

(b) Mr Redshaw claims that the alleged unjustified action on the part of his employer has resulted in a loss of dignity, humiliation, stress and distress for which he seeks compensation of \$20,000.

(c) Mr Redshaw also claims that there has been a breach of his employment contract which warrants a penalty being awarded.

[2] The Council seeks that Mr Redshaw's claims be struck out on two grounds:

(i) That he is estopped from pursuing a wage arrears and breach of contract action against the Council, due to his acquiescence to two respective changes to the Councils remuneration policy in 2003 and 2007, and that he accepted salary increases and bonuses in accordance with the new remuneration policies. It is advanced that by doing so, he represented to the Council that he accepted them and Mr Redshaw should now be prevented from arguing otherwise; and

(ii) That pursuant to s.114(1) of the Act, Mr Redshaw is now time barred from raising his personal grievance claim as his disadvantage grievance relates to events which first arose in 2003 or alternatively, 2007, and that he failed to raise a personal grievance at the time, hence he is now well outside the 90 day limit.

Preliminary Hearing

[3] During a case management conference call with the parties on 10th August 2009, it was agreed that the investigation meeting on 17th September 2009 is solely for the purpose of hearing evidence about and then determining, whether or not Mr Redshaw is able to pursue his claims, given the defensive arguments put forward by the Council.

[4] While the Authority is at first instance concerned with the determination of the preliminary matters, given the nature and the background of Mr Redshaw's claims, it is evitable that an examination of the substance of employment relationship, including the remuneration of Mr Redshaw, is required.

- [5] The Authority received evidence from the applicant along with evidence for the Council from Mr John Woods, Group Manager, Human Resources, and relevant documents and submissions provided by both parties.

Background Evidence and Findings

- [6] Mr Redshaw commenced his employment with the Council on 4th July 1994 in the role of Area Accountant. He subsequently was appointed to the position of Manager Business Improvement in 1996. This role was disestablished in 1999 and Mr Redshaw was subsequently appointed to the role of Business Analyst. This followed some degree of conflict between the parties that was, in due course, resolved.

- [7] It is commonly accepted that the employment terms and conditions pertaining to Mr Redshaw's new position were then set out in two documents; a contract of employment dated 31st August 2000, and a letter dated 21st December 2000 confirming the appointment of Mr Redshaw to the position of Business Analyst, effective from 15 January 2001. The letter also provides that:

“The terms and conditions of your employment will remain the same as per your contract dated 31 August 2000, with the following clarification.

Each year you and your manager will agree on objectives, which are realistic and achievable. Provided these are met, then your current percentage on the salary scale will be retained. Unless there is a performance issue the market related movement of salaries will be applied to your salary. You will continue to be eligible for a performance bonus.”

- [8] The letter continues:

“Details of your current salary package is set out below:

Base salary	\$83,701
Percentage of salary scale	128%
Superannuation	\$8,370
Vehicle compensation allowance	\$16,479 (effective 1 May 2001)”

- [9] It is the position of Mr Redshaw that the provisions of the employment contract dated 31st August 2000 and the letter dated December 2000, continue to this day, particularly the provision pertaining to the application regarding

the percentage of the salary scale being at 128%. Mr Redshaw says that these two documents are the only employment agreement he has ever had with the Council, apart from the notified amendment or variation of 13th June 2007, pertaining to the inclusion of the telephone allowance into his base salary.

- [10] On or about the end of August, in each of the years 2001 to 2003, Mr Redshaw received performance based salary increases and by 29th August 2003, his new gross salary was \$102,567 per annum. However, Mr Redshaw says that from September 2003 he has not received the salary increases which he is entitled to, as based on his year 2000 employment conditions.

The Personal Grievance 90 day Issue

- [11] The evidence of Mr Redshaw is that until the Chief Executive Officer of the Council announced to all staff in February 2009, that there would be no budget for salary increases in the 2009/2010 financial year, he had not given any thought to why he had not received the salary increases that he believes he is entitled to. After reviewing his year 2000 employment conditions, Mr Redshaw concluded that errors had been made by the Council in respect of his salary payments since September 2003. Mr Redshaw says that the affect is that there has been a continual decrease in his place on the pay scale relative to the 100% base salary mark with his current base salary being at 108% of the pay scale when it should be 128%. Mr Redshaw wrote to Mr Woods on 25th March 2009 setting out his concerns and calculations as to what he believed he was entitled to.

- [12] Mr Woods responded on 1st May 2009 pointing out to Mr Redshaw that there had been two changes to the Council's remuneration policy; in 2003 and 2007 respectively, which Mr Redshaw had been consulted about, these were applicable to him and he had accepted them, hence his year 2000 salary arrangements had been superseded by the new policies. Mr Redshaw filed a statement of problem with the Authority on 5th June 2009.

- [13] The Council has provided evidence of a change in its remuneration policy, introduced in 2003. Mr Redshaw acknowledges that he was aware of the

change in policy but he does not accept that it applied to him. He says that his employment contract was never altered. There is evidence that tends to support Mr Redshaw's position. If one takes the letters dated 30th August 2002, 29th August 2003, 27th August 2004 and 1 September 2005,¹ the words used advising Mr Redshaw of a salary increase refer to a "performance based increase" each year. While the Council submits that one of the outcomes of the 2003 change was that salary increases were to be performance related rather than market adjustments, and that Mr Redshaw was aware of and affected by this, that is not reflected in any change in the terminology used to specifically notify Mr Redshaw of his respective annual increases from 2002 to 2005 (there is no evidence of what happened in 2006). That is, there is no difference in the terminology used prior to 2003, when the remuneration policy changed, to that used after the change. Mr Redshaw's position appears to be further supported in a letter to him from the Council dated 21st January 2005², confirming his placement in the position of Business Analyst in the Group Management Team and that:

"All other terms and conditions as per your employment agreement will remain unchanged."

There is no evidence of any notification of a change to Mr Redshaw's remuneration arrangements.

[14] While I accept that the Council changed its remuneration policy in 2003 and that it believes that Mr Redshaw was affected by this change, in that the relevant employment conditions relating to his remuneration were amended, I find that the substance of the evidence pertaining to this period inclines more towards Mr Redshaw's position and it is more probable than not that he had no good reason to raise a personal grievance regarding any change to his remuneration then.

[15] It is the Council's further position that there was a further remuneration policy change in 2007 and that at this time, Mr Redshaw would have been aware of the affect upon his remuneration and he could have raised a personal grievance then. The *Remuneration policy review*³ was a communication to all employees

¹ Statement of Problem, annexed documents 8,9,10 and 12.

² Annexed document 11.

³ Document 12 and 13 of the respondent's bundle.

and Mr Redshaw acknowledged he was aware of this, including, the “Pay structure” at page 3 of the document, which among other things, states that: “In turn, there is a pay spread of 80 percent to 120 percent for each zone.” The new pay structure consists of six pay groups divided into 14 pay zones.

[16] Because of the management position that Mr Redshaw held, he also received a confidential memorandum dated 6th July 2007. This document imparted further information about the application of the pending (September) pay review including that individuals will be rewarded for superior performance and that the remuneration policy will be applied “consistently and equitably across the whole organisation.”

[17] Via a letter dated 3rd September 2007⁴, Mr Redshaw was informed by his Group Manager that:

“This year’s pay review is our first opportunity to apply Auckland City Council’s new remuneration policy.” The letter also conveyed that:

“Your current fixed pay exceeds what the market is, in general, paying for the role you currently have, therefore, I advise that you will not receive a salary increase. This simply reflects the level of your current fixed pay and in no way should be taken as a reflection of your performance.”

[18] Attached to this letter is a “Pay review summary” which shows that Mr Redshaw is in pay zone 11 and his position in the range is 125%, (not 128%) giving him a base salary of \$117,719. While Mr Redshaw received a performance bonus payment of \$17,231 he did not receive a base salary increase and he was notified in the letter that his; “ongoing fixed pay amount will not change as a result of this payment.” The evidence of Mr Redshaw is that if he been paid at 128% as per his year 2000 employment terms, he would have received a new base salary of \$137,760; a deficit of \$20,041.

[19] The next year, Mr Redshaw received a similar letter dated 1 September 2008 from his Group Manager⁵. Again the pay review summary shows that Mr Redshaw is in pay zone 11 and his position in the range is 125%. Mr Redshaw did receive an increase to his fixed pay this year taking him to a new base

⁴ Document 16 of the respondent’s bundle.

⁵ Document 17 of the respondent’s bundle.

salary of \$121,757. Mr Redshaw says that if he had been paid at 128% as per his year 2000 employment terms, he would have received a new base salary of \$144,024; a deficit of \$22,267. Mr Redshaw also received a performance bonus payment of \$15,000.

[20] From the evidence relating to the change in the Council's remuneration policy in 2007 and the subsequent pay review summaries given to Mr Redshaw, dated 3rd September 2007 and 1st September 2008, I conclude that he must have been aware that the remuneration arrangements that he had back in the year 2000 no longer existed and that he was now affected by the 2007 change in the Council's remuneration, most probably on or about the 3rd of September 2007 and again by confirmation on or about the 1st of September 2008.

[21] Mr Redshaw says that the reason he did not raise any concerns about his remuneration in 2007 is, that he was very busy at work with various matters and had this not been so, he "may" have queried why he was not given a market related increase in his salary. Mr Redshaw further says that he received a salary increase of \$2,355.36 and so he assumed his salary had been increased anyway. An analysis of the relevant payslips provided by Mr Redshaw shows that this is not so as the total net pay received on the payment date 26/09/07 was very nearly exactly the same as the total net pay received on 29/08/07, the month before the pay review, being the sums of \$3,207.44 and \$3,207.49 respectively.

[22] I also note the evidence of the Council where in June 2007, Mr Redshaw took issue with an incorrect calculation relating to the tax free portion of his telephone allowance. It was \$55.58 per annum short. Mr Redshaw provided precise calculations as to the correct amount he was due. A correction was subsequently made by the Council. Given that Mr Redshaw had no hesitation in pursuing the correct payment of a relatively small monetary sum on this occasion, I do not find it to be credible that he would have overlooked a substantial shortfall in payment of \$20,041 in 2007 and a further \$22,267 in 2008.

[23] Even if I was to accept that Mr Redshaw may have overlooked the loss of \$20,041 in 2007 (and I do not), it is most improbable that he would have accepted a further loss of \$22,267 in 2008 and not done something about it. I could not help but observe that Mr Redman is probably quite astute when it comes to financial matters and with due respect to him, I do not see him as being reticent when it comes to asserting his rights regarding his employment conditions.

[24] I find that it is more probable than not that Mr Redshaw would have been quite aware of how he was personally affected by the 2007 changes to the Council's remuneration policy and that his salary arrangements were no longer according to the year 2000 agreement. Given the obvious evidence and the time that has since elapsed, it can be reasonably implied that he had accepted that the 2007 remuneration changes applied to him, particularly the continual decrease in his place on the pay scale relative to the 100% base salary mark. I further find that had Mr Redshaw wished to do so, he was entitled to raise a personal grievance with the Council on the basis that his employment had been affected to his disadvantage within 90 days of the 3rd of September 2007. Mr Redshaw did not do so then within the time permitted by s.114 (1) of the Act and he is now plainly and excessively time barred from doing so.

[25] Given my finding in the paragraph above it is probably obvious, but for reasons of completeness, I record that I do not accept that Mr Redshaw only became aware of the disadvantage to his employment in March 2009, or shortly after, when he claims he first did his financial analysis.

The Issue of Estoppel

[26] While in the context of the time limit for a personal grievance claim to be raised, I have found that it can be implied that Mr Redshaw accepted the Council's 2007 changes to its remuneration policy, and this is something that he may wish to consider in regard to pursuing his substantive contractual claim, I do not accept the Council's argument that Mr Redshaw is estopped from pursuing this claim on the grounds of what has been referred to as

passive acquiescence. *NZ Building Trades Union v Ebert Bros Construction Limited* [1991] 3 ERNZ 1004.

[27] It was held by the Employment Court (Goddard CJ) in *NZ Building Trades Union*: [“ ... acquiescence is a form of estoppel at least to this extent, that it is available only if the conduct said to amount to acquiescence has involved a detriment-producing alteration of position on it, usually taking the form of expenditure of money or effort or both.” Chief Judge Goddard also referred to an earlier case; *Mowat v NZ Stevedoring Co Ltd* [1990] 3 NZILR 61 at p.85, where he explained that: [“ ... an estoppel by representation has legal effect only if the conduct or statement said to amount to a representation was acted upon with ensuing detriment to the actor.”

[28] There is no evidence that the Council has acted to its detriment in reliance upon any assurances given by Mr Redshaw, quite simply because he has not given any actual or implied assurances. For there to be an estoppel that would cause the Authority to restrain or prevent Mr Redshaw from pursuing his contractual claim, the Council would have to show that it has acted to its detriment by relying upon some assurance or undertaking given by Mr Redshaw.⁶ Passive acquiescence or silence in response to the change in the Council’s remuneration policy in 2007 is not enough. Though, that factor may assume greater significance in regard to the eventual determination of the contractual claim as it related to the changes to the terms and conditions of Mr Redshaw’s remuneration.

Decision

[29] For the reasons set out above, I find that:

1. Because Mr Redshaw did not raise a personal grievance within 90 days starting on or about 3rd September 2007, pursuant to s.114 (1) of the Employment Relations Act 2000, Mr Redshaw is now time barred from having the Authority investigate and determine his personal grievance claim of unjustified disadvantage. The Authority does not have jurisdiction.

⁶ *Graham v Crestline Pty Ltd* (unreported) AC 53/06, Colgan CJ, 15 September 2006.

2. In relation to his claim for unpaid salary totalling \$98,938, Mr Redshaw is not estopped from pursuing this claim, albeit he may wish to give further consideration to my findings at paragraphs 24 and 26 of this determination.

Costs

[30] Costs are reserved pending the investigation and determination of the substantive claim.

K J Anderson
Member of the Employment Relations Authority