

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA39/08  
5089851

BETWEEN                      CHRISTOPHER BARTON  
   Applicant  
  
AND                                PROGRAMMED  
   MAINTENANCE SERVICES  
   (NEW ZEALAND) LIMITED  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:              Paul Pa'u, Counsel for Applicant  
   Simon Connelly, Counsel for Respondent  
  
Investigation Meeting:        26 October 2007  
  
Determination:                10 January 2008

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1]     The applicant, Mr Christopher Barton, has filed a Statement of Problem alleging unjustified dismissal by the respondent, Programmed Maintenance Services (New Zealand) Limited ("PMS"). The applicant and respondent in this matter are the same parties as were the parties to the determination of the Employment Relations Authority in file number AEA 164/05.

[2]     The respondent's position is that Mr Barton, by filing the current statement of problem, is attempting to re-litigate matters already determined in the previous decision. In the previous decision it was a claim for unjustified disadvantage that was heard and determined.

[3]     The respondent has filed an application to strike out the applicant's statement of claim. This has been done on the basis that the claim has in substance and effect

already been disposed of by the Authority in proceedings between the same parties, and the applicant is estopped from bringing the claim.

[4] Further, and/or alternatively, the claim is an attempt to raise issues that were available and open to the applicant to raise in the proceedings between the same parties in AEA 164/05 and there are no special circumstances to justify the bringing of this claim.

[5] The respondent says the claim is an abuse of the ERA process, and is vexatious and frivolous. A party may not attempt to bring a claim based on facts which were previously the subject of a matter already determined. The Laws of New Zealand on res judicata state at paragraph 21: Raising Issues Available in Former Action:

*Except under special circumstances a party may not in a subsequent proceeding raise a ground of claim or defence which was open to that party in the former one upon the pleadings or the form of the issue.*

[6] In Thompson & Taylor v Ross [1942] NZLR 713 at 719 states:

*In the leading case, Henderson v Henderson, Wigram V-C pointed out that the plea of "res judicata" applied not only to points upon which the Court is required by the parties to form an opinion and to pronounce judgment, but to every point which properly belongs to the subject of litigation in which the parties, exercising reasonable diligence, might have brought forward at the same time.*

## **History**

[7] On 24 February 2005 Mr Barton filed a Statement of Problem alleging that PMS had caused him unjustified disadvantage resulting from actions leading up to and beyond his last day of attendance at work. Mr Barton's last day of work was 26 October 2004. While on extended sick leave he maintained possession of the company vehicle and the company cellphone.

[8] PMS engaged the services of two private detectives, Mr Michael McKee and Mr Bryce Dick, to investigate the suspicion that Mr Barton had found alternative employment elsewhere whilst on sick leave. They both subsequently filed statements of evidence dated 31 May 2005 and 1 July 2005. The private detectives deposed that in April 2005 they had followed Mr Barton and seen him work at a competitor's offices. They filed their reports with PMS. McVeagh Fleming, acting for PMS, sent

a letter dated 11 May 2005 to Mr Barton's solicitors asking whether Mr Barton was working elsewhere. No reply was received. A follow-up letter was sent on 19 May 2005 seeking Mr Barton's urgent response. Again no reply was received. A third letter was sent dated 20 May dismissing Mr Barton due to his employment at Sika, another employer, and asking for the return of the company vehicle. On 20 May 2005 Mr Pa'u replied stating that he was awaiting his client's instructions as to whether he would pursue a personal grievance claim. On 23 May 2005 McVeagh Fleming replied objecting to Mr Pau's contention that Mr Barton had insufficient opportunity to reply to the allegations, and again seeking an answer to the question of whether Mr Barton was working elsewhere. No reply was received. Copies of these letters were provided to the Authority prior to its determination of 4 August 2005.

[9] The company vehicle was subsequently retrieved by Mr Dick from the premises of Sika on 25 May 2005. The Authority's investigation into the claim of unjustified disadvantage took place on 20 and 28 June 2005. Mr Barton's dismissal and the subsequent retrieval of his company car were referred to in the course of the Authority meeting.

### **PML's Position**

[10] The Authority's determination in Mr Barton's claim was issued on 4 August. His claim was dismissed.

[11] The Authority discussed the company's retrieval of Mr Barton's company vehicle at paragraph 57. The Authority stated:

*I find the actions of PMS in recovering the car and cancelling the cellphone account were not in breach of its obligations to act in good faith.*

The respondent says that the Authority's decision therefore covered the period of time during which Mr Barton was dismissed.

[12] On 1 September 2005 Mr Barton filed a Statement of Claim in the Employment Court seeking a de novo hearing. That claim was ruled a nullity as Mr Barton did not pay the filing fee.

[13] Mr Barton was dismissed a month before the Employment Relations Authority hearing in 2005. He had ample time to amend his Statement of Problem prior to the

hearing. Mr Pa'u's letter dated 20 May 2007 refers to waiting to obtain his client's instructions regarding pursuing an unjustified dismissal grievance.

[14] On 13 July 2005 Mr Pa'u notified PMS that Mr Barton considered that he had been unjustifiably dismissed, that he sought compensation for humiliation and distress and loss of wages, and he stated Mr Pa'u's letter of 13 July stated:

*We will write to the Authority but respectfully will need to file an amended statement of problem and the matter will need to proceed in the normal way.*

[15] No amendment was made.

[16] Mr Pa'u's reference to the possibility of amendment to the Statement of Problem after the date of the hearing is an acknowledgement that the claim of unjustified dismissal would be based upon facts already traversed at the hearing. The evidence put before the Authority, and the Authority's determination covered and incorporated the period of time up to the retrieval of the vehicle from Sika and the events which took place within it thereby including Mr Barton's prior dismissal.

[17] Mr Barton's dismissal and the reasons for it were clearly put before the Authority in the form of Mr Dick's and Mr McKee's statements of evidence showing that Mr Barton had alternative employment and had been dismissed as a result; and also by the way of McVeagh Fleming's letters of 11 May, 20 May and 23 May and Mr Pau's 20 May letter to McVeagh Fleming. The respondent says the Authority's endorsement of PMS's retrieval of the car which was necessitated by his dismissal was therefore a tacit acknowledgement of the legitimacy of his dismissal.

[18] The respondent submits that the subject of the litigation included Mr Barton's dismissal. In accordance with Thompson & Taylor v Ross (supra), Mr Barton is estopped from filing a claim for unjustified dismissal because it is based on the same subject matter of litigation already decided, and Mr Barton's current application should accordingly be struck out as an abuse of process.

[19] It is submitted that Mr Barton's claim for unjustified dismissal should also be struck out as an abuse of process because it is an attempt to circumvent Mr Barton's inability to have his claim for unjustified disadvantage reheard afresh in the Employment Court because of his failure to pay the setting down fee. The claim is without merit and frivolous and vexatious. McVeagh Fleming's 11 May 2007 and 19

May 2007 letters gave him the opportunity to answer the question as to whether he had found alternative employment. He did not respond. He cannot now claim he was not given a chance to respond.

[20] The Statement of Problem filed on 8 June 2007 is a claim for an unjustifiable dismissal and contends that “... *the respondent did not give the applicant the opportunity to comment on the respondent’s view that the applicant was working while on sick leave.*” Mr Pa’u has attached to the Statement of Problem the following documents:

- The statements of evidence of Mr Bryce Dick, of Nigel Caigou and of Barcooy McGuire;
- A letter from McVeagh Fleming, 9 August 2005.

These are all documents that were filed for the previous proceedings.

[21] Mr Caigou’s evidence says at para.27:

*It is an understatement to say that I was disappointed to learn that Chris had gone to another employer without telling us first. When Chris and his solicitors did not clear the air in answer to PMS’s solicitor’s letter dated 11 May 2005 asking about Chris’s intentions and any steps he had taken to secure alternative work, I authorised PMS’s solicitors to inform Chris’s solicitors that the company’s [I word 13.09] of action of repudiation of his employment agreement and that the agreement was cancelled. That notice was given by PMS’s solicitors on 20 May 2005, and included a request that Chris immediately return PMS’s car to it.*

[22] And at para.28:

*A further request for the return of the car was made by PMS’s solicitors on Monday, 23 May 2005. When this did not result in the car being returned to PMS, I authorised the private investigator to uplift the car, which he did at approximately mid-day on Thursday, 26 May 2005 from Chris’s new workplace at Sika Technology’s East Tamaki office.*

[23] In its determination the Authority found that Mr Barton’s claim that he no longer trusted his employers to act fairly and reasonably was an over reaction. Up until 26 January 2005 PMS had not conducted itself in the way which could possibly lead to such a conclusion. The Authority also dealt with the seizure of the car by PMS in May 2005 and the claim that PMS did not act in good faith. The Authority

found that the actions of PMS in recovering the car and cancelling the cellphone account were not in breach of its obligations to act in good faith.

### **Mr Barton's Position**

[24] Mr Barton says he does not seek to relitigate the matter that has already been heard but wishes to have his unjustified dismissal grievance heard; and that that has not been heard and determined. Mr Pa'u said that Mr Barton claims while on sick leave his employer terminated his employment without a reasonable opportunity being provided to Mr Barton to respond to the allegations that he had abandoned his employment. He says the determination did not address the applicant's dismissal and that the facts and issues relied upon in regard to the dismissal are not the same ones relied upon for the disadvantage.

### **Decision**

[25] In Henderson v Henderson [1929] 2 Ch 213 at p.100, the Court said at p.115:

*Where a given matter becomes the subject of litigation in, and an 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, 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 could actually be required by the parties to form an opinion and pronounce the judgment, but to every point which properly belongs to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

[26] The subject matter of the litigation was the disadvantage grievance, not the unjustified dismissal grievance. Mr Barton is not claiming that there are issues regarding the disadvantage grievance that he now wishes to have heard.

[27] In Town of Grandview v Doering (1976) 61 DOR (3d) 455, the majority of the Supreme Court of Canada decided that the unsuccessful plaintiff was not entitled to bring a subsequent action against the same defendant raising substantially the same issues as were decided against him or her in the former action by alleging that the damage complained of was caused in a different way, or at a different time from that which the plaintiff had previously alleged. The Court said that it was desirable to

protect defendants from plaintiffs who unnecessarily split up their claims against them.

[28] The Doering (supra) case related to matters dealing with whether flooding on a person's property was caused by a dam or by an underground aquifer. The subsequent action was based on a different way as to how the damage was caused.

[29] Regarding the precise scope of the doctrine enunciated by Wigram V-C in Henderson (supra), in Brisbane City Council v Attorney-General for Queensland 19 ALR 681 the Privy Council declared at 688 that abuse of process was the true basis of the doctrine of res judicata when the defence, in its widest sense, according to which a party may be shut out from raising in a subsequent action an issue which she or he could, and should have raised in the earlier proceedings, was raised. The Privy Council went on to say that *".. it was only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing a genuine subject of litigation."*

[30] There has been a tendency to extend the idea underlying cause of action estoppel to claims which while they are not the subject of former adjudication could have been advanced as part of the cause of action in the proceeding which resulted in the judgment alleged to constitute an estoppel.

[31] If the issue sought to be raised related to a new cause of the disadvantage then the outcome might well be that the matter would be struck out. In Doering (supra) the subject matter was the damage and the new issue sought to be raised was a different cause of the flooding that had not previously been raised. In L E Walwin & Partners Ltd v West Sussex County Council [1975] All ER Ch D 605 the subject matter was the status of a right of way and the issue sought to be raised, which had not been raised in earlier proceedings, was that of a barrier. The matter was not to be relitigated.

[32] The dismissal claim is a new cause of action; it is not a permutation of the disadvantage claim. There are facts which common to both causes of action but the doctrine upon which PML seeks to rely is limited to matters which arise within one cause of action: Doering (supra) at p.459.

[33] I decline to strike out the Statement of Problem.

## **Costs**

[35] Costs were reserved. If the parties agree, I will determine costs after the hearing of Mr Barton's grievance. Otherwise, if the parties are unable to resolve the issue of costs Mr Barton should file a memorandum within 28 days of the date of this determination. PML should then file a memorandum in reply within 14 days of receipt of Mr Barton's memorandum.

Dzintra King  
Member of the Employment Relations Authority