IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 97
EMPC 257/2016
EMPC 303/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a stay of proceedings
AND IN THE MATTER	of an application for a strike-out
BETWEEN	ANDRE NEL Plaintiff
AND	ASB BANK LIMITED Defendant

Hearing:	6 July 2017 (heard at Auckland)
Appearances:	C W Stewart and E Taylor, counsel for plaintiff S Dench and S Kopu, counsel for defendant
Judgment:	10 August 2017

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B A CORKILL

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[1] In the first interlocutory judgment which I delivered in this proceeding, I considered a range of discovery issues.[1] Two further and related issues now require resolution.

[2] They both centre on a potential issue which Mr Nel wishes to argue for the purposes of his challenge, which is that there was disparity of treatment when he was dismissed for serious misconduct.

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1 *Nel v ASB Bank Ltd* [2017] NZEmpC 56.

[3] The first issue is whether the pleading as to disparity of treatment in Mr Nel's statement of claim (EMPC 257/2016) should be struck out. For ASB Bank Ltd (ASB), Mr Dench argues that as currently pleaded the examples of disparity fall outside the scope of the applicable legal tests. For Mr Nel, Ms Stewart argues that having regard to all the circumstances, this is not the case and that the application for strike-out should be dismissed.

[4] The second issue is whether orders relating to disclosure of disparity documents, as made in my first interlocutory judgment, should be stayed pending determination by the Court of Appeal of ASB's application for leave to appeal that judgment. ASB's application to this effect is also opposed.

Background

[5] In the first interlocutory judgment, I outlined the background to the challenges which are before the Court, in some detail. For convenience, I repeat the essential details. At issue are the circumstances which resulted in Mr Nel's termination of employment, following service of some 18 years. Mr Nel faced serious misconduct allegations which arose from certain interactions he had with an employee, Ms A, who reported to him. He says that he reasonably believed she had developed a romantic interest in him; that they worked in a workplace where staff engaged in banter which was at times sexually suggestive; that the use of profanities was common, as the working environment was "generally relatively smutty"; and Ms A participated fully in this workplace environment.

[6] Following a series of private Facebook exchanges between Mr Nel and Ms A, she told him that his feelings towards her were not reciprocated, and that she wished to maintain a strictly professional relationship. He says he immediately apologised and set about repairing the relationship. A disciplinary process followed which resulted in the decision to terminate on the ground that Mr Nel had:

- failed to comply with ASB's Code of Conduct;
- failed to comply with ASB's Harassment, Discrimination, Bullying and Offensive Behaviour Policy;

- failed to act consistently with ASB values, including its value of integrity; and

- failed to meet ASB's expectations of Mr Nel as a senior manager.

[7] Mr Nel challenges both the substantive and procedural steps which were taken. He contends that a significant aspect of his claim was that the way in which he was treated was inconsistent with how others were treated in comparable circumstances.

[8] This aspect of Mr Nel's claim arises from the following paragraph of his statement of claim:

> 42. The plaintiff's dismissal was not what a reasonable employer could have done in the circumstances at the time of the dismissal pursuant to s 103A of the Employment Relations Act. In particular:
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> a. …
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> d. The defendant's finding and action of dismissal amount to disparity of treatment against the plaintiff in light of the defendant's workplace culture of alcohol abuse and profane language and other incidents involving serious concerns of bullying, use of recreational drugs, sexual and racial harassment and breach of confidentiality which the defendant was aware of but did not investigate and/or take disciplinary action;
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> In particular:
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> i. On 14 May 2015, the plaintiff sent an email to Mr Twomey raising serious concerns about a staff member's behaviour including alleged drug-taking. Mr Twomey took no action or no adequate action to investigate these concerns and/or take disciplinary action against the staff member concerned;
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> ii. On 2 July 2015 a staff member sent an email to Mr Twomey and the plaintiff raising concerns about serious workplace bullying by a staff member including alleged drug-taking; despite assuring the plaintiff that he would deal with it Mr Twomey took no action or no adequate action to investigate and/or discipline the staff concerned;
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> iii. On 28 September the plaintiff raised serious concerns with Mr Twomey about behavioural issues of a staff member including a crude sexual remark to a customer. Mr Twomey took no action or no adequate action to investigate and/or discipline the staff member concerned;

…

ASB's application for strike-out

[9] The essence of ASB's application for a strike-out order is that the pleaded circumstances could not be said to be "truly parallel to" or "substantially similar to" the circumstances in which Mr Nel was dismissed; it is asserted that these phrases describe the relevant threshold test for a disparity allegation. It is submitted that the pleading is too wide and should be struck out or re-pleaded so that it is confined to circumstances in which disparity of treatment is able to be recognised.

[10] In support of the application, ASB relies on an affidavit from Mr Kiran Vallabh, which was previously by the Court for the purposes of the first interlocutory judgment, where it is summarised.

[11] In his submissions, Mr Dench stated that the starting point for a consideration of the topic of disparity is the Court of Appeal decision in *Chief Executive of the Department of Inland Revenue v Buchanan.*[2] He referred to the court's statement that the correct approach to an analysis of disparity requires consideration of three issues, to which I shall return below.

[12] Mr Dench also developed a submission based on a judgment of the United Kingdom Employment Appeal Tribunal, *Hadjioannou v Coral Casinos Ltd,* to which the Court of Appeal had made reference.[3] In that case, the Tribunal had accepted a submission that an argument by a dismissed employee based upon disparity could only be relevant in limited circumstances; one of these circumstances was where there were "truly parallel circumstances" in other cases. Mr Dench referred also to another observation which had been made in *Hadjioannou* that other cases should be "truly similar, or sufficiently similar" to the subject case.

[13] Mr Dench said that the Court of Appeal went on to observe without reservation that the passage from *Hadjioannou* which it cited had been approved by the English Court of Appeal in *Paul v East Surrey District Health Authority,* as well

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2 *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA).
3 *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 (EAT); cited in *Buchanan* at [43].

as later United Kingdom decisions.[4] He said that the court in *Buchanan* "understood and implicitly approved the test in *Hadjioannou*, together with its note of caution".

[14] Mr Dench went on to submit that what was required to constitute "a prima facie case of disparity" appeared not to have been defined explicitly in New Zealand; nevertheless the courts had required evidence which showed at least similarity between the conduct of the employee in the case before it, and the comparator conduct. He said that courts had also recognised an implicit need for comparator conduct to have occurred within a reasonable timeframe of the employee's conduct, although not always within a short timeframe.

[15] These submissions were supported with reference to numerous cases to which reference will be made later in this judgment.

Mr Nel's case in opposition

[16] Mr Nel's grounds of opposition are, first, that he was dismissed for failure to comply with ASB's Code of Conduct and Harassment, Discrimination, Bullying and Offensive Behaviour Policy and other policy documentation, all of which describe ASB's expectations in a wide range of circumstances. He wishes to compare these circumstances with instances of breaches of the Code of Conduct or other policies or expectations by other staff members, which in some instances were more serious than Mr Nel's conduct. These instances had not been investigated and/or had not resulted in disciplinary action at least to the point of dismissal. There was accordingly disparity of treatment. Mr Nel asserts that the pleading is not too wide, since it referenced conduct like his which fell under the Code of Conduct and policy documentation.

[17] Furthermore, it is argued that it would be inappropriate to strike out the claim summarily, unless the Court could be certain that it could not succeed; in this case there could be no such certainty. The cause of action is not so clearly untenable that it cannot possibly succeed. The Court should be slow to strike out a claim in a developing area of law, of which this was arguably an example.

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4 *Paul v East Surrey District Health Authority* [1995] IRLR 305; cited in *Buchanan* at [44].

[18] Ms Stewart developed these assertions with reference to previous decisions of this Court, particularly those which emphasise it is not desirable to define disparity exhaustively, because whether any asserted disparity could impugn a dismissal would involve a careful analysis of all relevant facts and circumstances.

Strike-out principles

[19] The following strike-out principles can be taken from the Court of Appeal's judgment in *Attorney-General v Prince*:[5]

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend, however, to pleaded allegations which are entirely speculative and without foundation.

(b) A cause of action must be clearly untenable before it may be struck out.

(c) The jurisdiction is to be exercised sparingly, and only in clear cases, reflecting the Court's reluctance to terminate a claim or defence otherwise than on its merits.

(d) The Court should be particularly slow to strike out a claim in any developing area of the law: for example, where a duty of care is alleged in a new situation.

[20] In *Couch v Attorney-General*, Elias C J and Anderson J emphasised that it is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed:[6]

[21] In *Attorney-General v McVeagh*, the Court of Appeal stated that a court may receive affidavit evidence on a strike-out application, but it should not attempt to resolve genuinely disputed issues of fact.[7] Evidence which is inconsistent with the pleading would not normally be considered, since the application is dealt with on the footing that the pleaded facts can be proved – unless the essential factual allegations

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5 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267 – 268.
6 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
7 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

are so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[22] These principles apply to proceedings in this Court.[8] I shall refer to them again later.

Analysis

[23] The submissions of counsel raise the following issues:

(a) Did the Court of Appeal in *Buchanan* impliedly approve the UK formulation, of "truly parallel circumstances" or "cases which are truly similar, or sufficiently similar", as being the appropriate test for disparity?

(b) If not, what does constitute disparity?

(c) Is there a requirement that comparator conduct must have occurred within a reasonable timeframe of the subject employee's conduct.

[24] Before dealing with each of these issues, however, it is necessary to describe why an allegation of disparate treatment may be relevant to a dismissal.

[25] The rationale was well expressed, with respect, by this Court in *Rapana v Northland Co-Operative Dairy Company Ltd*, when the Court noted:[9]

> … Where, in the course of an inquiry which may lead to dismissal of an employee (or indeed to other disadvantage in employment) a question of parity of treatment of employees is in issue, the reasonable and fair treatment of the employee may involve consideration by the employer of relevant prior incidents and consequences of them for other employees. A fair and reasonable employer will treat employees in a fair and reasonable manner. Reasonable consistency is one facet of fairness. To arbitrarily impose consequences for materially similar breaches and/or in respect of employees

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8 *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13], *Milne v Air New Zealand Ltd* [2014] NZEmpC 101 at [18], *Ahmed v Connect Supporting Recovery Inc* [2016] NZEmpC 127 at [14] and *Kaipara District Council v McKerchar* [2017] NZEmpC 55 at [162] – [163] and [190] – [193].

9 *Rapana v Northland Co-Operative Dairy Co Ltd* [1998] 2 ERNZ 528 (EmpC) at 537.

> whose circumstances are materially similar, may not be fair and reasonable treatment. …

[26] This passage emphasises that allegations of disparity are only relevant for the purpose of deciding whether an employer acted in a fair and reasonable way (currently under s 103A of the Employment Relations Act 2000 (the Act)).

Did the Court of Appeal approve the UK formulation?

[27] As already mentioned, Mr Dench submitted that the Court of Appeal implicitly approved the passage which it cited from *Hadjioannou,* in *Buchanan*.

[28] The passage was cited at a point where the Court summarised a submission made by counsel for the appellant to the effect that disparity would be relevant to an issue of fairness of a dismissal only in very limited circumstances. These circumstances were described in this way:[10]

> (a) If there was evidence that employees had been led by an employer to believe that certain categories of conduct would either be overlooked, or at least would not be dealt with by the sanction of dismissal.
>
> (b) Cases in which evidence about decisions made in relation to other cases support an inference that the purported reasons stated by the employer are not the real or genuine reason for dismissal.
>
> (c) Decisions made by an employer in truly parallel circumstances; these cases may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the employee's conduct with a penalty of dismissal and that some lesser penalty would have been appropriate.

[29] The Court recorded that on the basis of this submission there was no suggestion that the first and second categories identified in the UK decision applied; it was only the third which could be applicable, and for the appellant it was argued that it did not.

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[10] *Hadjioannou v Coral Casinos Ltd*, above n 3, at [24] – [25].

[30] Against that background, the Court of Appeal described the three separate issues which it was well established had to be considered for the purposes of a disparity argument:[11]

(a) Was there disparity of treatment?

(b) If so, was there an adequate explanation for the disparity?

(c) If not, was the dismissal justified notwithstanding the disparity for which there was no adequate explanation?

[31] The Court then stated that the appeal turned on whether this Court had adequately considered the third of these issues; that is, whether the dismissal could be justified notwithstanding the disparity for which there was no explanation.

[32] In a later passage in the judgment, the Court of Appeal made it clear that when dealing with the case at first instance, the Employment Relations Authority (the Authority), had considered a schedule of some 35 cases which had been the subject of an audit.[12] The Authority had found that there were three workers, investigated as part of the audit, who were given final warnings rather than being dismissed. Those workers were thus given a chance to retain their employment, which was not an opportunity extended to the respondents; yet their circumstances were "very similar if not almost exactly the same" as those of the three identified comparator employees.[13]

[33] The Court of Appeal held that the third issue had to be assessed on the basis of these findings; the question was whether the dismissal could be justified notwithstanding disparity for which there was no adequate explanation.

[34] In short, the Court of Appeal was not required to consider, and did not assess, the first two issues which related to whether there was disparity and/or whether there was an adequate explanation for it. It proceeded on the basis of a finding already

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11 *Chief Executive of the Department of Inland Revenue v Buchanan*, above n 2, at [45].
12 At [59].
13 At [67].

made that the comparator conduct was very similar, if not exactly the same. It did not need to consider whether any other instances could or should have been considered.

[35] There are two other points to be made regarding the reference by the Court of Appeal in *Buchanan* to the UK decision *Hadjioannou*. First, although it used such phrases as "truly parallel circumstances" and "truly similar or sufficiently similar" with reference to comparator cases, elsewhere the Employment Appeal Tribunal also used the descriptor "essentially similar".[14]

[36] The Tribunal also stated with reference to the statutory provision which was the subject of the appeal, s 57(3) of the Employment Protection (Consolidation) Act 1978:

> The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if Tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or Tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation.

[37] In light of this dicta, it is inherently unlikely that the Court of Appeal in *Buchanan* when citing the extract that it did from *Hadjioannou* intended to "implicitly approve" the descriptors to which reference had been made in *Hadjioannou*.

What does constitute disparity?

[38] It is necessary to go on to consider whether there is in fact an established test of disparity in New Zealand.

[39] Mr Dench referred to many cases in this Court which he argued showed that in practice disparate treatment was only ever considered where there were "truly

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[14] *Hadjioannou v Coral Casinos Ltd*, above n 3, at [23].

parallel circumstances"; and that those circumstances were limited. He said this was demonstrated by a number of post-*Buchanan* judgments such as *Go Bus Transport Ltd v Hellyer;*[15] *Wikaira v Chief Executive of Department of Corrections;*[16] *Thorne v KiwiRail Ltd;*[17] *H v A Ltd;*[18] *George v Auckland Council;*[19] *Kaipara v Carter Holt Harvey Ltd;*[20] *Smith v Attorney-General*[21] and *Fuiava v Air NZ Ltd.*[22] Reference was also made to cases which pre-dated *Buchanan*, such as *Rapana*;[23] *NZFP Pulp and Paper Co Ltd v Horne;*[24] *New Zealand Police Association Inc v Commissioner of Police*[25] and *Sutherland v Air New Zealand Ltd*.[26]

[40] However, what these authorities establish is that an analysis as to parity of treatment is necessarily case-specific. As one would expect, courts have focused on the particular allegations of disparity which were placed before them. Moreover, when considering those instances, judges have considered all the circumstances in order to determine whether it could be said there was sufficient similarity in the comparative instances, the assessment being one of fact and degree.

[41] A range of descriptors has been regarded as appropriate in particular circumstances – including those referred to by Mr Dench. However, in only one authority has there been a discussion as to whether there is, or should be, a test for disparity.

[42] That authority is *Sutherland*. In that case the Court said this:[27]

> Mr Timmons for the respondent sought to establish a test of disparity. In his memorandum of written submissions Mr Timmons initially argued:

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15 *Go Bus Transport Ltd v Hellyer* [2016] NZEmpC 177.
16 *Wikaira v The Chief Executive of the Department of Corrections* [2016] NZEmpC 175.
17 *Thorne v KiwiRail Ltd* [2015] NZEmpC 48.
18 *H v A Ltd* [2014] NZEmpC 189. Note that while this case was reversed on appeal (*A Ltd v H* [2016] NZCA 419), leave on the disparity issue was declined, it being fact-specific and not an issue of law (at [55]).
19 *George v Auckland Council* [2013] NZEmpC 179.
20 *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40, (2012) 9 NZELR 545.
21 *Smith v Attorney-General* [2009] ERNZ 467 (EmpC).
22 *Fuiava v Air NZ Ltd* [2006] 1 ERNZ 806.
23 *Rapana v Northland Co-Operative Dairy Company Ltd*, above n 12.
24 *New Zealand Forest Products Pulp and Paper Co Ltd v Horn* [1996] 1 ERNZ 278.
25 *New Zealand Police Assoc Inc v Commissioner of Police* [1997] ERNZ 199 (EmpC).
26 *Sutherland v Air New Zealand Ltd* [1993] 2 ERNZ 386 (EmpC).
27 At [397].

> In order raise a prima facie case of disparity, the appellant must show that he has been treated differently by the employer in relation to the same set of circumstances.
>
> In the course of oral argument, however, Mr Timmons retreated somewhat from this inflexible position and conceded that disparity in any case is a question of degree but submitted that there "must be a marked degree of similarity, a substantial similarity" between the cases for comparison. I do not think it is desirable for this Court to exhaustively define disparity. There must, I accept, be a sufficient degree of similarity and materiality for comparison to be made. But I think it is preferable for the Court or Tribunal to assess whether the proven facts of any case amount to such. Factors such as identity of employer, position held by the employees, the general nature of the misconduct, and the like are all relevant and will assist in the assessment of whether a valid comparison can be made.

[43] The circumstances of the case related to a dismissal of an Air New Zealand Ltd employee, following an incident when he was on duty overseas. The employee, after consuming a significant quantity of alcohol, had abused a fellow employee for the other's involvement in an employer-supported employee organisation.[28]

[44] The Court recorded that a submission had been made that alleged serious misconduct had occurred whilst the employee was drunk, which would justify dismissal, and that this differed from comparator instances which involved other employees who had not been intoxicated.

[45] As to this submission, the Court said:[29]

> I think to focus upon the aspect of drunkenness and, by its exclusion from the findings of the company in the other cases, to assert there was not disparity, is too narrow. I should have regard, also, to the relative seniorities and experience of the employees involved, the potential for harm or a risk to safety, the bringing of the company into contempt in the eyes of its passengers or others with whom it had to deal, and the like. To say that Mr Sutherland's circumstances were sufficiently removed from those of other employees because he became drunk and it had not been established that others had not been intoxicated, is to focus upon a select aspect of the misdemeanour and to ignore *the whole picture in the analysis of disparity*.
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> (emphasis added)

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28 *Sutherland v Air New Zealand Ltd*, AT 129/92, 20 July 1992, at 2 – 3.
29 At [398].

[46] This authority, as well as others, was cited in the subsequent decision of *Rapana*.[30] These principles were not challenged in the subsequent appeal, *Northland Co-operative Dairy Company Ltd v Rapana*.[31]

[47] I respectfully agree with the dicta in *Sutherland*. Because the analysis as to what may constitute relevant comparative circumstances is inevitably so case-specific, it is not necessary, or desirable, to define the term – albeit there must be, as all the authorities state, a sufficient degree of similarity for the purposes of the assessment which is to be made for the purposes of s 103A of the Act.

[48] Mr Dench attempted to confine potential comparator cases to instances of similar *conduct*. However, the authorities establish that a disparity allegation requires a consideration of similar *circumstances*. It is that focus which is relevant.

[49] An example of this proposition is found in *Wikaira*.[32] The case involved an issue as to whether dismissal of a corrections officer was justified. Following a family incident, the employee had faced a charge of wilful damage of a motor vehicle; she was subsequently discharged without conviction. She did not tell her employer of the events that led to her being charged, or that she was to appear, or had appeared in court, despite several court appearances. Subsequently she was dismissed on grounds of serious misconduct arising from breaches of the Department of Corrections' policies and procedures, particularly its Code of Conduct.

[50] The circumstances of several other employees were compared with those of the plaintiff, even though their conduct involved different types of offending such as domestic assault and wilful damage, assault and a third instance where the employee had been charged with assault and had obtained permanent name suppression.[33] Although the conduct of other employees was different, they had all faced criminal charges, and had been discharged without conviction. They were not dismissed.

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30 *Rapana v Northland Cooperative Dairy Company Ltd*, above n 10.
31 *Northland Co-operative Dairy Company Ltd v Rapana* [1999] 1 ERNZ 361 (CA) at [10].
32 *Wikaira v The Chief Executive of Department of Corrections*, above n 16.
33 At [171] – [176].

Their circumstances were regarded as being sufficiently similar as to lead to a finding that there was a lack of parity in the subject employee's treatment.[34]

[51] A yet further illustration is provided by the case which I considered in the first interlocutory judgment: *New Zealand Police Association Inc v Commissioner of Police.*[35] Notwithstanding that the offending of a comparator employee did not match the plaintiff's offending, the Judge stated in his substantive judgment:[36]

> … I conclude that serious misconduct by another police officer, in circumstances occasioning the disciplining of that officer, is relevant in a comparative way to the punishment of dismissal imposed upon Mr Neilsen for his offending, notwithstanding that the offending by the compared officer did not duplicate, through matching identifying characteristics, as it were, the offending by Mr Neilsen.

[52] In short, when making a disparity assessment, it will be necessary to consider whether the comparative conduct is sufficiently similar. Consideration should be given to all relevant circumstances, including context. The assessment will be case-specific. The analysis is for the purpose of determining whether the dismissal or other step taken meets the statutory test of justification under s 103A of the Act.

Timing of comparator events

[53] Mr Dench stated that courts have also recognised an implicit need for comparator conduct to have occurred within a reasonable timeframe of the employee's conduct, although not always within a short timeframe. No authority was cited for this proposition.

[54] I accept there are instances where an analysis of all the circumstances has involved a consideration of related events; *Buchanan* is just such an example.

[55] Indeed, in that instance the Court was required to consider whether decisions made *after* the dismissal of the subject employee could be relevant comparators. The employer had conducted a coordinated disciplinary process for a number of employees, whose conduct came into question as a result of the audit to which I

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34 At [185].
35 *New Zealand Police Association Inc v Commissioner of Police* [1995] 1 ERNZ 658 (EmpC).
36 At [666] - [667].

referred earlier. The Court concluded it would be artificial to consider only prior cases given the coordinated investigation, emphasising that this conclusion was case specific.[37]

[56] Two points arise. First, the Court did not state that there was any requirement of proximity. Secondly, the issue illustrated the requirement that all circumstances needed to be considered; in a particular case, timing might be one of those circumstances. But it does not follow that comparator conduct must always occur within a reasonable timeframe of the conduct or dismissal in question.

Application of strike-out principles

[57] I turn now to consider the strike-out application in light of the principles I have discussed. For the purposes of that application, Mr Dench traversed the relevant history leading up to Mr Nel's dismissal, stating that from ASB's perspective, a senior manager had developed a romantic interest in a junior female subordinate, acted inappropriately, declared his feelings in a way that would inevitably create problems if not reciprocated, failed to recognise this or the impact on the subordinate, and failed to respect her wish not to bring the matter up again.

[58] Relying on certain emails which Mr Vallabh had placed before the Court, Mr Dench argued that Mr Nel's conduct was not related in any way to situations referred to in the three particulars pleaded in para 42(d) of Mr Nel's statement of claim.[38] Dealing with each particular he said:

(a) The first related to the behavioural issues (alleged drug-taking) of two individuals in Mr Nel's office. In those cases, there were many examples of conduct which were petty, although obviously disruptive. That conduct needed to be managed and may have required disciplinary action. However, it was not remotely close to that of a senior manager who had formed a romantic attachment to a relatively junior subordinate. A further distinguishing feature was that Mr Nel was a senior manager in charge of Ms A; a manager's role was to lead by

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[37] *Chief Executive of the Department of Inland Revenue v Buchanan*, above n 2, at [52] – [53].
[38] Above at para [8].

example, and the power imbalance made it especially important that he take care with regard to his behaviour.

(b) The second particular (alleged bullying and drug-taking) related to the same individuals, with similar observations being appropriate.

(c) The third particular related to another employee who reported to Mr Nel. Again there were behavioural issues, (essentially insulting behaviour towards a manager); Mr Dench said the conduct was not remotely the same as the conduct for which Mr Nel was dismissed.

[59] For the purposes of his opposition to the strike-out application, Mr Nel filed an affidavit which summarised the circumstances of the dismissal. He also placed before the Court relevant documents, including ASB's Code of Conduct and other policy documentation which was relied on for the dismissal. He said that the conduct described in ASB's documentation related to conduct described as sexual harassment, racial harassment, bullying, intimidation, use of recreational drugs, alcohol abuse, and a breach of confidentiality as well as other types of breach.

[60] In advancing Mr Nel's opposition, Ms Stewart emphasised that the pleaded circumstances all involved conduct which fell under the descriptions given in the Code of Conduct and policy documentation which had been produced; and that there was accordingly a reasonably arguable cause of action.

[61] The application for strike-out must proceed on the basis that the pleaded facts are assumed to be true, unless they are entirely speculative and without foundation. There is limited scope for determining a strike-out application on affidavit evidence: *Attorney-General v McVeagh*.[39]

[62] The focus of Mr Nel's dismissal was his alleged failure to comply with ASB's Code of Conduct, and certain policies relating to harassment, discrimination, bullying and offensive behaviour. The allegation of disparity of treatment is put on

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[39] *Attorney-General v McVeagh*, above n 8, at [566] .

the basis that other employees also breached ASB's Code of Conduct and relevant policies.

[63] The Code of Conduct outlines principles and gives examples of conduct that would amount to a breach of its requirements. For instance, it states that employees are expected to adhere to the highest standard of ethics and behaviour. The mandatory obligation which is said to flow from this principle is that employees must treat all others including staff and employees, courteously, fairly, and with consideration and respect. Employees were to consider the impact of their actions on others, and avoid activities such as discrimination, harassment, bullying or offensive behaviour that may unreasonably upset or harm others.

[64] Examples of circumstances which would breach the expectations of the Code included:

- the use, possession of, supply of, or being under the influence of narcotics, intoxicants, drugs or hallucinatory agents during work hours, and outside work where conduct would reflect on the Bank;
- use of profane language, threatening or intimidating behaviour; and
- harassment discrimination, bullying, offensive behaviour, or unreasonable behaviour that created workplace disharmony.

[65] Paragraph 42 of the statement of claim starts with an overarching allegation that Mr Nel's dismissal was not what a reasonable employer could have done in the circumstances at the time of the dismissal, having regard to the statutory test of justification. Several sub-clauses then describe why the dismissal was unjustified.

[66] Sub-clause 42(d) is one of these, describing the assertion of disparity of treatment. It asserts that this arose in the context of a "workplace culture of alcohol abuse and profane language and other incidents involving serious concerns of bullying, use of recreational drugs, sexual and racial harassment and breach of confidentiality" of which it is alleged ASB was aware but did not investigate or undertake disciplinary action.

[67] The three pleaded examples then follow. The first involved drug taking, the second involved bullying and drug taking and the third involved issues of a staff member making a crude sexual remark to a customer. In each case it was asserted that the relevant manager took no action or no adequate action to investigate these concerns and/or take disciplinary action.

[68] The essence of the allegation is that there was a range of behaviours that were contrary to ASB's stated expectations as contained in its Code of Conduct and other policies, and that there was a particular workplace culture where such conduct was tolerated with no action or no adequate action to investigate or deal with these issues by way of disciplinary action.

[69] Mr Nel asserts that what happened to others is contrary to what occurred in his case, and that having regard to those factors, there was a disparity of treatment.

[70] The emphasis in the pleading is not on conduct per se, but on behavioural issues which took place in a particular workplace environment, and the manner in which these issues were typically dealt with.

[71] As I have explained earlier, an assessment of an allegation of disparity of treatment requires a consideration of all the circumstances. An essential aspect of the pleaded circumstances in this case involved the way in which behavioural issues were dealt with by the employer, this being said to amount to a "culture".

[72] For completeness, I refer to the email evidence on which ASB relied for the purposes of the strike-out application:

(a) It is apparent that the emails describe only part of the relevant circumstances. There is insufficient evidence of context in which the pleaded allegations of disparity have to be assessed: the picture is not complete.

(b) On that limited evidence, it is not possible to conclude that the pleaded assertions are "so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further".[40]

[73] Potentially the circumstances pleaded in para 42 of the statement of claim do involve circumstances that are sufficiently similar as to require a conclusion that they constitute prima facie instances of disparity, or enough to cause inquiry to be made – the question raised by the first test in *Buchanan*. Whilst Mr Nel's seniority as a manager may be a distinguishing feature, the Court cannot resolve that issue on a strike-out application.

[74] Having regard to all these factors, it is not appropriate to conclude that the disparity allegations as currently pleaded are clearly untenable. The Court cannot be certain that these allegations cannot possibly succeed.

[75] I emphasise that the assessment at this stage, made on the basis of well established strike-out principles, in no way indicates that the allegations of disparity will in fact succeed. It is not the function of the Court to determine the actual merits at this preliminary stage.

[76] Accordingly, I dismiss the application for strike-out.

Application for stay

[77] As indicated earlier, ASB also sought a stay of the order to disclose disparity documents until its application for leave to appeal aspects of the first interlocutory judgment has been resolved.

[78] The nub of the submissions made by Mr Dench in support of that application was that without a stay, ASB would lose the benefit of its appeal because:

(a) It would be required to disclose highly sensitive information about employees and other people. He said that much of this information is very personal, and that the individuals involved would have expected it

[40] At 566.

to remain private. It was also fair to assume that some of the resignations resulted from a wish to keep matters private.

(b) There would be a major infringement of privacy were the information to be disclosed to Mr Nel. He was employed by ASB for some 18 years and may know some of the persons involved.

(c) It would be unduly onerous to redact information, or search for further information, as the order made by the Court would require.

[79] Ms Stewart submitted on behalf of Mr Nel:

(a) It could not be said that there are strong prospects of success for the obtaining of leave to appeal.

(b) If the documents were not provided as ordered, significant delays would occur; Mr Nel had applied in October 2016 for the matter to be heard under urgency because he was seeking reinstatement, and there have been multiple delays to this point.

(c) Compliance with the order pending determination of the application for leave would not undermine the purpose of the intended appeal, if successful. In any event, the fact that an appeal might be rendered nugatory by not ordering a stay is not necessarily determinative.

(d) An intermediate position was available whereby the documents could be provided with undertakings and returned if the appeal succeeds. That would enable Mr Nel to draft an amended statement of claim, which could be filed immediately if the appeal fails.

[80] In the course of argument, it emerged that there was a willingness on the part of ASB to provide the available documents to counsel for Mr Nel only, on a strictly confidential basis; and for certain further enquiries to be made to locate outstanding documents.

[81] Prior to the hearing, I had made an interim order of stay so as to preserve the status quo until I could receive submissions from both parties as to whether the interim order could continue.

[82] In light of the consensus which was achieved at the hearing on 6 July 2017, I continued the interim order of stay subject to conditions. The first was that some 1,500 pages of documentation, which had been located by ASB, would be provided to counsel only on a strictly confidential basis, and as soon as possible. The second condition was that ASB would attempt to locate a limited number of further documents. I directed that I would review the position in a week's time.

[83] Counsel continued to liaise over these issues, and then filed updating memoranda a week after the hearing. These indicated that a significant number of documents had been provided to counsel only, and that ASB was continuing its efforts to locate further documents. I was not persuaded that the Court should direct any further steps such as a computerised search at that stage; and indicated that I would conduct a telephone directions conference with counsel on 20 July 2017 to review progress. I also requested an indication as to when the application for leave to appeal was likely to be heard.

[84] At that telephone conference, I was advised that no date had as yet been scheduled for the hearing of the application for leave to appeal. I had previously been advised that there was a possibility the application could be heard in early August, but if not at that time then in early September 2017.

[85] Ms Stewart advised the Court that she had been provided with sufficient documentation to enable Mr Nel's claim as to disparity to be re-pleaded with reference to further comparative circumstances. However, she objected to a continuation of the interim order of stay. She said that the interim order should be discharged which would mean that ASB should conduct a computer search for yet further documents. Ms Stewart also said she wished to discuss with Mr Nel particular documents which had been disclosed.

[86] Mr Dench strongly opposed both such possibilities. He emphasised again that the taking of either of these steps would render the intended appeal nugatory.

[87] These competing submissions required a consideration of conventional stay principles. In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position until the appeal is concluded.[41]

[88] Having regard to counsel's submissions, there are several key factors to be balanced.

[89] First, I accept that ASB has filed its application for leave to appeal on a bona fide basis, and that it is endeavouring to have the application for leave heard as soon as possible.

[90] Second, I accept that two key factors which underpin the application for leave to appeal relate to the scope of the order of disclosure which was made, including the extent of resources which ASB says is required to comply with it. There are also, potentially, significant privacy issues.

[91] I interpolate that if the application for leave to appeal is dismissed, these matters can and will be managed by appropriate directions in this Court – both as to the extent of documentation which is in fact to be disclosed, and as to steps which would protect the privacy of individuals who are not parties to this proceeding.

[92] What the Court must balance is Mr Nel's proper concern that he should be able to advance his challenge in a timely way on the one hand, and ASB's concern, which is also proper, that its appeal rights should not be rendered nugatory.

[93] In my view, significant progress has been made since the hearing which allowed Mr Nel's counsel to move to the point of being able to re-plead; but the Court needs also to respect ASB's appeal rights.

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[41] *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 at 87; *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 13 PRNZ 48 (CA) at [8] - [10]. These principles were re-confirmed in *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11].

[94] Balancing these factors, I considered that the interim order of stay of the direction contained in para [110] of my judgment of 16 May 2017 should be continued. This order will be reviewed when the Court of Appeal issues its judgment on ASB's application for leave to appeal. This order is subject to any particular arrangements which the parties may agree.

[95] I indicated my views to this effect in the course of the telephone directions conference, which led to further discussion as to possible further steps that could be undertaken so as to progress the proceeding.

[96] As mentioned, Ms Stewart had advised the Court that she needed to take instructions from Mr Nel on a proposed amended statement of claim, which would contain further allegations of disparity. Counsel agreed that with regard to individual alleged instances of disparity of treatment, a description of the relevant event, without name, but with sufficient detail as to the nature of the event as would need to be included in the pleading, could be disclosed to Mr Nel, providing he first gives an undertaking not to disclose this information to any third party until he was released from the undertaking.

[97] It was also agreed that once instructions had been so taken, counsel could liaise with regard to any further documents that may be requested in connection with any particular proposed instances which are to be pleaded. Whether an amended statement of claim would be filed and served on behalf of Mr Nel is a matter for his counsel.

[98] Given these agreed arrangements, Ms Nel's legal advisors should thereby be able to continue with the necessary work which needs to be undertaken. However, I reserve leave for either party to apply for any necessary directions from the Court.

Conclusion

[99] ASB's application for strike-out is dismissed.

[100] An interim order of stay of the direction contained in para [110] of the Court's judgment of 16 May 2017 is continued until further order of the Court. This

order will be reviewed when the Court of Appeal issues its judgment on ASB's application for leave to appeal. The order is subject to any particular arrangements which are agreed between the parties.

[101] I reserve leave to both parties to apply for any necessary directions.

[102] Costs are reserved.

B A Corkill
Judge

Judgment signed on 10 August 2017 at 3.10 pm