IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 63
EMPC 271/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out
BETWEEN	AUCKLAND COUNCIL Plaintiff
AND	ROBIN DROUGHT Defendant

Hearing:	5 March 2019 (Heard at Auckland)
Appearances:	A Lubbe and G Crudge, counsel for plaintiff P Cranney and C Mayston, counsel for defendant
Judgment:	24 May 2019

JUDGMENT OF JUDGE J C HOLDEN
(Application to strike out)

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[1] This judgment resolves the defendant, Mr Drought's, application to strike out the challenge brought by the plaintiff, Auckland Council.

[2] Mr Drought says that the challenge brought by Auckland Council is moot because he succeeded in the Employment Relations Authority (the Authority) on two separate bases, only one of which is the subject of the challenge.[1] He says the proceedings should be dismissed.

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1 *Drought v Auckland Council* [2018] NZERA Auckland 261.

[3] It was anticipated that the substantive challenge would be heard on 5 March 2019, and the parties filed evidence and submissions. However, Mr Drought applied to strike out the challenge, and sought to have that application dealt with first, as a preliminary matter. I proceeded to hear that application on 5 March 2019. The substantive challenge has not been argued.

The background facts are largely agreed

[4] Although the witnesses' evidence has not been tested through cross-examination, the key facts are not in dispute.

[5] Mr Drought was employed with the Auckland City Council for many years. Under Mr Drought's individual employment agreement with the Auckland City Council, if he was made redundant, he would have been entitled to compensation for redundancy of eight weeks' salary for the first year of service and two weeks' salary for each subsequent completed year or part-year of service. There was no cap on his entitlement to redundancy compensation. That formula was preserved in subsequent applicable collective agreements between the PSA and the Auckland City Council.

[6] Auckland Council was formed from 1 November 2010 by the amalgamation of eight local authorities that had previously existed in the Auckland Region, including the Auckland City Council.

[7] Auckland Council and the PSA negotiated a new collective agreement. That collective agreement included a cap on redundancy compensation so that the maximum redundancy compensation payable for all an employee's years of service would not exceed 48 weeks' salary.

[8] The collective agreement also made provision for the preservation of "Personal to Holder" terms. Mr Drought claims that his entitlement to uncapped redundancy compensation was preserved through that process. Auckland Council disputes that.

[9] In 2016, Auckland Council embarked on a restructuring that involved changes to the system within which Mr Drought worked. In that context, Auckland Council's

People and Capability Team representatives told Mr Drought that he could choose to accept redundancy, and that the redundancy compensation payable was 100 weeks' salary, estimated at $205,401.92. This assessment was based on Mr Drought's total service with Auckland Council and its predecessors of almost 47 years.

[10] Mr Drought decided to accept redundancy. He says he planned to use the compensation towards paying down mortgages that he held.

[11] Subsequently, approvals were reached within Auckland Council for the redundancy, and a formal approval to proceed with Mr Drought's exit was confirmed.

[12] Mr Drought agreed that his compensation for redundancy would be paid with his final pay as part of a normal pay cycle on the Wednesday following his departure from Auckland Council.

[13] He left Auckland Council on Friday 12 August 2016, apparently on good terms.

[14] However, when his pay went through the following Wednesday 17 August 2016, the amount he received as compensation for redundancy was $98,592.92, representing 48 weeks' salary, rather than the anticipated 100 weeks' salary.

The Authority found for Mr Drought

[15] The two bases on which the Authority found for Mr Drought were: first, Auckland Council had breached the collective agreement by failing to pay Mr Drought his contractual entitlement to redundancy compensation, that finding being based on Mr Drought having a Personal to Holder right to uncapped redundancy; and second, Auckland Council was estopped from reneging on its promise to pay Mr Drought the sum of 100 weeks' salary as compensation for his redundancy. The Authority ordered Auckland Council to pay $106,901 to Mr Drought, being the difference between the 100 weeks' salary the Authority found Mr Drought was entitled to and the redundancy compensation he received, plus interest.

[16] Auckland Council filed a non-de novo challenge to the determination. It challenged the Authority's first finding but did not challenge the finding that Auckland

Council was estopped from reneging on its promise. Notwithstanding that, Auckland Council seeks an order quashing the order of the Authority.

Proceedings may be struck out if they are an abuse of process

[17] In applying to strike out the challenge, Mr Drought relies on the High Court Rules 2016, r 15.1, which applies by virtue of the Employment Court Regulations 2000, reg 6(2)(a)(ii).

[18] Under r 15.1, the Court may strike out all or part of a pleading if to permit it to continue would be an abuse of the process of the Court.[2] If it strikes out a statement of claim, it may also dismiss the proceeding.[3]

[19] The label "abuse" is a technical one, not necessarily pejorative.[4] An abuse of process can take a number of forms; for example, proceedings brought for an improper purpose, a proceeding that attempts to relitigate matters that are already determined, and a proceeding brought where it is inevitable that a remedy will be refused, even if one or more grounds are made out.[5] Proceedings may be struck out for abuse of process if they are moot.[6]

There are two key issues

[20] Mr Drought's application therefore raises two key issues:

(a) Is the challenge moot?

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

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2 High Court Rules 2016, r 15.1(1)(d); *Dotcom v The District Court at North Shore* [2017] NZHC 3158 at [22].
3 High Court Rules 2016, r 15.1(2).
4 *Te Runanga o Ngai Tahu Ltd v Durie* [1998] 2 NZLR 103 (HC) at 107.
5 *Rabson v Judicial Conduct Commissioner* [2016] NZHC 2539, [2016] NZAR 1679 at [31].
6 See for example *Friends of Pakiri Beach v McCallum Bros Ltd* [2008] NZCA 87, [2008] 2 NZLR 649 at [16]; *Page v Whanganui District Council* [2016] NZHC 654 at [14].

First issue: Is the challenge moot?

[21] A "moot" point in the context of a judicial proceeding is one that is academic or abstract; it has no practical effect on the rights of the parties to the litigation.[7]

[22] Mr Drought says because the Authority's second finding has not been challenged, the monies awarded by the Authority are recoverable regardless of the outcome in the Court.

[23] Mr Drought also says that, to the extent Auckland Council is endeavouring to overturn the second finding through challenging the first finding, that is a collateral attack on the Authority's decision, which cannot be allowed. Mr Drought relies on the recent decision in *Jacks Hardware and Timber Ltd v First Union Inc*.[8]

[24] Auckland Council says that the Authority's finding on the estoppel relied on representations that Auckland Council made, based on its misunderstanding or mistake about the status of Mr Drought's entitlement to uncapped redundancy compensation. It submits that, if it succeeds in its argument that the claimed Personal to Holder provision was inconsistent with the collective agreement, and in breach of s 61 of the Employment Relations Act 2000, the estoppel would be based on an illegality and would not be able to stand. It says this is because an estoppel cannot be founded on an illegality. It also says that, to give effect to an estoppel in this situation would be effectively to circumvent s 61.

[25] The matters that the Authority Member said Mr Drought had to establish to be successful on his estoppel claim were:[9]

(a) Auckland Council acted in a manner that caused him to have a certain belief or expectation.

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7 W J Stewart ed *Collins Dictionary of Law* (online ed, 2006): "…as an adjective, a point of law is often said to be moot if, raised in a litigation, the point does not any longer affect the decision in the case before the court." <https://legal-dictionary.thefreedictionary.com/moot>. See also *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [16]; *Borowski v Attorney-General* [1989] 1 SCR 342 at 353.

8 *Jacks Hardware and Timber Ltd v First Union Inc* [2019] NZEmpC 20.

9 *Drought v Auckland Council*, above n 1, at [50], citing *Hansard v Hansard* [2014] NZCA 433, [2015] 2 NZLR 158 at [63].

(b) He reasonably relied upon that belief or expectation.

(c) He will suffer detriment if the belief or expectation is departed from.

(d) It would be unconscionable for Auckland Council to depart from the belief or expectation.

[26] As is apparent from the identification of those issues, although Mr Drought had to establish that he had a belief or expectation that he reasonably relied on, the Authority did not consider it necessary for Mr Drought to establish that the representations made by Auckland Council were based on a correct interpretation of the collective agreement. The finding of estoppel was independent of any entitlement Mr Drought had under the collective agreement.

[27] Even if the argument now articulated were to be valid, Auckland Council has not challenged the Authority's second finding. It cannot seek to set that finding aside by way of a side door – that would amount to a collateral attack on the second finding, which is not permitted.[10]

[28] Consequently, if Auckland Council were to be successful in the Employment Court challenge, it is still estopped from reneging on its promise to pay to Mr Drought 100 weeks' salary as compensation for his redundancy. This means the challenge is moot.

Should the challenge be allowed to proceed anyway?

[29] In general, appellate courts do not decide appeals where their decision would have no practical effect on the rights of parties before the court, in relation to what has been at issue between them in lower courts.[11] The same principle applies by analogy to challenges brought to the Employment Court. Nevertheless, the Court may hear a

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10 *Dotcom v The District Court at North Shore*, above n 2, at [58]; *Jacks Hardware and Timber Ltd v First Union Inc*, above n 8, at [57].

11 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [14].

challenge on a point that is moot if the circumstances warrant an exception to the general policy.[12]

[30] A court should, however, be restrained in deciding whether to hear a moot challenge. The reasons for this are, first, the importance of the adversarial nature of the process of determining appeals or challenges; second, the need for economy in the use of limited resources of the courts; and third, the responsibility of the courts to show proper sensitivity to their role in our system of Government. In general, advisory opinions are not appropriate.[13] For these reasons, a decision to hear a moot challenge should be made only in exceptional circumstances.[14] These circumstances may include where an important legal point is raised and/or where there is no detailed consideration of facts required, and the issue in the case is likely to require resolution in the near future.[15]

[31] In the present case, Mr Cranney, counsel for Mr Drought, points to the difficulties that arise should the Court proceed to hear the challenge because of its supposed precedential value. He notes that Mr Drought is disinterested in the outcome of the challenge as his remedy is unaffected – he gets the extra compensation pursuant to the second finding of the Authority in any event. He could simply not argue the case. On the other hand, the people who are potentially affected, including the union that is a signatory of the collective agreement, are not parties to the present proceedings. As Mr Cranney says, this raises a natural justice issue and points away from the Court hearing the challenge.

[32] Mr Cranney also says that this case was fact-specific; the first issue before the Authority dealt with whether the steps Mr Drought took when his employment transferred to Auckland Council were sufficient to preserve his uncapped entitlement to redundancy compensation. He says that any finding in that regard would not necessarily answer a similar question with respect to other employees.

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12 *Gordon-Smith v R*, above n 11, at [16].
13 At [18].
14 *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [33].
15 *Simpson v Whakatane District Court* [2006] NZAR 247 (HC) at [30], cited with approval in *Webb v New Zealand Tramways and Public Passenger Transport Employees' Union Inc* [2013] NZEmpC 154 at [21]; *Gordon-Smith v R*, above n 11, at [24].

[33] Mr Lubbe, for Auckland Council, points to two other determinations of the Authority involving former employees of Auckland Council in similar circumstances to Mr Drought.[16] That does not assist Auckland Council; the Authority's determinations demonstrate the fact-specific inquiry the Authority undertook in each case. In any event, Mr Lubbe advised that Auckland Council did not know if there are other individuals whose entitlements may be clarified by a judgment in this case.

[34] Considering all those matters, and bearing in mind the restraint that courts need to apply when considering whether to hear a moot challenge, I am not satisfied the circumstances here mean that this case ought to be heard.

[35] Accordingly, the statement of claim is struck out, and the challenge is dismissed. A stay of execution of the Authority's determination was ordered on 18 September 2018. That is now discharged.

[36] Costs are reserved. If they cannot be agreed, Mr Drought may apply within 20 working days from the date of this judgment. Auckland Council then must respond within a further 15 working days, and any reply submissions from Mr Drought must be filed and served within a further five working days.

J C Holden
Judge

Judgment signed at 12.30 pm on 24 May 2019

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[16] *Murphy v Auckland Council* [2018] NZERA Auckland 281; *Lasham v Auckland Council* [2013] NZERA Auckland 219.