**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 209/07
5032377

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| BETWEEN | Association of University Staff Inc<br>Applicant |
| AND | Vice-Chancellor of the University of Auckland<br>Respondent |

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| Member of Authority: | Dzintra King |
| Representatives: | Peter Cranney, Counsel for Applicant<br>Phillipa Muir, Counsel for Respondent |
| Investigation Meeting: | On the Papers |
| Determination: | 12 July 2007 |

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## DETERMINATION OF THE AUTHORITY

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### Background

[1] In 2005 the union, together with other unions, initiated bargaining with the respondent for two multi-employer collective agreements (MECAs). Auckland University declined to enter into a MECA and made offers to non-union staff who were on individual employment agreements. The union believed that the communications breached sections 4 and 32 Employment Relations Act 2000 and that they undermined its bargaining authority. A Full Bench of the Employment Court heard the matter and issued a decision in May 2005: *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224 (the AUS decision).

[2] The Court held that the refusal to bargain was unlawful and that the timing, unilateral nature and instantaneous personal distribution of the communications to

staff may have, in all the circumstances, undermined the bargaining or may have been seen to undermine the bargaining.

[3] Within 3 hours of receiving the Employment Court's judgment, which was relayed by email, the respondent again communicated to the applicant's members on 4 May. The applicant objected to this.

[4] On 1 September 2005 the applicant, the respondent and other universities entered into an agreement regarding good faith, agreeing to participate in a University Tripartite Forum and to implement agreed outcomes of the UTF into collective agreements.

**Application to Strike Out/Res Judicata**

[5] The First Cause of Action alleges a "breach of the law as set down in the 4 May decision of the Employment Court". This claim relates to the fact that on 23 February 2006 the respondent communicated with non-members (and also mistakenly some union members) proposing to pay a wage increase of 4.5% from 1 May 2006 to non-members and that the same wage increase would be offered to union members in March 2007.

[6] At para 2.19 the applicant asserts "In communicating in this manner the Respondent breached "the law as determined in the Employment Court's 4 May decision".

[7] The respondent has applied to strike out the applicant's first and third causes of action and paragraphs 2.3 to 2.7 and 2.15 to 2.20 of the Statement of Problem (insofar as the applicant seeks to rely on those paragraphs to support its causes of action), pursuant to s 162 Employment Relations Act.

[8] The respondent says the applicant has failed to specify with sufficient particularity any cause of action in respect of the respondent's alleged breaches of "law" in the AUS decision and that it is estopped from relying on matters set out in paragraphs 2.3 to 2.7 Statement of Problem and the Third Cause of Action (where it

relies upon paras 2.3 to 2.7 Statement of Problem) as those issues were previously determined in the AUS decision.

[9] That decision concerned communications between AUS and AU during bargaining in 2005. The Court recognised that an employer could communicate freely with those employees who had not chosen to be represented in the bargaining and found that communication to non-union employees offering a pay increase may have been seen to undermine the bargaining. However, there was no finding that the communications actually undermined the bargaining nor were any compliance orders made against the respondent.

[10] The AUS decision did not contain any orders with which the respondent was required to comply; rather, the decision clarified the meaning of sections 4 and 32 of the Employment Relations Act.

[11] The assertion in para 2.19 of the Statement of Problem that the respondent's actions in communicating an offer to pay non-union employees a wage increase of 4.5% from 1 May 2006 and advising that the same increase would be offered to union members when the respondent was legally able to do so constitutes a breach of "the law as determined in the Employment Court's 4 May decision" nowhere specifies what the actual breach of the law is. The applicant has therefore failed to specify any reasonable cause of action.

[12] The Third Cause of Action relates to breaches of the Employment Relations Act 2000.

[13] Paras 2.3 to 2.7 refer to the earlier communications that were the subject of the 4 May Court decision and also to that decision.

**Respondent's Position**

[14] A final decision was made in the AUS case on 4 May 2005 by a Court of competent jurisdiction. The parties are the same. The 2005 bargaining round was the subject matter of that decision and is pleaded as part of the allegations common to all

causes of action n these proceedings. The litigation in both proceedings concerned alleged breaches of sections 4 and 32 ERA.

[15] The Statement of Problem at 2.3 to 2.7 seeks to put matters in issue which have already been dealt with and resolved in prior proceedings. Therefore the applicant should be estopped from raising the matter in paras 2.3 to 2.7 in these proceedings.

[16] The Third Cause of Action alleges that the respondent's actions are in breach of sections 4 and 32. The 2005 bargaining issues and sections 4 and 32 were the exact subject matter of the AUS decision. Those issues should therefore be taken as having been disposed of and should not be able to be relitigated between the same parties.

[17] In the alternative, the respondent seeks further and better particulars of the alleged breaches of law in the First and Third Causes of Action; and the alleged breaches of the AUS decision and/or sections 4 and 32 that are unrelated to the 2005 bargaining.

**Applicant's Position**

[18] The applicant says that the First Cause of Action is properly pleaded: it is alleged that the Vice-Chancellor by communicating with non-members on 23 February 2006 acted unlawfully.

[19] This is an issue that was dealt with by the Full Court in its 4 May 2005 decision which dealt with identical conduct at an earlier date. The Court considered that such conduct should not have occurred as it breached sections 4 and 32 ERA.

[20] The pleadings do not put in issue the prior breaches dealt with in the AUS case. The existence of the prior communications and the Court's decision is pleased legitimately as background to the later alleged breaches.

[21] Mr Cranney said that although no particular sections of the ERA were mentioned in the First Cause of Action it was plain that sections 4 and 32 (1) (d) (iii) were relied upon.

[22] As to the application to strike out what in essence is not the entirety of the Third Cause of Action but paras 2.3 to 2.7 the applicant says again that the case dealt with the same conduct at an earlier date and that the Court considered the behaviour should not have occurred.

[23] The applicant says that better particulars are not needed. The law as contained in the AUS decision (which interprets sections 4 and 32 is relied upon for the First Cause of Action).

[24] The Third Cause of Action clearly specifies the various sections that will be referred to in support of that Cause of Action in para 2.23.

**Strike Out Principles**

[25] The principles regarding strike out applications were enunciated in *NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW and Anor* [1989] 3 NZILR 284:

It must be demonstrated that the case pleaded is so clearly untenable that it cannot possibly succeed

- The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied that it can reach a definite and certain conclusion

- It is not a valid criticism of a strike out that extensive and complex argument and even evidence is necessary to demonstrate that the case is clear enough for the Court to exercise its summary powers of striking out

- The Court will not strike out a proceeding if, on the way to doing so, it has to decide disputed questions of fact

- Even if jurisdiction exists and the absence of a tenable case is established, the Court has a residual discretion t decline the application if the justice of the

case so requires, but that discretion will often be exercised if the Court has been able to form a clear view of the case.

[26] In *Clark v Nelson Marlborough District Health Board* [2002] 2 ERNZ 483 Goddard CJ said at 498-499:

> *It is a serious step to strike out a case and deny the plaintiff an opportunity to run it. It has to be borne in mind that any defects in the statement of claim that may exist at present are capable of being cured by amendment. The claim may be struck out only if it has no prospect of success no matter how it is amended or re-formulated. It is a high hurdle…*

**Res Judicata/Issue Estoppel**

[27] In *Shiels v Blakeley* [1986] 2 NZLR 262 at 266 the Court of Appeal set out the principle of issue estoppel:

> *Where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits.*

[28] In *Reid v Fire Service Commission (No 2)* [1998] 3 ERNZ 1237, Goddard CJ set out the test as follows:

- Where a final decision has been pronounced
- by a Court or Tribunal of competent jurisdiction
- over the parties to
- and subject matter of
- litigation

then each party is estopped or precluded from disputing or questioning such decision on the merits as against the other party in subsequent litigation.

In *Waugh v Commissioner of Police* [2003] 1 ERNZ 236 Goddard CJ held:

> *In a case in which res judicata is asserted, it should be possible for the party relying upon it to point to evidence that the other party may not give because of a conclusive judicial finding on the subject.*

**Decision**

[29] Spencer Bower & Turner's *Doctrine of Res Judicata* (2nd Ed, London, Butterworths, 1969) notes that the rule is intended to promote justice and therefore it should not be used to defeat justice. They state that the doctrine of estoppel is the product of the adversary system of litigation practised in our Courts and it may not be equally relevant to the work of tribunals whose work is inquisitorial and who therefore should not be prevented by the application of technical rules from carrying out a full investigation: *Clark v Nelson Marlborough District Health Board* [2002] 2 ERNZ 483 at 499-500.

[30] Spencer Bower & Turner state at para 184 that it is essential, if estoppel is to arise, that the identity of the subject matter in the two proceedings should be established and there is a burden on the party claiming an estoppel to establish it. It has to be shown that the plaintiff is seeking to re-agitate the very same question of fact or law which has already been the subject of a final decision between the same parties by a tribunal of competent jurisdiction.

[31] At para 206 Spencer Bower & Turner state that it is not enough that that the proceedings are similar.

[32] The First Cause of Action and the Third Cause of Action seem in essence to be identical. The First Cause of Action appears to assert that the AUS decision made certain findings regarding sections 4 and 32 which support the applicant's claim set out in the Third Cause of Action that the respondent's later actions constitute a breach of those sections.

[33] The problem regarding the respondent's arguments is that I am not convinced that the issue to be determined in these proceedings is identical to the issue

determined in the AUS case. While there are similarities in the behaviour the circumstances are different. Given that, it cannot be said that the issues are identical.

[34] I have borne in mind that The Employment Relations Authority is a low level and informal forum and have taken into consideration the comments in Spencer Bower & Turner regarding tribunals and inquisitorial processes.

[35] I decline to strike out the Third Cause of Action.

[36] I decline to strike out paras 2.3 to 2.7. They are present as background information.

[37] I understand from the applicant's submissions that the breach of law relied upon in the First Cause of Action is a breach of sections 4 and 32. If that is indeed the case I cannot see that the First Cause adds anything – it is superfluous. If that is the case, the applicant should remove it. If I am wrong, the applicant should amend it.

**Costs**

[38] Costs are reserved. I will determine the costs regarding this after hearing the substantive matter.

Dzintra King
Member of the Employment Relations Authority