IN THE EMPLOYMENT COURT
AUCKLAND

AC 10/09
ARC 85/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out part of statement of claim
BETWEEN	BRIAN ALEXANDER WEBB Plaintiff
AND	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGERS TRANSPORT EMPLOYEES' UNION INCORPORATED Defendant

Hearing: 25 March 2009
(Heard at Auckland)

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

Judgment: 26 March 2009

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

---

[1] The defendant union has applied for an order striking out paragraph [10] of the plaintiff's statement of claim dated 26 November 2008 which reads as follows:

> *The Authority has power to address the issues Webb has raised in relation to the unions* [sic] *loan scheme under s162 of the Employment Relations Act which provides "the Authority, in any matter relating to an employment agreement may make and* [sic] *order that the High Court or District Court may make under any enactment of law relating to contracts". The provision of s162 would include credit contracts entered into between a*

union member and a Union. The concerns Wiri union members have raised with Webb are the usurious interest charges and lack of disclosure and reporting.

[2] The plaintiff has challenged parts of the Employment Relations Authority's determination of 29 October 2008 under AA 370/08 and paragraph 3(d) of his statement of claim dealing with one part reads:

…

d. The manner in which the concerns raised with the union loan and welfare scheme were dismissed – [Determination 77 & 78].

[3] Paragraphs [77] and [78] of the determination acknowledge that the plaintiff was able to submit a grievance to the National Council of the union concerning his complaint about the Welfare and Loan scheme operated by the defendant. Paragraph [78] of the determination states:

I confirm directions given on 24 September 2008 that the Authority has determined not to investigate that particular complaint because;

- *it has already been investigated and determined under AA 221/08 on 27 June 2008,*
- *it is arguably not, or not yet, an employment relationship problem, as no participant in the scheme has complained about it, and*
- *it should be dealt with under the union's internal grievance procedure, pursuant to R22.a.(iii) and R32.(d).*

[4] The grounds of the application for strike out are that the determination did not deal with the issue of the Loans Scheme, referred to at paragraph [10] of the statement of claim, because the issue had been determined by the Authority in its earlier separate interim direction issued on 24 September 2008 and substantively, in the determination dated 27 June 2008. This earlier determination was challenged by

the plaintiff out of time and the Chief Judge declined leave (*Webb v The New Zealand Tramways and Public Passenger Transport Employees' Union Inc* AC 35/08, 18 September 2008).

[5] The strike out application is supported by an affidavit of Gary Richard Froggatt who is the National Secretary of the defendant Union and the President of its Auckland branch. He deposes that the loan scheme is operated by the union to assist members in financial trouble and that the plaintiff has attempted to raise issues about it, including in the Employment Relations Authority. The affidavit annexes a copy of the direction of the Authority dated 24 September 2008, which is in substance the same as that appearing in paragraph [78] of the Authority's 29 October determination.

[6] As developed by Mr Mitchell on behalf of the defendant at the hearing it was argued that the plaintiff's employment relationship problem had been disposed of in the 27 June 2008 determination and paragraph [10] of his statement of claim was an attempt to re-litigate matters already decided and was therefore an abuse of process.

[7] In opposition to the application to strike out, Mr Carrucan on behalf of the plaintiff contends that the Authority's determinations AA 370/08 and 221/08 did not resolve the employment relationship problem, and for the Employment Court to now strike out or not hear that part of the challenge would prevent the matter being dealt with on its merits. He submitted that the challenge to AA 370/08 was filed within the 28-day timeframe, has not been abandoned by the plaintiff, and ought to be dealt with.

[8] The plaintiff also contends that the Authority's determinations are not a final or competent decision on the merits and facts placed before the Authority and therefore did not give rise to an estoppel for *rem judicatum.*

[9] The plaintiff's notice of opposition is supported by an affidavit from Brian Alexander Webb which deals with the merits of the complaints he has made concerning the Welfare and Loan Scheme and his allegation is that it is being operated in breach of the Credit Contracts And Consumer Finance Act 2003.

[10] After hearing the argument of Mr Carrucan on behalf of the plaintiff I was satisfied that Mr Mitchell's submissions were correct. I have examined the 27 June determination and find that it dealt with precisely the same issue the plaintiff wishes to raise again in his challenge.

[11] That determination is deemed conclusively to be correct as between the parties and, as no leave to challenge out of time was given, it is determinative of the matters the plaintiff is still seeking to litigate.

[12] The Court has jurisdiction to strike out proceedings as an abuse of process, see for example *Clark v NCR (NZ) Corporation* [2006] ERNZ 401. The Court previously applied High Court Rule 106 but since 1 February 2009, the Rule is now 15.1 which is substantively the same. In the commentary an attempt to re-litigate matters already determined is given as example of an abuse of process.

[13] The grounds for the strike out having been made out, I would have ordered the striking out of paragraphs 3(d) and 10 of the plaintiff's statement of claim. Other paragraphs in the statement of claim would also need to be omitted as they refer to the loan scheme.

[14] There are also other difficulties with the statement of claim because it does not comply with s179(4) of the Employment Relations Act 2000. It does not specify the error of law or fact relied on, the questions of law or fact to be resolved, and the clear grounds on which the election is made. Any statement of claim to be filed would have to comply with those provisions.

[15] However, in the course of argument it became clear that some of the other matters in the substantive determination which the plaintiff has elected to challenge may have been overcome by subsequent events and the plaintiff now wishes to reconsider proceeding with his challenge.

[16] It is also clear that it is still open to the plaintiff to raise any concerns he may have about the loan scheme internally, in accordance with the union's rules and, if he

is unhappy with the result, he may then raise a fresh employment relationship problem in the Employment Relations Authority.

[17] The defendant having succeeded in its application is entitled to costs and at the request of counsel I have reserved these. They may be addressed by the filing of a memorandum, if they are not determined by agreement, once the issue of whether a notice of discontinuance will be filed has been decided by the plaintiff.

B S Travis
Judge

Interlocutory Judgment signed at 3pm on 26 March 2009