohey's submissions for JCE, sought to apply r 15.1 of the High Court Rules. If that rule is applied, the Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action, or is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of the processes of the Court.[6] Her submissions concentrated on r 15.1(1)(d); that allowing the proceeding to continue would be an abuse of process because it is moot as between the parties. She sought to rely on the summary of mootness by Judge Holden in *Auckland Council v Drought* where r 15.1 was applied.[7]

[18] Ms Radich began her submissions on jurisdiction with an analysis of the nature of a challenge, the Court's role in problem solving in relation to a challenge, and the statutory requirement for the Court to make its own decision on matters before it.[8] The general thrust of these submissions was that statements of principle from courts of general civil jurisdiction are of limited assistance.

[19] In summary, Ms Radich's submissions were:

(a) There was no need to refer to the High Court Rules because this is not a situation where "no form of procedure" had been provided, which is a requirement before reg 6(2)(a)(ii) of the Employment Court Regulations 2000 can apply allowing reference to those rules.

(b) Striking out a proceeding is a substantive outcome not a procedural one so reg 6(2) does not apply.

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6 High Court Rules 2016, r 15.1(1)(a)-(d) inclusive.
7 *Auckland Council v Drought* [2019] NZEmpC 63.
8 Relying on Employment Relations Act 2000, ss 179(1) and 183(1).

(c) The procedure for striking out a proceeding under the Act is reserved for cases that are frivolous or vexatious within the meaning of cl 15 of sch 3 to the Act. The application did not claim that the challenge was either frivolous or vexatious.

(d) The Court has limited jurisdiction to strike out proceedings arising from a combination of ss 162, and 221 of the Act and cl 15 of sch 3 as well as by relying on an inherent power to control its own processes.[9]

(e) Where *Drought* applied r 15.1 that decision was wrong and should not be followed.

(f) As an alternative submission, the decision in *Drought* is distinguishable because in that case the challenge was a collateral attack on the Authority's determination.

[20] I do not accept Ms Radich's submissions. They were similar to the unsuccessful arguments presented in *Lloyd v The Museum of New Zealand Te Papa Tongarewa*.[10] An attempt was made in that case to argue that the Court's power was limited by cl 15 of sch 3, as it was at that time.[11] The argument was unsuccessful because the Court held that it had jurisdiction for several reasons including by reference to the High Court Rules via reg 6.

[21] The short point is that r 15.1 of the High Court Rules has been used previously without criticism. Furthermore, the Court of Appeal in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union Inc* commented that there was no reason for this Court to approach strike out applications on any basis other than that applying in the High Court.[12]

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9 See *Lloyd v The Museum of New Zealand Te Papa Tongarewa* [2002] 2 ERNZ 356.

10 *Lloyd*, above n 9.

11 Originally cl 15 dealt with striking out frivolous and trivial proceedings. The clause was substituted by the present clause on 1 April 2011 by s 39(2) of the Employment Relations Amendment Act 2010 and the reference to dismissing a matter as "frivolous or trivial" became "frivolous or vexatious".

12 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union Inc* [2005] ERNZ 1053 at [13]. See as an example *Webb v New Zealand Tramways and Public Passenger Transport Employees Union Inc* [2013] NZEmpC 154.

[22] If any further analysis is needed, the Act and the regulations do not provide a procedure for considering an application to striking out a proceeding where the grounds relied on are other than a claim that it is frivolous or vexatious. There is an obvious gap in the regulations that is able to be filled by the High Court Rules.

[23] I consider the approach in *Drought* to be correct and that the Court has jurisdiction to strike out by applying r 15.1.[13]

Is the proceeding moot?

[24] In *Drought*, Judge Holden described a moot point in a proceeding as one that is academic or abstract and having no practical effect on the rights of the parties to the litigation.[14] The decision in *Drought* was made in reliance on the Supreme Court decision in *Gordon-Smith v R*.[15]

[25] In *Gordon-Smith*, the Court held that the traditional position is that New Zealand Courts will not hear a case where the "substratum" of the litigation has gone and there was no matter remaining in actual controversy requiring a decision.[16] The Court went on to say a proceeding is moot if there is no live issue, avoiding on policy grounds decisions that are based on theoretical considerations. There is an exception, if a question arising in a case that is otherwise moot is one of public importance that is highly likely to come before the Court at some point.[17] While *Gordon-Smith* dealt with jury vetting in a criminal case the same approach applies to civil cases.[18]

[26] Ms Toohey's submissions on the proceeding being moot can be succinctly summarised. Her argument was that it is because, whatever the result, there will be no adverse effect on the outcome achieved in the Authority by JCE. From his perspective, any ongoing dissatisfaction the department has with the determination is immaterial and of no consequence to him. Her submission was that he should not be

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13 *Drought*, above n 7.
14 *Drought*, above n 7, at [21].
15 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721.
16 *Gordon-Smith v R*, above n 15, at [14]. Relying on *Finnegan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA) and by reference to *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 at 114.
17 *Gordon-Smith v R*, above n 15, at [24].
18 *Gordon-Smith v R,* above n 15, was considered in *Orlov v ANZA Distributing (NZ) Ltd (in Liq)* [2011] NZSC 28, [2011] 2 NZLR 72.

put to any further expense or inconvenience by continued participation in the proceeding.

[27] Ms Radich accepted that to avoid a proceeding being considered to be moot there needs to be a live issue. She submitted there was such an issue, because of the department's intention to dispute the Authority's decision as it relates to staffing ratios and its interpretation of the User Guides. She considered that the Court's decision on such a dispute would have a practical effect on the rights of the department as a statutory employer and the interpretation issue may have ongoing consequences. Those consequences included, under s 8 of the Corrections Act 2004, ensuring the safe custody and welfare of prisoners. She noted that JCE's statement of defence denied any error had been made by the Authority, which, she argued, was an indication the dispute remained a live issue.

[28] To reinforce its opposition to the application the department filed an affidavit of Jack Harrison, who is one of its senior managers. Mr Harrison acknowledged that the department's proceeding would not affect JCE personally. However, Mr Harrison considered that would not be an issue for JCE because he was not expected to give evidence. That was because the challenge involved interpreting documents JCE was not involved in drafting or using. Exhibited to Mr Harrison's affidavit were three proposed briefs of evidence for witnesses who would give evidence if the challenge proceeded. They were for the Senior Advisor Operations in the Custodial Practice Team at National Office for the department, a Lead Advisor – Prison Facilities for all prison development and a Unit Manager. All of that proposed evidence was about staffing needs in prisons and providing context to assist in interpreting the User Guides. None of that proposed evidence was about the defendant or his circumstances. The evidence did not seek to reconsider what happened when JCE was assaulted.

[29] In *Drought*, Judge Holden referred to r 15.1 allowing the Court to strike out a proceeding if to permit it to continue would be an abuse of the processes of the Court.[19] In that case the Court referred to "abuse" as being a technical label that encompasses examples where the proceeding was brought for an improper purpose, or was

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[19] *Drought*, above n 7, at [18].

attempting to relitigate something that had already been determined, or where it was inevitable that a remedy would be refused, even if one or more of the grounds were made out.[20]

[30] The conclusion in *Drought* was that a proceeding may be struck out for an abuse of process if it is moot.[21] I agree with that analysis and conclusion. Applied to this case, the proceeding is moot as between the department and JCE. The case the department intends to run is entirely about staffing and how to interpret the User Guides as was evident from Mr Harrison's affidavit. It has absolutely no consequence for the defendant. In those circumstances I do not accept that there is a live issue. Staffing ratios, and the User Guides, are important to the department but they are not relevant to JCE. He has inadvertently become tangled up in the department's concerns about staffing when he has no ongoing interest in that subject. There is nothing left to decide that would affect, or potentially affect, the dispute that initiated this litigation.

[31] Finally, one of the arguments Ms Radich relied on was that the department could have filed a challenge disputing the whole determination, in which case staffing ratios and the User Guides would have been before the Court and JCE would have been placed in the same position as he is now in. There is no substance to that submission, for the obvious reason that the department did not challenge the determination on this wider basis.

[32] The defendant has made out a case for the proceeding to be struck out, unless there is a sufficient reason for it to be allowed to continue.

Should the proceeding be allowed to continue?

[33] A case that is moot may be allowed to continue if the Court exercises a discretion to do so. The discretion requires the matter raised to be one of public importance which is highly likely to come before the Court again at some point.[22]

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20 *Drought*, above n 7, at [19].

21 *Drought*, above n 7, at [19] referring to *Friends of Pakiri Beach v McCallum Bros Ltd* [2008] NZCA 87, [2008] 2 NZLR 649; while that case involved the inherent jurisdiction of the High Court as the source of the power to strike out the proposition, that an abuse of process may render a proceeding moot, remains applicable.

22 *Gordon-Smith v R*, above n 15, at [24].

[34] In support of the Court exercising the discretion in favour of the department Ms Radich relied on the following:

(a) *Drought* was wrongly decided where it referred to a general proposition or policy that courts do not decide cases where the decision would have no practical effect on the rights of the parties.

(b) The Authority's finding risks a significant and ongoing impact on the staffing and resourcing of prisons throughout New Zealand, because the documents interpreted by it are applied nationwide.

(c) An acknowledgement by the defendant that the User Guides may be important to the department.

(d) The finding made by the Authority represents a change from what has been the status quo since 2002.

[35] I do not accept Ms Radich's submission about *Drought*. The passage from that judgment she criticised was no more than a summary of decisions examining the circumstances in which the discretion was considered.

[36] As to the balance of Ms Radich's submissions, she sought to draw parallels between this case and the decisions in *Attorney-General v David* and *Gordon-Smith* so that the discretion should be exercised in the department's favour.[23] In *David*, the critical issue was about the rights of parties in an Authority investigation meeting to cross-examine witnesses. In that case the proceeding was moot, because there had been a settlement between the parties, but the right to cross-examine was an issue of such public importance that the Court of Appeal decided to allow the interveners to continue with the appeal. The issue was significant because it affected all investigation meetings. In *Gordon-Smith*, the issue of public importance was jury vetting.

[37] The department's dissatisfaction with the Authority's interpretation of its staffing ratios and User Guides cannot be elevated to being of public interest in the

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[23] *Attorney-General v David* [2002] 1 NZLR 501 (CA).

same way that prompted the decisions in *David* and *Gordon-Smith* where the subject matter had far reaching implications. The determination has no ongoing implications for the department. It resolved the dispute between it and JCE but in doing so did not create a binding precedent that must be applied in any future dispute. It follows that the determination does not have the significant and ongoing impact feared by the department.

[38] For that matter, Mr Harrison did not indicate that the determination caused any staffing difficulty in prisons, or had led to disagreement or confusion about what is required. It is notable that the department has taken no steps to seek to invite intervention in the proceeding by the unions representing corrections officers.

[39] Even if there was an issue of public importance, that is not sufficient to place the defendant in a position where he should remain interested in the proceeding. If I had been persuaded that this proceeding raised an issue sufficient to consider allowing it to continue, the discretion would not have been exercised in favour of doing so. In reality, the department is seeking a declaration where the obvious contradictors are its existing employees, and their unions, but not JCE.

[40] I am satisfied that this proceeding is moot and that there are no grounds to exercise the discretion to allow it to continue and be heard.

Outcome

[41] The proceeding is struck out.

[42] The defendant is entitled to an order of costs. He may file a submission seeking costs within 20 working days. The department has 20 working days to respond and he has a further 10 working days to file any reply that might be required.

K G Smith
Judge

Judgment signed at 2.30 pm on 19 December 2019