IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 25
EMPC 233/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out proceedings
BETWEEN	JOHN ROBERTS Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	27 November 2023 (Heard at Auckland)
Appearances:	JM Roberts and MJ Morrissey, counsel for plaintiff K Radich, counsel for defendant
Judgment:	23 February 2024

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application to strike out proceedings)

Introduction

[1] This is a challenge to a preliminary determination of the Employment Relations Authority.[1]

[2] The determination resolved a number of matters against the plaintiff. While the challenge is de novo, he only pursues the breach of contract claims arising from

[1] *Roberts v The Chief Executive of the Department of Corrections* [2023] NZERA 305 (Member Larmer).

the express terms of the Department of Corrections Frontline Staff (Prisons Based) Collective Agreement (CA). He does not pursue any grievance, any separate claim arising from the code of conduct, any ACC top-up claim, or any penalty.

[3] The plaintiff is a corrections officer who has worked for the Department of Corrections (Corrections) from July 2013, having commenced employment at Northland Regional Correctional Facility (NRCF). He is a member of the Corrections Association of New Zealand (CANZ). At all material times, CANZ and he were parties to the CA, which contains particular clauses that the plaintiff says were breached between 4 May 2018 and 27 November 2018.

[4] The plaintiff says Corrections failed to take steps to ensure his safety, which was in breach of its duties including:

(a) breach of cl 6.1.3 of the CA by failing to meet its obligations under the Health and Safety at Work Act 2015 and, in particular, the primary duty of care in s 36 to ensure, so far as reasonably practicable, the health and safety of its workers;

(b) breach of cl 1.5.2 of the CA by failing to operate a personnel policy requiring safe working conditions;

(c) breach of cl 6.1.4(i) of the CA by failing to provide and maintain a safe working environment;

(d) breach of cl 6.1.4(ii) of the CA by failing to make sure the working arrangements were not hazardous;

(e) breach of cl 6.1.4(vii) by failing to engage with its employees about the hazard and risks posed by prisoner A; and

(f) breach of cl 6.1.4(iii) of the CA by failing to provide training and instructions for staff at NRCF dealing with prisoners with a history of violent behaviour and who present with a risk of violence towards staff.

[5] The plaintiff says these alleged breaches by Corrections, and its failure to acknowledge those breaches, remedy them or resolve his concerns, has caused him emotional distress.

[6] He acknowledges that he was injured at work on 27 November 2018 and that the injury was covered by the Accident Compensation Corporation (ACC). He says he is not bringing a claim for his personal injuries or any other damages relating to those injuries.

[7] The plaintiff says he is bringing his claim for breaches of specific terms of the CA and the emotional harm that such breaches caused him independent of the injury. He says that even if there was no injury, he would still have a claim for those breaches of contract.

[8] Corrections says that such claims are barred by s 317 of the Accident Compensation Act 2001 (AC Act) because:

(a) the plaintiff suffered a personal injury covered by the AC Act in relation to the same events, leading to the same injury, for which he now claims damages for alleged breaches of contractual duties by it and therefore seeks damages arising directly or indirectly out of his personal injury; and

(b) no court or tribunal may award compensation for damages arising from a covered personal injury so that the plaintiff's claims are moot because he cannot be awarded any further compensation.

[9] Corrections is applying to strike out the proceedings on that basis.

The law

[10] The Employment Court has jurisdiction to strike out proceedings pursuant to reg 6 of the Employment Court Regulations 2000, and strike-out applications are considered on the same basis as in the High Court.[2]

[11] The Court may strike out an application if it:[3]

(a) discloses no reasonably arguable causes of action, defence, or case appropriate to the nature of the pleading;

(b) is likely to cause prejudice or delay;

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the Court's process.

[12] The principles governing an application to strike out on the grounds of no reasonable cause of action are longstanding and well established:[4]

(a) The jurisdiction is to be sparingly exercised and only in a clear case where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion;

(b) the plaintiff's case must be so clearly untenable that it cannot possibly succeed; and

(c) the Court will approach the application assuming that all the allegations in the pleadings are factually correct, irrespective of whether or not the facts are admitted.

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2 *The Chief Executive of the Department of Corrections v JCE* [2019] NZEmpC 195 at [17]–[23].
3 High Court Rules 2016, r 15.1.
4 *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 (CA) at 645; and *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

[13] Where a strike-out is based on a statutory bar, the Supreme Court in *Trustees Executors Limited v Murray* observed that:[5]

> … the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process.

[14] Turning to the issue of moot proceedings, a "moot" issue is one that is academic or abstract; resolving such an issue will have no practical effect on the rights of the parties to the litigation.[6] Moot proceedings are not automatically struck out as "mootness is not a matter that deprives a court of jurisdiction", so the Court can exercise a discretion to hear such proceedings.[7] However, they ought to be struck out as an abuse of process where "the decision will have no utility", otherwise "Court resources are wasted".[8]

[15] Finally, s 317 of the AC Act states:

> **317 Proceedings for personal injury**
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> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
>
> (a) personal injury covered by this Act; or
>
> (b) personal injury covered by the former Acts.
>
> (2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—
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> (a) any damage to property; or
>
> (b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998); or
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> (c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.
>
> (3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).
>
> (4) Subsection (1) does not prevent any person bringing proceedings under—
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> (a) section 50 or section 51 of the Health and Disability Commissioner Act 1994; or
>
> (b) any of sections 92B, 92E, 92R, 122, 122A, 122B, 123, or 124 of the Human Rights Act 1993.

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5 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33].
6 *Auckland Council v Drought* [2019] NZEmpC 63, [2019] ERNZ 135 at [21].
7 *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [14]–[16].
8 *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC) at [28].

(5) Subsection (1) does not prevent any person bringing proceedings in any court in New Zealand for damages for personal injury of the kinds described in subsection (1), suffered in New Zealand or elsewhere, if the cause of action is the defendant's liability for damages under the law of New Zealand under any international convention relating to the carriage of passengers.

(6) Subsection (1) does not affect proceedings to which section 318(3) applies.

(7) Nothing in this section is affected by—

(a) the failure or refusal of any person to lodge a claim for personal injury of the kinds described in subsection (1); or

(b) any purported denial or surrender by any person of any rights relating to personal injury of the kinds described in subsection (1); or

(c) the fact that a person who has suffered personal injury of the kinds described in subsection (1) is not entitled to any entitlement under this Act.

[16] It is s 317(1)–(3) that is of particular relevance in this case.

Analysis

Submissions

[17] The key question in determining whether or not the plaintiff's claim is statute barred is whether or not the emotional harm claimed by him is disjunctive from his personal injury.[9]

[18] Counsel for the plaintiff submitted that that such an assessment can only be made after a review of the evidence in a full hearing. He reviewed a number of cases in support of his submission that this is an evidential matter which will turn on the evidence provided.[10]

[19] He maintained that the employer's actions (or inactions) can create disjunctive causes of action to the personal injury. He argued it will be necessary for the Court to

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9 Accident Compensation Act 2001, s 317(1).

10 Relying on *Mitchell v Blue Star Print Group (NZ) Ltd* [2008] ERNZ 594 (EmpC); *Northern Distribution Union v Sherildee Holdings Ltd (t/a New World Titirangi)* [1991] 2 ERNZ 675 (EmpC); *Jennings v University of Otago* [1995] 1 ERNZ 229 (EmpC); *Kim v Thermosash Commercial Ltd* [2011] NZEmpC 169; and *JCE v Chief Executive of the Department of Corrections* [2020] NZEmpC 46, [2020] ERNZ 92.

assess whether the breaches alleged are established and, if so, what damages, if any, flow from such breaches on the days leading up to 27 November 2018.

[20] He says that such an assessment cannot be made without close consideration of the facts, which cannot be undertaken as part of this application.

[21] The defendant accepts that if quantifiable breaches cause quantifiable loss to an employee, and those breaches are entirely independent or disjunctive of the personal injury, then s 317 does not bar the employee from seeking compensatory damages. However, Ms Radich, counsel for the defendant, submitted that such separation is not possible in this case. She argued that the plaintiff's personal injury arising out of the November 2018 assault was covered by the AC Act, that the statement of claim ties the plaintiff's claim for general compensatory damages (for emotional harm) to that assault and that, as a result, Mr Roberts's claim is clearly barred.

[22] Ms Radich submitted that any damages would arise directly or indirectly out of the personal injury and that the emotional harm arising from the alleged breaches and the physical injury (which was covered by ACC) were inherently connected and thus not disjunctive.

[23] She relied on a number of cases where the applicants' stress or damage was inextricably connected to their physical injuries and was found to be part and parcel of the personal injury suffered.[11] She says that is also the case here.

[24] Ms Radich further relied on *Northern Distribution Union v Sheridee Holdings Ltd (t/a New World Titirangi)* where it was found that the embarrassment and distress

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[11] Relying on *Brittain v Telecom Corp of New Zealand Ltd* [2002] 2 NZLR 201 (CA); *Re Chase* [1989] 1 NZLR 325 (CA); *Northern Distribution Union v Sheridee Holdings Ltd (t/a New World Titirangi),* above n 10, *Jennings v University of Otago*, above n 10; *Attorney-General v B* [2002] NZAR 809 (CA); *Mitchell v Blue Star Print Group (NZ) Ltd*, above n 10; *Kim v Thermosash Commercial Ltd,* above n 10; *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99, [2014] ERNZ 813; *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA); and *JCE v Chief Executive of the Department of Corrections* [2020] NZEmpC 46, [2020] ERNZ 92.

were so minimal, if they existed at all prior to the injury, that they could not be the subject of compensation.[12]

[25] Ms Radich submitted that the same logic applies in this instance; that is, that any emotional harm the plaintiff might have suffered from his claimed breaches of contract would have been subsumed by the incident that then occurred with prisoner A and the injuries that he suffered. She submitted that the plaintiff's claim for damages for emotional harm is, in actuality, a claim for damages for the personal injury that he suffered. As such, because this injury was covered by ACC, no compensation can be awarded, and it is barred by s 317 of the AC Act.

[26] She said that the claim for emotional harm prior to 27 November 2018 is an attempt to get around this statutory bar.

[27] Ms Radich further argued that if this is not the case, then the breach of contract claims brought by the plaintiff would be moot because they are academic and abstract and will have no practical effect on the rights of the parties to this litigation. She submitted that there can be no damage arising from breaches prior to 27 November 2018 that are not linked to the injury suffered by the plaintiff. She says that the claim therefore discloses no reasonably arguable cause of action and is otherwise an abuse of process and so must be struck out.

Discussion

[28] There are the two elements to the plaintiff's claims. First, the alleged breaches of the CA and second, damages for the alleged emotional harm suffered as a result of the breaches.

[29] In terms of the first element of the claim, the breaches of contract pleaded, at least in principle, are able to provide the basis for a standalone claim by the plaintiff against Corrections.[13] In determining whether or not there is a basis for striking out

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12 *Northern Distribution Union v Sherildee Holdings Ltd (t/a New World Titirangi),* above n 10, at 681.

13 Accident Compensation Act, s 317(2)(b).

pleadings, the Court must assume that pleaded breaches can be proved. There is no basis to strike out these claims.

[30] In relation to the second element of the claim, in *Attorney-General v B*, the Court of Appeal confirmed that: "The critical issue is whether damages which are sought in a common law proceeding are damages 'arising directly or indirectly out of personal injury covered' by the legislation."[14] It said that the apprehension of merely theoretical possibilities should not displace a realistic evaluation of the nature of a pleaded claim for damages.[15]

[31] The question is whether the Court can make that realistic evaluation at this stage. I am concerned that is not possible in this case.

[32] The question of whether or not such breaches caused damage (emotional harm) to the plaintiff independent of any harm arising from the assault is a matter of evidence. Again, it is a claim that, for the purposes of a strike-out application, the Court must assume is proven.

[33] It is too soon to determine the defendant's argument that such harm is either subsumed within that caused by the assault, or is minimal and therefore moot. That is something to be tested at trial.

[34] While the alleged breaches, in chronological terms, lead up to the assault on 27 November 2018, they are able to be separated from that assault. It is not necessary for there to be an assault in order for the Court to find breaches of the CA. Such findings are possible, at least in principle, without any assault having taken place. Likewise, in principle, such breaches are capable of causing emotional harm to an employee. Whether or not they have in fact done so, and the value that should be attached to such harm, is a matter of evidence.

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14 *Attorney-General v B*, above n 11, at [25].
15 At [25].

[35] Further, I note that a claim for breach of contract is likely only moot where no damages are sought. That is not the case here.[16]

[36] The plaintiff submitted that striking out this proceeding would give employers a perverse incentive not to avoid harm or breaches because subsequent claims will always be blocked by the AC Act. While I would hope that would not be the case, it would seem to be adverse to public policy to deny an employee a means of addressing a breach or breaches of a collective agreement simply because monetary damages were minimal. Breaches of collective agreement terms can have a broader impact on the workplace and employment relationships than that which can be measured in purely financial terms. It would not be in the interests of justice if such claims were shut down prematurely.

[37] As noted in the recent Supreme Court decision of *Smith v Fonterra Co-operative Group Ltd*: "Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail."[17] That cannot be said of the plaintiff's case as pleaded.

[38] The plaintiff's claim discloses a reasonably arguable cause of action. It is not so clearly untenable that it cannot possibly succeed. It is not an abuse of process.

[39] This is not a case that must be struck out. I note, however, that does not say anything about whether or not the claim will ultimately succeed.[18]

Outcome

[40] I decline the application to strike out the plaintiff's claim.

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16 Additionally, even if no emotional harm damages are sought, it is at least reasonably arguable that nominal damages could be sought by the plaintiff. There is potentially competing authority on this point. It is not clear whether this issue has been resolved conclusively within the context of New Zealand's employment relationship system or within the context of s 317(2)(b) of the Accident Compensation Act. For the general New Zealand position, see: *Re Chase* [1989] 1 NZLR 325 (CA); *X v Chief Executive of Oranga Tamariki* [2022] NZCA 622, [2023] 2 NZLR 261; and *SPAK (1996) Ltd v LeRoy* [2022] NZCA 564, (2022) 23 NZCPR 769. For an alternative view, see *Uzuegbunam v Preczewski* 141 S Ct 792 (2021) at 9–10; and *MC v The Clinical Director of the Central Mental Hospital* [2020] IESC 28, [2021] 2 IR 166 at [47]–[48].

17 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [85].

18 At [84].

[41] Costs are reserved. In the event the parties are unable to agree on costs, the plaintiff will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the defendant having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 3.45 pm on 23 February 2024