IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 79
ARC 22/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	PREMIER EVENTS GROUP LIMITED First Plaintiff
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP) Second Plaintiff
AND	MALCOLM JAMES BEATTIE First Defendant
AND	ANTHONY JOSEPH REGAN Second Defendant
AND	PATRICIA PANAPA Third Defendant
AND BETWEEN	MALCOLM JAMES BEATTIE First Plaintiff
AND	ANTHONY JOSEPH REGAN Second Plaintiff
AND	PATRICIA PANAPA Third Plaintiff
AND	PREMIER EVENTS GROUP LIMITED First Defendant
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP) Second Defendant

Hearing: 30 April 2012
(Heard at Auckland)

Counsel: Aaron Lloyd and Vonda Hodgson, counsel for Premier Events Group Limited
David Neutze and Natalie Lord, counsel for BA Partners Limited (in liquidation and receivership)
John Eichelbaum, counsel for Malcolm James Beattie, Anthony Joseph Regan and Patricia Panapa

Judgment: 1 May 2012

Reasons: 14 May 2012

REASONS FOR ORAL INTERLOCUTORY JUDGMENT NO 3 OF CHIEF JUDGE GL COLGAN

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[1] These are the reasons for the Court's Interlocutory Judgment No 3[1] delivered orally and urgently on 1 May 2012. I will not repeat what is said in that judgment so that this must be read in conjunction with it. Not all of the issues determined by that oral interlocutory judgment require elaborate reasoning including, in particular, the orders and directions refused and given at [10] and following of that judgment.

Strike-out of affirmative defence/set off (personal grievance)

[2] The first issue for determination at the start of the trial was whether one of Mr Regan's defences to BA Partners Limited's claim against him should be struck out. That positive defence purports to be a personal grievance for which compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) is claimed. The particular nature of the personal grievance is that BA Partners Limited (BAPL) disadvantaged unjustifiably Mr Regan in the course of his employment.

[1] [2012] NZEmpC 71.

[3] BAPL said that Mr Regan is not entitled in law to bring a claim for personal grievance where s 114 of the Act has not been complied with. This requires a grievant to raise a grievance with his or her employer within the period of 90 days following the grievance arising or coming to the grievant's notice, whichever is the later. BAPL says that, before pleading a personal grievance in these proceedings, Mr Regan's claim was never raised with it so that, absent an extension of time to raise the grievance (which is not being sought from the Court), the defence should not be permitted and should be struck out.

[4] Section 114 of the Act provides materially:

> **Raising personal grievance**
>
> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
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> (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[5] It was common ground that Mr Regan did not raise his personal grievance himself by notifying his employer. Nor did any agent of Mr Regan raise the grievance. Rather, Mr Regan lodged a statement of problem in the Employment Relations Authority which outlined his grievance. There was no argument that this document did not raise his grievance with sufficient specificity so that an employer could address the grievance.[2] The date of its receipt by the employer, so far as that can best be estimated, was 25 June 2010 when the Authority served the statement of problem on BAPL. The 90 day period referred to in s 114 can be calculated by counting back from that date. That covers some of the period of Mr Regan's employment with BAPL.

[6] The first issue therefore was whether the lodging and service on the employer of a statement of problem in the Authority raised Mr Regan's personal grievance in

[2] *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

accordance with the requirements of s 114. Counsel were unable to cite any instance where the Court has squarely addressed this question. There is, however, well-developed case law on the interpretation of s 114 and its predecessor section in the Employment Contracts Act 1991, s 33. It is clear that the Court's approach has been to treat s 114 and its predecessor broadly in that there is a relatively low threshold for notification of the personal grievance.[3] In *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds*, after a discussion of the statutory language and the parliamentary history, the Court noted that because getting to the dispute resolution process is a key aim of the Act, "less rigidity and less formalism are guidelines in interpreting provisions in Part 9 including the requirement to raise a personal grievance."[4]

[7] That general approach is reflected in two judgments which, although decided under the Employment Contracts Act 1991, are relevant here. The relevant provision in that Act, s 33(2) provided:

> Every employee who wishes to submit a personal grievance to that employee's employer in accordance with the applicable personal grievance procedure shall, subject to subsections (3) and (4) of this section, submit the grievance to that employee's employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being submitted after the expiration of that period.

[8] In *Wilkinson v ISL Computer Systems Ltd*,[5] the plaintiff had been employed by KPMG Peat Marwick but had first been seconded, and later employed, by a related company, ISL. The employee believed she was still employed by KPMG and raised her personal grievance with that company. KPMG forwarded the grievance letter to ISL within the 90 day limitation period and ISL responded to the personal grievance. ISL argued that the plaintiff had never herself raised her grievance with her correct employer but the Court rejected that proposition finding that, as the grievance had found its way to the employer within the 90 day period and ISL had then responded to the grievance, it had been properly raised.[6]

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[3] *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139 at [42].
[4] At [40].
[5] [1993] 1 ERNZ 512.
[6] At 523-524.

[9] The second case, *Forever Living Ltd v Kruesi*,[7] also involved employer misidentification. Like *Wilkinson*, the correct employer was informed of the personal grievance within the 90 day period by a related entity with which the grievance had been mistakenly raised. The Court rejected the plaintiff's submission that s 33(2) required a direct communication by the employee to the employer and did not permit communication of the grievance through a third party. The Court held:[8]

> Section 33(2) requires the employee to submit the grievance to the employer, which can be done by bringing it to the employer's notice or to the notice of a representative of the employer. Alternatively, it can be brought to such notice circuitously, provided it actually reaches the employer or the employer's representative in circumstances which objectively can be viewed as having presented the submission to the employer for consideration or decision in a way that enables the employer to respond.

[10] This case does not concern employer misidentification but I consider that the case law supports a finding that an employee may raise a personal grievance if a third party brings that grievance to the attention of the employer within the 90 day period. An employee who submitted an application to the Authority could be confident (because that is the normal procedure) that the Authority would serve that application to the named employer soon after its submission. While this method of raising a personal grievance runs the risk that service may occur outside the 90 day window, in this case a count back from the date of service includes some part of Mr Regan's employment.

[11] Further, I consider that this approach is mandated by the terms of s 114(2) itself which define the raising of a grievance with an employer as occurring "as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware". What is required is that the employee has made the employer aware of the grievance and that awareness occurred in this case when the employer was served with the statement of problem. In addition, the inclusion of the words "has taken reasonable steps to make", a phrase which was absent from the Employment Contracts Act, also clearly allows a grievance to be raised where reasonable steps have been taken even if the employee has not

[7] [1993] 2 ERNZ 636.
[8] At 644.

succeeded in directly raising the grievance with the employer. I consider that Parliament's use of this phrase confirms this Court's interpretation that a "circuitous route"[9] for raising a personal grievance may be permissible depending on the facts of the case. In this case, the reasonable steps taken were the filing of the claim with the Authority.

[12] Interpreting s 114 in this way might seem to permit a party to short circuit the normal process of dispute resolution which the Act envisages will occur in most cases. That is, a grievance is raised first with the employer and then there is an opportunity for negotiation and discussion so that a resolution may occur before the matter is lodged with the Authority. Such an approach is to be encouraged. But there will remain ample opportunity for the employer to address the grievance and, perhaps, resolve that grievance through discussion and/or mediation between the parties even after the matter is officially before the Authority. If unmeritorious claims are lodged in the Authority, but which could have been resolved by earlier discussion for instance, then the party lodging the claim may well have to bear the costs' consequences of such a claim.

[13] Because both the statute and the principles of long established case law allow a personal grievance to be raised by lodging a statement of problem in the Authority if such claim is served on the employer within the 90 day limitation period, I declined the first ground to strike out Mr Regan's claim.

[14] This decision raised a second issue, namely what conduct by the employer may be encompassed within the unjustified disadvantage grievance. Events which occurred during the period of 90 days before 25 June 2010 (which in reality may be a period of one or two weeks before Mr Regan's employment ended) can clearly be the subject of that grievance. However, I concluded also that earlier events connected with those events in the last days of his employment, may fall for consideration if these amount to a course of conduct leading and linked to the events within the 90 day period. I did so for the following reasons.

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[9] At 640.

[15] It is clear that the Court may consider evidence which provides background and context to an alleged personal grievance. In *Coy v Commissioner of Police*,[10] the Court allowed evidence of events which occurred some 8 years before the personal grievance was raised to be admitted in an unjustified constructive dismissal claim. However, it also commented that, "the plaintiff is not entitled to rely upon events that occurred prior to 90 days before she raised the relevant personal grievances as independent disadvantage grievances".[11] It cautioned that evidence of earlier events would have to be relevant to the justiciable grievances.

[16] In this case, the claim is that the Court should hear evidence of events which occurred before the 90 day period but which were connected to the events which were within time.

[17] In *Jack v Her Majesty's Attorney-General in respect of the Department for Courts*,[12] the Court examined claims for wrongful dismissal and other breaches of contract which the parties agreed were subject to the six year limitation period of the Limitation Act 1950. The plaintiff intended to rely on a course of conduct that began outside the limitation period, continued through it and culminated with her dismissal within the period. While expressing some doubt that the series of discreet actions the plaintiff complained about could be related to the allegations and actions within the limitation period, the Court was not prepared to strike out the plaintiff's claim.[13] The plaintiff would, however, have to prove the connection between the events was such that there was a "continuous cause of action".[14]

[18] Also in *Waugh v Commissioner of Police*,[15] the Court accepted that there was a continuing cause of action in respect of actions taken by the employer against the plaintiff. This included actions which were four years apart. The Court commented, relying on the Court of Appeal decision in *Minister of Education v Bailey*,[16] that: "it

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[10] CC 23/07, 19 November 2007.
[11] At [6].
[12] [2002] 1 ERNZ 720.
[13] At [33].
[14] At [32].
[15] [2003] 1 ERNZ 236.
[16] [1992] 1 ERNZ 948 at 954.

is a question of fact and degree whether separate acts are so close in time and quality as to be properly described as constituting a continuous cause of action."[17]

[19] Similarly, in this case, it will be for Mr Regan to show that the events which occurred outside the 90 day period were connected to those within the period so as to establish a course of conduct which the Court can evaluate as the basis for a disadvantage grievance

[20] This approach coincides both with case law and with the practicalities of bringing a disadvantage grievance. It cannot be right that an employee who alleges he or she is suffering an on-going disadvantage must raise a personal grievance every 90 days while the claim is considered and dealt with by the employer or the employment institutions. Rather, one raising of a personal grievance should be sufficient to cover one related and continuous cause of action, provided the events complained of outside the 90 days all relate to events contained within the 90 day period and form a course of related conduct.

Evidence admissibility

[21] The second matter heard was a challenge by both corporate parties to the admissibility of some of the evidence intended to be called by witnesses for the individual parties. There were two broad grounds for impugning the intended evidence. The first can be described as irrelevant and therefore impermissible propensity evidence. The second may be most conveniently summarised by what the parties know as the evidence of alleged asset stripping by those corporate parties and their representatives. The admissibility of this latter class of evidence is to be judged in the light of the Court's earlier interlocutory judgment[18] affecting the striking out of certain defences raised by Mr Regan in particular, but also now affecting Mr Beattie.

[17] *Waugh* at [97].
[18] [2012] NZEmpC 26.

A general comment

[22] It is necessary to make two things very clear about these applications and this judgment. Although it is necessary to refer to the general nature of the evidence intended to be called when analysing whether it is admissible, no conclusion has been reached by the Court on the accuracy or truth of the intended evidence. Much, if not all, of it will be contested if it is admissible but nothing said about it should be taken as the expression by the Court of any view of its accuracy.

[23] The second thing I wish to make plain is that exclusion or criticism of the intended evidence should not be seen as a criticism of the person who might have given it. The test to be applied is a legal one of relevance to particular proceedings. The people involved, all of whom I am sure are anxious to assist the Court by giving their conscientious accounts, will understand, I hope, that their evidence must be confined to relevant issues for determination by the Court.

The nature of the proceedings

[24] Premier Events Group Limited's proceedings against Messrs Beattie and Regan and Ms Panapa are contained in its amended statement of claim dated 25 November 2011. Mr Beattie was an employee of Premier Events Group Limited (PEGL) from 10 June 2003 to 5 March 2010. He was also Managing Director of the company from 10 June 2003 to 24 December 2009. Ms Panapa was an employee of PEGL from 19 December 2006 to 1 April 2010. There is no allegation that Mr Regan was in an employment relationship with the company.

[25] There are four separate causes of action in PEGL's claims against Mr Beattie and Ms Panapa. First, it says that they breached restraints of economic activity in their employment agreements causing economic loss or, alternatively, as a result of which the defendants have been unjustly enriched. The second cause of action which purports to be against Messrs Beattie and Regan (but in respect of which there is no discernible pleaded cause of action against Mr Regan) alleges misuse of confidential information obtained in the course of employment. The third cause of

action in PEGL's proceedings against Mr Beattie and Ms Panapa is for breach of contract and alleges that both employees competed in business unlawfully with their employer whilst still employed by PEGL and retained and misused confidential information which was the property of PEGL. It claims that this has resulted in damage to its goodwill. It also says that Mr Beattie and Ms Panapa failed in their contractual obligations to serve the company honestly and faithfully.

[26] The final cause of action against Mr Beattie and Ms Panapa is breach of good faith in contravention of s 4 of the Act.

[27] The defendants to the claims by PEGL advance a number of defences including denials of their alleged wrongdoing and then a number of affirmative defences. These include, first, that PEGL is not entitled to seek equitable relief from them because it comes to the Court, as they describe it, "with unclean hands" and in particular that it participated unfairly and in bad faith in the conduct of an asset stripping scheme designed to disadvantage them as from June 2009.

[28] The second affirmative defence advanced by the individual defendants against PEGL is that it breached its duty of good faith to them under s 4 of the Act. They say that it did so by manipulating its accounts to reduce bonuses due to Mr Beattie and to reduce the purchase price for the 50 per cent of the shares in the business that he acquired from PEGL in 2004. They say that other examples of breaches of good faith by PEGL included:

- that it attempted to divert business into Mr Gill's personal family company;
- that it took sides with the Commissioner of Inland Revenue in a GST dispute with Mr Beattie;
- that it made unauthorised deductions from Mr Beattie's salary;
- that it assisted in breaching the terms of the 2004 buy-out of Mr Beattie by treating him unfairly in breach of contract;

- that it participated in an unfair/bad faith asset stripping scheme;

- that it failed to treat its key employees (Messrs Beattie and Regan) fairly and brought about the demise of Mr Beattie's own business;

- that it failed to give notice of company meetings;

- that it failed to obtain shareholders' approval for major transactions requiring this;

- that it failed to obtain a special resolution for a specified major transaction; and

- that it cumulatively alienated Mr Beattie who was the key revenue generator in his business and that of Mr Regan.

[29] Next, the individual defendants deny that PEGL has suffered any loss.

[30] Their fourth affirmative defence is that PEGL breached their contracts of employment in a number of specified ways similar to those set out above.

[31] Their fifth affirmative defence is that PEGL failed to mitigate any losses that it suffered.

[32] Their sixth defence is "acquiescence, estoppel and waiver".

[33] Seventh, they say that PEGL's conduct was repudiatory of their employment agreements. Their eighth defence is styled "APPORTIONMENT/ CONTRIBUTION", and says that PEGL's demise was brought about by Mr Gill alienating both Messrs Beattie and Regan.

[34] BAPL's claims against Mr Regan and Ms Panapa are set out in its amended statement of claim dated 22 November 2011. BAPL was incorporated on 10 June 2003, placed in receivership on 20 April 2011, and went into liquidation on 3 July 2011. Its current sole director is Robert Gill. Mr Regan was employed by BAPL as

Group Chief Operating Officer from 14 November 2003 and was a director from 29 August 2003 until 31 March 2010, having given notice of his resignation from that role on 17 March 2010.

[35] BAPL's shareholders are Mr Gill's 'interests' (Robert Gill, John Gill and B and M Trustees NZ Limited) as to 80 per cent of the share capital on the one hand, and Mr Regan, Jennifer Regan and Bart Cleverley (as to 20 per cent of the share capital).

[36] The cause of action against Mr Regan is described as "unauthorised diverting of funds" but amounts, in effect, to a breach of contract claim that he unlawfully paid himself or caused himself to be paid the sum of $52,693 for which there is claimed a compliance order for the return of this sum or damages for its loss in the same amount.

[37] Mr Regan's defences to BAPL's claims against him include, in addition to general denials of them, a number of affirmative defences. The first of these is that the sum of $52,693 was properly paid to him in the ordinary course of business, confirmed by an independent accountant and constituted monies due and owing for salary and holiday pay.

[38] Second, and by way of set-off defence, Mr Regan claims the same amount as is claimed against him for BAPL's breach of the statutory duty of good faith under s 4 of the Act in a number of ways specified in his statement of defence dated 5 March 2012.

[39] The third alternative set-off defence is for breach of contract and, in particular, of the obligation to treat him fairly and relies on a number of particulars set out in the statement of defence.

[40] The fourth alternative set-off defence is for breach of the Wages Protection Act 1983 and/or an express term of his employment contract by failing to pay him agreed salary or wages.

[41] The fifth alternative set-off defence purports to be a personal grievance which is the subject of an independent strike-out application dealt with earlier in this judgment.

Relevance

[42] In the applications by the corporate parties to have ruled as inadmissible the evidence of some of the individual parties' witnesses, relevance is determined by the pleadings. Some of these at least have been the subject of strike-out applications and decisions so that the justiciability and relevance of some of the individual parties' assertions have already been decided. If the impugned intended evidence of witnesses relates to these causes of action or affirmative defences, then it is very difficult, if not impossible, to rule that such evidence is irrelevant and therefore inadmissible. That is not the same thing, of course, as the acceptance or rejection of that evidence or even the weight which it may be given if accepted. Those are all trial issues, not for determination pre-trial.

[43] It is not inappropriate to sound a note of commonsense and practicality at this point. This is not a trial before a jury in which there might be a risk of jurors placing emphasis, or too much emphasis, on inadmissible evidence. Judges sitting alone sift out irrelevant or otherwise inadmissible evidence that they may happen to hear, and do so on an almost daily basis. In these circumstances, it is sometimes simply better to get on with the evidence, warts and all, in the knowledge that some of the admissible evidence will go no further than being given to the Court. That is what happens, of course, when inadmissible evidence is given unscripted, for example during cross examination. In these circumstances, the more important factors in determining admissibility before trial are to ensure that it is focused on the real issues and concludes within a reasonable time.

The law on admissibility of evidence

[44] As to the general grounds of inadmissibility, the following can be said immediately. Proceedings in the Employment Court are not governed by the

Evidence Act 2006. Rather, the admissibility of evidence is governed by the very much more general s 189 of the Employment Relations Act 2000 which provides:

> **189 Equity and good conscience**
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> (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
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> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[45] As numerous cases have held,[19] however, relevant provisions of the general rules of evidence including the Evidence Act 2006 guide this Court in the exercise of its broad discretion under s 189(2) above.

Propensity evidence

[46] This is a convenient, although not entirely accurate, label describing some of the intended evidence which is sought to be ruled inadmissible. Whilst the term is well known in criminal law, it is not in civil proceedings such as these are, and needs to be defined to the extent it can be. Propensity is not unassociated with what lawyers call 'similar fact' evidence which is a constituent of propensity. By establishing a person's relevant conduct, which is not the subject of the proceedings but is nevertheless so materially similar to conduct that is the subject of the proceedings, propensity or similar fact evidence is adduced in an attempt to persuade the tribunal of the probability that the conduct impugned in the proceedings took place.

[47] So defined, propensity or similar fact may assist the Court to determine the probabilities of relevant events, especially where these are denied and it might be otherwise difficult to determine which of two accounts is more probably correct. So, to take a simple example, if an important and relevant event is alleged to have taken

[19] For example *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31 at [53]; *Mana Coach Services Ltd v NZ Tramways and Public Passenger Transport Union (Wellington Branch) Inc* WC13A/08, 30 June 2008 at [13].

place in a location that the alleged wrongdoer denies ever having been to, evidence of that person's prior presence at that place may establish a propensity for that person to be there. Even more pertinently in employment cases, where there is an allegation of sexual harassment in a workplace that is denied, evidence of similar behaviour towards other employees on other occasions, although not the subject of the immediate proceedings, may tend to establish a propensity for it by the perpetrator..

[48] Just as with similar fact evidence in criminal law, there must, however, be a sufficient identity of conduct for similar fact evidence leading to an argument of propensity to be persuasive and therefore relevant. Again to give a simple example, just because an employer has previously dismissed an employee for theft does not mean that this can be used as evidence of a propensity to do so and thus to weaken the employer's case of justification for dismissal.

[49] There is some case law guidance on propensity and similar fact evidence in this Court. As regards propensity, *NZ Woollen Workers IUOW v Distinctive Knitware NZ Ltd*[20] deals with the receipt of similar fact evidence going to propensity and identifies the Court's residual discretion to exclude such evidence if it does not meet the equity and good conscience test. Such similar fact evidence as may be admitted will be subject to weight.

[50] This was followed in *Z v A*:[21]

> Equity and good conscience often call for the exclusion of such evidence from consideration. At other times, it is very much in point and can even be decisive if it discloses a pattern of conduct or a systematic resort to the same false explanation for equivocal conduct of a comparable kind. Put shortly, the safe rule for the Tribunal is that in all fairness it can rely on evidence of facts said to be similar if there is a real and striking, as opposed to a superficial or unimpressive, similarity with the central allegations. The former prescription is not met here.

[51] As the Labour Court noted in *Distinctive Knitwear*, rules on similar fact evidence in civil proceedings were promulgated as long ago as 1908 in *Hales v Kerr*[22] in this way:

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[20] [1990] 2 NZILR 438 at 443-446.
[21] [1993] 2 ERNZ 469 at 492.

> It is not legitimate to charge a man with an act of negligence on a day in October and to ask a jury to infer that he was negligent on that day because he was negligent on every day in September. … But where the issue is that the defendant pursues a course of conduct which is dangerous to his neighbours it is legitimate to show that his conduct has been a source of danger on other occasions, and it is a legitimate inference that, having caused injury on those occasions, it has caused injury in the plaintiff's case also.

[52] Next, similar fact evidence in civil proceedings is not admissible to show only that the employer had a propensity to act in a particular way. It is not admissible to show merely a general disposition towards wrongful or unjust conduct. Such evidence may be relevant, but notwithstanding its relevance, the Court has a discretion to refuse to receive it, and will normally do so.

[53] Such evidence can, however, be both relevant and admissible for the purpose of either rebutting a defence by showing it to be false, because in other similar cases the respondent has unsuccessfully raised the same defence, or for the purpose of demonstrating the existence of a systematic course of conduct on the respondent's part – thereby supporting the grievant's evidence by making it more likely that that evidence is true.

[54] But for such evidence to be admissible, there must be a striking similarity between the conduct towards others and the conduct towards the grievant.

[55] The foregoing propositions are drawn from *R v Boardman*[23] and *R v Hsi En Feng*.[24] In *Boardman*, Lord Wilberforce said:[25]

> The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s).

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[22] [1908] 2 KB 601at 604-605.
[23] [1975] AC 421 (HL).
[24] [1985] 1 NZLR 222 at 224-225 (CA).
[25] At 444.

[56] In *R v McLean*[26] the New Zealand Court of Appeal put it this way:

> While various formulae are used to express the same underlying idea, it is enough for our purposes to say that evidence of other conduct by the accused may not be admitted merely to show that he has a propensity to commit homosexual offences; but if, between the complainant's account and the accounts given by others of the accused's conduct on other occasions, there is a striking similarity, so as to make it highly likely that the complainant is telling the truth, those other accounts may be admitted; subject, nonetheless, to the overriding discretion of the Judge to exclude them on such grounds as that their probative value is outweighed by their prejudicial effect or that there appears to be a real chance that witnesses have collaborated to tell a false story. It was stressed by the House of Lords in *Boardman* that the admission of this kind of evidence is exceptional, the general rule being that it offends against the concept of a fair trial to allow evidence that the accused is a man of bad character with a disposition to commit certain crimes.

[57] As the Labour Court in *Distinctive Knitwear* noted, there may be a difference in degree in the application of similar fact rules between criminal and civil cases.[27] So the English Court of Appeal in *Mood Music Publishing Co Ltd v De Wolfe Ltd*[28] said:

> In civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

[58] A similar approach was taken in New Zealand in *The King v Westfield Freezing Company Ltd*.[29] And in *O'Brien v Chief Constable of South Wales Police*,[30] Lord Carswell described the passage from *Mood Music* cited above as "clearly express[ing] the correct approach".

[59] The Labour Court applied the materially identical evidence admission provision to that which now applies but was then s 303(1) of the Labour Relations Act 1987 in relation to similar effect evidence in *NID Distribution Workers IUOW v A B Ltd*[31] as follows:

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[26] [1978] 2 NZLR 358 at 361.
[27] At 444.
[28] [1976] 1 All ER 763 at 766.
[29] [1951] NZLR 456 at 466-470 (CA).
[30] [2005] UKHL 26, [2005] 2 AC 534 at [72].
[31] [1988] NZILR 761 at 764.

> … the Court was asked to rule on the application to it of the principles governing evidence of "similar facts". A statement of these principles appears in Cross on Evidence (Third New Zealand Edition, D L Mathieson, Ed, at pp 343 and following). It is our view that the governing provision for this Court is s 303(1) of the Act which for convenience we set out here:
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> …
>
> It is our view that the discretion provided there overrides the operation of the principles governing "similar fact" evidence. It overrides also the operation of the principles governing the admissibility of corroborative evidence that may apply in other Courts. The Court however should and does in such cases consider those principles.

[60] Turning to character evidence generally, this was discussed by the Employment Court in *Walley v Gallagher Group Ltd.*[32] In *Walley*, the Court commented on evidence of the good character of one of the witnesses, effectively a party. Although describing it as "unusual", the Court admitted evidence of general good character in these circumstances as being relevant to disputed allegations leading to an allegedly unjustified dismissal.

[61] For these reasons, the Court will hear similar fact evidence to support arguments for a case of propensity, but within limits. These limits include a sufficient identity of the conducts alleged, relevance to the issues before the Court for determination, and where the probative value of the similar fact/propensity evidence is greater than its prejudicial effect.

[62] I allowed some evidence of propensity but only to extent that it was related to the issues between the parties in this case. I did not allow purely general good character evidence because, despite what I suspect are the views of the parties, this is this is not a case about their general good, or rather bad, characters. I allowed the witnesses who are parties to the proceeding greater latitude at the margins, that is I erred on the side of allowing evidence in and to go to weight where it was not clearly irrelevant and therefore inadmissible.

The intended witnesses/evidence

[63] I dealt first with PEGL's application to declare inadmissible the intended evidence of five witnesses intended to be called by the individual parties and to

[32] [1998] 3 ERNZ 1153.

declare inadmissible parts of the intended evidence of a further four witnesses to be called by the individual parties including that of Mr Beattie himself. These applications were filed on 17 April 2012, and some as recently as a few days before the hearing, but were not able to be heard and determined until the first day of the substantive hearing.

[64] The names of the intended witnesses, the admissibility of whose evidence was challenged in total, are Jonathan Ferdinand, Robert Harvey, William Garlick, Nicola Wagner and Blair Dods. The names of those intended witnesses, parts of whose evidence are impugned, are Lisa Hill, Aroha Whippy, Roxanne Salton and Malcolm Beattie.

[65] The grounds of challenge included:

- irrelevance in the sense that the intended evidence does not prove or disprove anything of consequence to the determination of these proceedings;
- hearsay evidence prohibited by s 17 of the Evidence Act 2006;
- statements of opinion prohibited under s 23 of the Evidence Act 2006;
- inadequately specified propensity evidence; and
- that insufficiency of detail renders such evidence unfairly prejudicial when compared to its probative value.

[66] PEGL also said that hearing this evidence will prolong needlessly the hearing.

[67] The second corporate plaintiff, BAPL, has also applied to strike out some of the intended evidence of the individual defendant, Mr Regan, against whom it is claiming. I have already summarised the nature of the proceedings brought by

BAPL against Mr Regan in my Interlocutory Judgment[33] issued on 21 February 2012, so it is unnecessary to repeat that now.

[68] Some of the evidence which BAPL seeks to have ruled inadmissible is the same evidence that the other corporate plaintiff, PEGL, does likewise. This includes all of the evidence of Ms Wagner, paras 2 and 7 of the proposed evidence of Mr Dods, all of which PEGL seeks to have ruled inadmissible, some of the same paragraphs of Mr Beattie's brief that are impugned by PEGL, and also some other paragraphs of Mr Beattie's evidence, those numbered 5.4 to 5.7.

[69] In addition, BAPL challenges the admissibility of paras 8, 9.12, 13 and 19.14 of Mr Regan's intended evidence.

[70] The first of the applications to prohibit the entire evidence of a witness relates to Jonathan Ferdinand. Mr Ferdinand was formerly employed at companies operated by PEGL's Roger Gill. The thrust of Mr Ferdinand's intended evidence is to complain about his treatment as an employee by Mr Gill which culminated in Mr Ferdinand's resignation. I determined it was not relevant to the issues to be determined in this case.

[71] The evidence of the next intended witness sought to be ruled inadmissible is that of Robert Harvey. Mr Harvey will attest to his long acquaintance with Malcolm Beattie and the latter's good works in the community in the associated fields of surf life saving and helicopter rescue services. Mr Harvey's intended evidence attests generally to Mr Beattie's good character. That is not really an issue in the case and Mr Harvey's intended evidence was not therefore relevant.

[72] Next was the intended evidence of William Garlick who was formerly the Chairman of the New Zealand Olympic Committee and chaired its Marketing Commission. Mr Garlick's evidence was intended to address what he describes as an episode of unsatisfactory dealings between the Olympic Committee and Mr Gill, although which events are not the subject of this proceeding. Again, the thrust of the

[33] [2012] NZEmpC 26.

evidence was to seek to portray Mr Gill as an aggressive, unethical and coercive businessman and, to a lesser degree, to portray Mr Beattie in a contrary light. The difficulty with both the factual allegations that Mr Garlick makes against Mr Gill and, more particularly, with the pejorative descriptions of these in his intended evidence is that there was a very real risk of the trial being sidetracked into a contested hearing about these events which took place now more than 10 years ago. It is inevitable that Mr Gill will wish to refute in equally strong terms the serious allegations to be made about him by Mr Garlick but which, until now, have not been a feature of litigation, at least between the Olympic Committee and Mr Gill.

[73] Despite my indication, expressed to counsel at the hearing, that Mr Garlick's brief of evidence would not be admissible, Mr Eichelbaum was insistent that Mr Garlick had other relevant evidence to give of more recent events which would be pivotal to his client's cases although counsel was not able to articulate what this evidence would be. In these circumstances, I allowed Mr Eichelbaum an opportunity to recast Mr Garlick's intended evidence within relevant parameters, reserving leave to the corporate parties to renew their challenge to the admissibility of this. However, I determined that because of its disconnection with the events which are the subject of the case and Mr Garlick's retirement from the New Zealand Olympic Committee and the speculative nature of his evidence about what its attitude might now be, the signed brief as filed would be inadmissible. Mr Eichelbaum subsequently elected not to proceed with Mr Garlick's evidence, but did proceed with that of another NZOC officer, who was in that role at times relevant to this proceeding. This evidence was allowed and heard despite objection.

[74] Next is the intended evidence of Nicola Wagner. It is intended that Ms Wagner give evidence about her sale in 2008 of shares in two website companies to Mr Gill as the Chief Executive Officer of a company owned by the first and second corporate plaintiffs, Digital Partners Ltd. Ms Wagner's intended evidence will be to the effect that Mr Gill subsequently attempted to on-sell these website enterprises that he had purchased from Ms Wagner but refused to pay her about one-half of the agreed purchase price despite an arbitrator's award for the balance of the unpaid monies having been made in Ms Wagner's favour. Ms Wagner's intended evidence will say that Mr Gill has continued to avoid paying her, including by a scheme to

place the two liable companies into receivership and liquidation after Mr Gill had asset stripped these companies. Ms Wagner's intended evidence would, if admissible, outline her understanding of the scheme by which Mr Gill sought to relieve his companies of this debt.

[75] I determined that Ms Wagner's evidence would not assist the Court in determining the issues now before it. She is engaged currently in proceedings in the High Court which have some but not a significant connection to this case. Although, through other witnesses, there will be some evidence of Ms Wagner's dealings with PEGL's Mr Gill in particular, to have heard her intended evidence would have run the very real risk of examining the merits of her claims which are matters currently before another court. Furthermore, as Mr Eichelbaum eventually summarised the import of Ms Wagner's evidence, it is not helpful for a clearly dissatisfied litigant in other litigation to speculate on the motives or methods of a party in this proceeding. For these reasons I determined that Ms Wagner's intended evidence was and is inadmissible.

[76] Finally, in the category of PEGL's application to reject completely the intended evidence of a witness, was the intended evidence of Blair Dods. Mr Dods was, until recently, the General Manager of one of Mr Gill's (and therefore PEGL's) subsidiary companies, Digital Partners Ltd and closely involved in the transactions affecting the website companies formerly owned by Ms Wagner. Mr Dods's intended evidence concerns not the transactions immediately at issue in this proceeding but other commercial transactions, those affecting the former Wagner companies. Mr Dods's intended evidence also addresses his own experience of employment in Mr Gill's companies and concerns evidence that he was asked by Mr Gill to prepare for this hearing. Mr Dods's evidence also contains allegations about Mr Gill's work practices in relation to the email records of other employees and his personal dealings with employees and business ethics and practices.

[77] In the case of Mr Dods, as in Ms Wagner's, there will be some other evidence about events that concerned Mr Dods but I am satisfied that this is both able to be given by other witnesses and will not be advanced by Mr Dods giving evidence of his own complaints about his employment by Mr Gill. In these circumstances, also,

his evidence would not have assisted the Court to determine the issues it must and is therefore inadmissible.

[78] The foregoing are the reasons for my interlocutory judgment of 1 May 2012.

GL Colgan
Chief Judge

Judgment signed at 9.15 am on Monday 14 May 2012