

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 25/07  
ARC 74/06**

IN THE MATTER OF            a compliance order

AND IN THE MATTER OF an application to strike out proceedings and  
   other orders

BETWEEN                        JON WOUD  
   Plaintiff

AND                                DEPARTMENT OF CORRECTIONS  
   Defendant

Hearing:            5 February 2007 (Heard at Auckland)  
                                 Defendant's memorandum filed on 23 February 2007  
                                 Plaintiff's memorandum in reply filed on 2 March 2007  
                                 Defendant's memorandum in reply filed on 12 March 2007

Appearances: Richard Harrison, Counsel for Plaintiff  
                         Roanna Chan, Counsel for Defendant

Judgment:        15 May 2007

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**JUDGMENT OF JUDGE BS TRAVIS**

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[1] The defendant has applied to strike out the plaintiff's proceedings. The plaintiff is seeking from the Court a compliance order directing the defendant to pay him \$6,674.10 and a declaration in relation to accrued annual leave, both matters said to arise out of the judgment of Chief Judge Goddard, reported in *Woud v Department of Corrections* [2005] 1 ERNZ 314. The Court awarded the plaintiff reinstatement, reimbursement of lost wages of \$34,787.83 gross and compensation for non-economic loss of \$15,000.

[2] The plaintiff has pleaded that the defendant has paid to him \$31,523.91 gross as reimbursement for lost wages and \$11,500 towards the award of compensation for non-economic loss. The amount the plaintiff contends is outstanding and owing to

him is \$3,174.10 gross for reimbursement and \$3,500 net for non-economic loss, making a total of \$6,674.10.

[3] The plaintiff also seeks, from the period of his summary dismissal to the date of his reinstatement, accumulated annual leave to an amount of 100 days and has sought this accrual to be added to his annual leave entitlement. He seeks a declaration that he is entitled to that accrued annual leave as between the date of his dismissal and reinstatement because the defendant has refused to comply with his request. It is common ground that the plaintiff is no longer in the employment of the defendant.

[4] The strike-out application pleads that no reasonable cause of action has been raised and that the plaintiff's proceedings are an abuse of the processes of the Court. It also contends that the doctrine of res judicata applies to the question of annual leave and that the Court cannot now re-determine the remedies contained in the original judgment.

[5] There was no issue between the parties as to the Court's jurisdiction to strike out proceedings, based on reg 6 of the Employment Court Regulations 2000 and High Court Rule 186. Mrs Chan observed that the striking out jurisdiction reflects the obligation of every court to prevent abuses of process, citing *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA). She referred to the following principles derived from *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267-268 (CA):

- (a) a strike-out application proceeds on the basis that the facts pleaded in the statement of claim are true;
- (b) the causes of action must be so clearly untenable that they cannot possibly succeed;
- (c) the jurisdiction is to be used sparingly and only in a clear case where the Court is satisfied it has the requisite material, and when it does not have to decide disputed questions of fact; and

- (d) If applications to strike out raise difficult questions of law, and require extensive argument, that does not exclude the jurisdiction.

[6] Mr Harrison also submitted the Court has a residual discretion to decline the application if the justice of the case so requires, citing *NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW and Steiner and Spartan Engineering* [1989] 3 NZILR 284.

### **The reimbursement and compensation claims**

[7] It is common ground that the defendant paid to the plaintiff's solicitors all the remedies awarded to him by the Employment Relations Authority, namely the sum of \$3,174.10 in respect of lost wages, and \$3,500 as compensation for humiliation and distress. The plaintiff's successful challenge resulted in the substantially greater remedies including the order for reinstatement.

[8] It is the plaintiff's contention that the amounts awarded by the Court were intended by the Court to be in addition to the amounts awarded by the Authority. Consequently the plaintiff says the subsequent payment by the defendant to the plaintiff's solicitors of \$27,000 and \$29,129.02, purportedly to satisfy the additional awards of the Court, after taking into account the amounts already paid in satisfaction of the Authority's awards, were insufficient to satisfy those awards.

[9] Mr Harrison, who was not counsel in the earlier case, submitted that the plaintiff's position was simply that the judgment of the Court should have been paid without deduction as either the Court was aware of the amounts awarded by the Authority and took these into account when determining its award, or it overlooked either or both of these amounts and the proper course would have been an application by the defendant to recall the judgment. He referred to the judgment at paragraph [6], where the Court observed that the plaintiff had recovered from the Authority \$3,174.10 towards his lost remuneration and \$3,500 by way of compensation and that these amounts had been paid to him.

[10] Mr Harrison then turned to the section of the judgment dealing with reimbursement of wages, which was set out at paragraphs [96] to [100]. The judgment makes it clear that the plaintiff can only recover actual losses which are

attributable to the personal grievance and, where there has been a long lapse of time since the dismissal, the Court must determine whether the loss for the entire period is so attributable or whether it is due to other causes. The Court found that the plaintiff had been less than forthcoming in giving particulars but was satisfied that he had made energetic attempts to find, and did find, other gainful employment. The plaintiff bought a courier business and for a time earned more than he would have earned as a Prison Officer. Although he later disposed of that business in favour of a less demanding occupation, the Court found this did not break the chain of causation and the plaintiff was entitled to recover for his loss during the period in question. The Court stated:

*... However I prefer Mrs Chan's figures to the plaintiff's but I adopt a slightly broader approach to the calculation. To the extent that I have not descended into minute detail, it is because it is the function of counsel to agree detailed figures or at least to bring the items of disagreement into narrow compass. That is commonsense and it is also a requirement of pleading in this Court that all calculations be provided well in advance of, not at, the hearing. (Para [97])*

[11] The judgment then sets out a calculation of the plaintiff's loss of wages (at paragraph [98]). The first period to 31 March 2001 of approximately 3 months shows a salary loss of \$9,774.71 less income received of \$4,689.04. Mr Harrison's argument was that this deduction, which appears to be gross in the sense of being before tax, rounds out to approximately \$3,100 with a tax rate of .36 cents in the dollar. He submitted that this figure is so close to the \$3,174.10 awarded by the Authority and paid by the defendant, as to suggest that the Court took it into account. If not then, he submitted, the matter should have been the subject of an application to recall the judgment by the defendant to correct any slip or omission.

[12] Turning to the compensation award, Mr Harrison referred to paragraph [101] of the judgment where His Honour states:

*In my judgment, the circumstance that reinstatement has been ordered warrants a lesser award than might otherwise have been the case, for the loss of position will have been temporary. On that basis, the evidence*

*supports an award of \$15,000. If I had not been reinstating the plaintiff, I would have awarded \$35,000.*

[13] The paragraph goes on to refer to the factors that His Honour took into account, including the severe impact on the plaintiff of the unjustified dismissal, his loss of confidence, headaches, sleepless nights, depression, humiliation, his sense of injustice, including having been suspended without the opportunity of input which had led to a mindset against him by the defendant's officers that he was never able to alter or influence. Mr Harrison observed that in setting out those factors the Court made no reference to the Authority's compensatory award. He contends that His Honour either factored in the Authority's award when arriving at his figure of \$15,000 or, alternatively, overlooked it. He accepted that it was the former given that, as the matters were heard de novo, the Court presumably took into account the Authority's determination but then made its own decision. Mr Harrison referred to ss179 and 183 of the Employment Relations Act 2000.

[14] Mr Harrison also submitted that if the Court had intended that the remedies awarded by the Authority were to be deducted from the amounts awarded by the Court, then it would expressly have provided for this in the judgment and given the appropriate directions. In this situation, he submitted that the appropriate course for the defendant would have been to have made an application to recall the judgment in order to correct any accidental slip or omission.

[15] Ms Chan submitted the judgment cannot be read as awarding additional amounts to the plaintiff, totally separate and distinct from the awards of the Authority, as the Court's judgment is substituted for the determination of the Authority. She submitted the determination of the Authority ceased to have effect once the Employment Court issued its decision. The defendant therefore claims to have satisfied the Court's judgment in full. She observed that the defendant had properly paid the amounts of the Authority's award to the plaintiff, being prepared to run the risk that the plaintiff might have to repay if his challenge had not been successful. She submitted the defendant should not be penalised for having so paid instead of waiting for the outcome of the challenge. She argued that the plaintiff was simply seeking to increase the amount of the remedies awarded by the Court.

[16] In subsequent written submissions Mrs Chan addressed the wording in the reimbursement calculations in paragraph [98] of the judgment, observing that the words “*Less income received*” were wide enough to include earnings from sources other than the defendant and therefore would not simply be the amount paid by the defendant in satisfaction of the Authority’s reimbursement award, less tax. She warned of the risk of accepting the plaintiff’s submissions and thereby making a finding that may not have been intended by the trial Judge.

[17] Mrs Chan referred to the decision of the High Court in *Brickell v Attorney-General* (2002) 16 PRNZ 557 where the issue was whether an earlier judgment of McGechan J in the High Court could be “*corrected*” to include the words “*net of tax*” by using r12 of the High Court Rules, which allows for the correction of accidental slips or omissions. Notwithstanding that it was agreed by counsel for both parties that the actuarial evidence had been presented with income figures net of tax, Justice Ellis declined to “*dissect*” the figures in the judgment as that would have involved consideration of the actuary’s evidence and Justice McGechan’s calculations. Justice Ellis therefore declined the application to correct the judgment of Justice McGechan.

[18] Mrs Chan submitted that once a decision is communicated to the parties it is final, citing *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173 (CA). She reiterated her earlier submission that a decision of the Employment Court necessarily replaces the determination of the Authority because that is the nature of an appellate decision. She submitted that this principle applies all the more forcibly in the present case, given that the original hearing was de novo in circumstances where liability was an issue.

[19] Mrs Chan submitted that express words would need to be added to the judgment in order to increase the defendant’s total apparent liability. She observed that no appeal had been lodged by the plaintiff and leave was not reserved to allow the parties to go back to the Court on any matters, unlike the situation in *Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1)* [2006] 1 ERNZ 1. No application for recall or on application under the slip rule had been filed by the plaintiff. In these circumstances she submitted that it cannot be correct, as a matter of law, that a party dissatisfied with what a judgment

clearly provides may be permitted to trawl through the judgment in the hopes of finding evidence that will improve his position. She submitted that in practical terms, if the parties are permitted to have another attempt at persuading a different Judge as to what the trial Judge intended, an issue would arise as to the scope of the re-evaluation of the evidence. Such an approach and the possible reaction of the other party to re-argue the issues, would upset the finality of the judicial decision and there would be no end to the litigation.

[20] As to the merits of the matter, Mrs Chan referred to the table of calculations in paragraph [98] and in particular to the highlighted amounts which totalled the Court's award for reimbursements. She noted that the Chief Judge had said that he preferred Mrs Chan's calculations to that of the plaintiff, but took a slightly broader approach. She submitted this highlighted that in reality the calculation of damages is often imprecise and unfairness would result if the plaintiff were permitted to dissect the figures awarded by the Court.

[21] Mrs Chan submitted the defendant had relied upon the judgment and paid what was owed on its express wording. She repeated the submissions she made in relation to res judicata, and which I shall return to when dealing with the holiday accrual issue. She submitted therefore that the defendant's application to strike out the plaintiff's claim should succeed in its entirety.

[22] Mr Harrison, in his written response, submitted that the Court was not being asked to dissect, or go behind, the original judgment. He repeated his earlier submissions that it was apparent from the judgment itself that the income attributed to the plaintiff when calculating lost reimbursement was that which had earlier been paid by the defendant to the plaintiff following the Authority's determination. He referred to the Authority having reduced the award of remuneration by 50 percent and submitted that left only one possible conclusion, namely that the only income that the plaintiff received in the first 3 month period was that paid by the defendant pursuant to the Authority's determination and was therefore taken into account by the Chief Judge when calculating the lost remuneration.

[23] He sought to distinguish the *Brickell* case dealing with the slip rule, r 12 of the High Court Rules, arguing that the plaintiff was not making an application to

correct the judgment but simply wanted payment of the judgment amount. He also noted that the Court in that case said that the matter at issue was being dealt with by the plaintiff and the Commissioner of Inland Revenue, who would be better placed to decide the matters and therefore the plaintiff was not being deprived of her remedy or the amount of property payable pursuant to the judgment. He submitted that was unlike the situation here because Mr Woud has no opportunity to go elsewhere and is left with the risk of not receiving the full reimbursement award of the Court. He repeatedly submitted that it was unfair that the defendant had not paid the full judgment amount by seeking credit for amounts paid to satisfy the earlier awards of the Authority, which, on his submission, would be to deduct those amounts twice, but pay them only once. He submitted that this was a case where, for the purposes of promoting good faith behaviour, equity and good conscience should be applied. He submitted that the defendant's counsel was in a good position, having represented the defendant throughout the hearing, to simply advise the Court as to whether or not the calculation presented on behalf of the plaintiff at the Court hearing, was meant to cover the amounts of the awards already received by him. He submitted that the judgment was consistent with the plaintiff's interpretation and if the defendant was aware that the plaintiff had been underpaid it would be unjust and unconscionable for the situation to stand.

[24] I prefer and adopt Mrs Chan's submissions. The plaintiff in the substantive challenge had sought a complete review of the remedies and in particular that of reinstatement, which had been declined by the Authority. The plaintiff's amended statement of claim, although it sought to defend the Authority's determination in part, stated it was "*now a full challenge de novo*" (para 4). The hearing took some 7 days and resulted in a substantial judgment which analysed in detail the substantive matters as well as the claims for increased remedies.

[25] The judgment was governed by the provisions of s183 of the Employment Relations Act 2000 which now provides:

***183 Decision***

- (1) *Where a party to a matter has elected under section 179 to have that matter heard by the Court, the Court must make its own decision on that matter and any relevant issues.*



- (2) *Once the Court has made a decision, the determination of the Authority on the matter is set aside and the decision of the Court on the matter stands in its place.*
- (3) *Despite subsection (2), a person may apply for review of the determination of the Authority under section 194.*

[26] I have said “now” in relation to s183 because sub-sections (2) and (3) were added by s61 of the Employment Relations Amendment Act (No 2) 2004. The Amendment Act came into force on 1 December 2004 and contained the following relevant transitional provision:

**73      *Transitional provisions***

- (1) *The amendments made by this Act do not apply to anything done or any matter arising before the commencement of this Act.*

[27] The challenge was filed in the Court in 2003 and the events it canvasses pre-date that. However, the hearing took place in April 2005 and the judgment was issued on 16 May 2005. The matter, in the sense of the challenge, therefore arose before the commencement of the Amendment Act. However, it is arguable that s61 insofar as it inserted subsection (2) was purely procedural to clarify the effect of a decision of the Court and will apply because the judgment was issued on 16 May 2005, after the Amendment Act came into force. The insertion of subsection (2) was therefore not retrospective as it did not affect the rights of the parties, but only clarified the effect of decisions of the Court.

[28] Sub-section (2) makes it clear that once the Court has made a decision on “the matter”, which must refer to those parts of the Authority’s determination which were the subject of the challenge if a full de novo hearing is not sought, the determination of the Authority is set aside and the Court’s determination stands in its place see *Gurleyen v Riyad* unreported, WC 14A/05, Couch J, 10 November 2005. In this case remedies were one of the subjects of challenge. The section as amended therefore effectively disposes of the plaintiff’s contention that the Court’s judgment is to be read as additional to the Authority’s determination.

[29] If I am wrong on the matter of the transitional provisions, and that issue was not argued before me, then the un-amended section clearly carried the implicit position that once the Court had made a decision, the determination of the Authority in the matter is to be set aside and the decision of the Court is to stand in its place:

see *Ruddlesden v Unisys New Zealand Ltd* unreported, Judge C M Shaw, 18 February 2005, WC 5/05.

[30] I also accept Mrs Chan's submission, that on a proper interpretation, the Chief Judge's decision was not intended to provide a reimbursement order in addition to that awarded by the Authority. The Chief Judge had acknowledged earlier in his judgment that payment had been made by the defendant of the Authority's awards, but in dealing with reimbursement he was giving credit for the gross income received in the first 3 month period. The relevant part of the judgment reads:

*Less income received*

*I disallow the reduction claimed by Mrs Chan for a payment of \$1,150.29 on 19 March 2001 because that must be taken to have been in the net income for the 3 months. (Para [98])*

[31] The \$4,689.04 the Chief Judge deducted as "*income received*" cannot, on a fair reading, be taken to mean the payment by the defendant to the plaintiff of the amount of the Authority's reimbursement award. That is not income received in the first 3 month period. It is purely coincidental that when income tax is taken off the sum of \$4,689.04 at the rate suggested by Mr Harrison it comes close to the amount of the reimbursement order of the Authority. The Court made it clear that it was taking a broad approach, in accordance with Mrs Chan's figures, and the highlighted figures in paragraph [98] show the amount of the actual awards. I conclude that the Court's order was intended to be in substitution for the Authority's award and therefore the defendant is entitled to claim credit for the payment already made.

### **Conclusion on the compensation award**

[32] Again I accept Mrs Chan's submissions. I find that s183, whether before or after the 2004 Amendment Act, effectively disposes of this matter as the Court's orders must be taken to have been given in substitution for the Authority's awards. The Chief Judge dealt comprehensively with the matters that he took into account in making a compensation award on the findings of fact that he had made, some of which were at great variance to those found by the Authority. I find that the Authority's compensation award was set aside and its only effect is that, because it

was paid, the defendant was entitled to claim credit for that amount against the new award.

### **The claim for accrued leave**

[33] Mr Harrison submitted that the accrual of annual leave was an entitlement that attached to the Court's order to reinstate the plaintiff to his former position. It was said that the plaintiff's application for recognition of accrued annual leave was by way of a compliance order pursuant to s139 of the Act because it was alleged that the defendant had not complied with:

(b) *any order, determination, direction, or requirement made or given under this Act by the Court.*

[34] The non-compliance alleged by the plaintiff is the defendant's failure to comply with the reinstatement order which would have had the effect of providing continuous employment. Mr Harrison submitted continuous employment would include related entitlements such as annual leave, sick leave accrual, long service leave and the like. Mr Harrison submitted that the accrued leave claim was not a new matter but rather a question of whether the reinstatement order had been properly applied.

[35] Mrs Chan submitted that the plaintiff's claim for accumulated leave from the time of the summary dismissal to reinstatement was based on the same facts as the judgment and so was a remedy which stemmed from the same cause of action. She submitted that the doctrine of res judicata applied to the plaintiff's claim. She cited *New Brunswick Rail Co v British and French Trust Corporation Ltd* [1939] AC 1 per Lord Maugham LC, at pages 19-20:

*The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them...*

[36] Mrs Chan submitted that the principle of res judicata required that, as between the opposed parties, once an issue was litigated it should be regarded as

forever decided. She submitted it was not necessary or relevant for the party arguing the estoppel to prove that the decision relied upon to found an estoppel was correct, or well founded in fact or law, so long as it represented a final judicial decision by a Tribunal having jurisdiction to determine the same question between the parties. That decision is deemed, conclusively, to be correct as between the parties unless or until upset on appeal. She observed that *res judicata* applies not only to the issues that have been the subject of litigation, but also to the issues that could and should have been the subject of litigation, if the parties had diligently pursued their claim. She cited the Privy Council decision *Hoystead v Commissioner of Taxation* [1926] AC 155 where at p170 it is stated:

*It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of Henderson v. Henderson (1) by Wigram V.-C. as follows: "I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time". This authority has been frequently referred to and followed, and is settled law.*

[37] Mrs Chan submitted that the plaintiff had had the opportunity to claim the amount of annual leave accumulated from the time of the summary dismissal to the date of reinstatement. The plaintiff had not sought this from the Court. She submitted that the question of annual leave properly belonged to the subject of litigation and cannot now be revisited. She contended that the plaintiff was seeking a new remedy in respect of the same cause of action.

[38] Further she argued that annual leave is given in respect of service provided to the employer in order for the employee to relax and refresh him or herself. The plaintiff was not in fact working for the defendant during the period in respect of which the plaintiff now claims annual leave. In that period he was either working for

other employers or was self-employed and under the duty to mitigate his loss. She submitted that the plaintiff's failure to mitigate precluded him from raising the question of annual leave now and accordingly this aspect of the claim should be struck out.

[39] She distinguished *Gilbert v Attorney-General* where the Court had expressly reserved the parties leave to return to the Court on certain aspects of the remedies. She also observed that in *Gilbert* Chief Judge Colgan observed that a recall of a judgment is not appropriate if its purpose or effect is to modify or change significantly the outcome of a judgment, as opposed to the reasons for it. He concluded:

*I accept, also, the principle that the Court should be reluctant to recall a Judgment not only with respect to issues that have been the subject of litigation but also and even more strongly to issues that should or could have been the subject of litigation if the parties had pursued their claims diligently.* (para [27])

[40] Ms Chan submitted that there was nothing in the judgment of Chief Judge Goddard to suggest that His Honour accidentally omitted to refer to annual leave in the discussion of remedies and the plaintiff does not now suggest that this was the case. Finally she submitted that the Court was functus officio and cannot re-determine remedies in the judgment which must now stand as being final. She also advanced an argument based on delay on the part of the plaintiff to pursue these matters.

[41] I accept Mrs Chan's submissions that the matter of accrued leave is res judicata and the plaintiff is estopped from now raising this issue which he had not raised in the original hearing. To allow the present application to go forward would be to relitigate a matter that had already been before the Court and should have been determined there, had it been raised. For the reasons advanced by Mrs Chan, which I accept, this cause of action must also be struck out.

## **Summary**

[42] The defendant's application to strike out the plaintiff's proceeding must succeed and the plaintiff's claims are struck out accordingly.

## **Costs**

[43] Costs are reserved and, if they cannot be agreed, are to be the subject of an exchange of memoranda, the first of which is to be filed within 30 days. Any memorandum in reply is to be filed and served within a further 21 days.

B S Travis  
Judge

Judgment signed at 4pm on Tuesday 15 May 2007