IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 199
EMPC 245/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEVIN BREEN Plaintiff
AND	PRIME RESOURCES COMPANY LIMITED Defendant

EMPC 249/2022

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BETWEEN	PRIME RESOURCES COMPANY LIMITED Plaintiff
AND	KEVIN BREEN Defendant

Hearing:	13 June and 26 September 2023
Appearances:	S Houliston, counsel for Kevin Breen A Schirnack, counsel for Prime Resources Company Limited
Judgment:	15 November 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Breen was employed by Prime Resources Company Ltd (the company) in April 2021. His job was directed at selling off-the-plans apartments for the company.

Less than four months after Mr Breen's appointment, COVID-19 struck. The country went into lockdown in August 2021. Mr Breen immediately advised Mr Chung, the company's managing director, that he would work from home.

[2] Mr Breen was paid on the first day of each month. On 1 September 2021, Mr Chung emailed Mr Breen to say that he was not intending to pay Mr Breen his full pay for August because he did not consider that he had been working full time during this period. He sought Mr Breen's confirmation that he was agreeable to this course. Mr Breen objected to a reduction in his pay.

[3] The parties subsequently attended mediation. Following mediation Mr Breen received a payment of outstanding wages from the company. The payment meant that Mr Breen was paid in full for both August and September, albeit late. Mr Breen remained dissatisfied and pursued a personal grievance claiming that he had been unjustifiably disadvantaged by the late payments for August and September.

[4] The Employment Relations Authority determined that the company had unjustifiably disadvantaged Mr Breen by the late payment for August.[1] It found that Mr Breen had not suffered an unjustifiable disadvantage in respect of the September payment because it had not been paid late and Mr Breen had, in any event, stopped working for some time during that period.[2] In respect of the August disadvantage the Authority awarded Mr Breen $2,000 by way of compensation for humiliation, loss of dignity and injury to feelings.[3]

[5] The Authority's determination gave rise to two challenges. Mr Breen challenged the quantum of the award in his favour on a non-de novo basis. The company filed a de novo cross challenge, which focussed on the finding that Mr Breen was underpaid for August and the finding that the late payment gave rise to an unjustified disadvantage.

[6] During the course of the hearing an additional ground of challenge was raised by the company, namely that there was no jurisdictional basis for Mr Breen's personal

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1 *Breen v Prime Resources Co Ltd* [2022] NZERA 285 (Member Robinson) at [50].
2 At [56]–[57].
3 At [62].

grievance because it derived solely from a dispute about the interpretation and application of an employment agreement. It was submitted that the only procedural route available to Mr Breen was confined to the dispute processes contained within the Employment Relations Act 2000 (the Act). An amended statement of claim was filed, by agreement, together with a response, and I heard further from counsel in relation to the jurisdictional issue.

[7] The company contends that if the jurisdictional argument succeeds, Mr Breen's challenge must fail, and the Authority's determination must be set aside. Alternatively, if the Authority is found to have erred in its finding of unjustified disadvantage relating to the late August payment issue, then the compensatory award must be set aside. In these circumstances it is convenient to deal with the company's challenge first.

What remedial route was open to Mr Breen in respect of the alleged late payment of wages?

[8] Mr Breen's employment agreement contained a clause relating to deductions from pay, including the circumstances in which this could occur (cl 4.2). The company submits that the parties were genuinely in dispute about the application and/or interpretation of that clause and that they were required under the Act to seek to resolve matters via the statutory dispute resolution processes, rather than by way of personal grievance.

[9] The company's jurisdictional argument centres on the wording of s 103(3) of the Act, which relates to personal grievances, and s 129, which relates to disputes. In essence it is submitted that the Act draws a distinction between personal grievances,[4] such as unjustified dismissals and unjustified disadvantages, and disputes. The remedial route a litigant must take depends on the correct characterisation of the matter at issue. The personal grievance route may lead to compensatory awards, such as was made in this case, whereas the dispute route may lead to declaratory relief, which can then be used to commence further proceedings such as a breach of contract claim, a compliance order application, and/or a penalty action.

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4 Personal grievance is defined in s 103(1) of the Employment Relations Act 2000.

[10] Counsel for Mr Breen submitted that while the parties were at odds over the application and/or interpretation of cl 4, that was not the sole focus of the difficulties between them. Rather, broader concerns were engaged, including about the way in which Mr Chung had dealt with Mr Breen and the failure to pay remuneration on time. All of this, it was said, gave rise to a disadvantage which was actionable.

[11] In order to deal with the correctness or otherwise of the parties' respective positions, it is necessary to set out the relevant provisions of the Act. Before doing so I record that it was common ground that the jurisdictional argument was not raised by either party in the Authority.

[12] Part 9 of the Act deals with three distinct matters, as the heading makes clear: personal grievances, disputes and enforcement. Section 103 provides:[5]

> **103 Personal grievance**
>
> (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
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> …
>
> (b) that the employee's employment, or 1 or more conditions of the employee's employment … is or are or was … affected to the employee's disadvantage by some unjustifiable action by the employer; or
>
> …
>
> (3) In subsection (1)(b), *unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement*.
>
> …

[13] Section 129(1), which relates to disputes, provides that:[6]

> *Where there is a dispute about the interpretation, application, or operation of any employment agreement*, any person bound by the agreement or any party to the agreement *may pursue that dispute in accordance with Part 10*.

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5 Emphasis added.
6 Emphasis added.

[14] Clause 4 of Mr Breen's employment agreement materially provided that:

> 4.2 You will not be paid for the hour you are not working because of your personal matter or ACC etc. Your holiday and sick leave shall not be applied to this clause.
>
> 4.3 Prime Resources shall be entitled to make a rateable deduction from your remuneration for the hours you have not worked as specified in clauses 4.2 set out above, which will be reflected with your wage calculation each month.
>
> 4.4 Your remuneration will be paid as per the remuneration conditions set out in this agreement, these being full compensation for all conditions of your works and other factors surrounding your job.

[15] Mr Chung advised Mr Breen that he would not be paid for August in reliance on cl 4.3, based on his expressed belief that Mr Breen had only been working limited hours during lockdown, that this fell within the "etc" part of cl 4.2, and that the company was accordingly entitled to deduct the hours assessed as not having been worked. Mr Chung was cross-examined on his motivations for reducing Mr Breen's pay, but there was insufficient evidence to conclude that his understanding of cl 4 was anything other than genuinely held. And while Mr Breen clearly disagreed with Mr Chung's view of cl 4.2, as the contemporaneous documentation makes plain, there was no suggestion at the time that Mr Chung was deliberately being disingenuous.

[16] The distinction between personal grievances and disputes, and the remedial routes available in respect of each, was dealt with by the Court of Appeal in *Auckland College of Education v Hagg*. While the Court was concerned with s 27(1)(b) of the Employment Contracts Act 1991, that provision was in materially the same terms as s 103(3) in the current Act.[7] The Court made the following relevant observation:[8]

> Finally, action derived solely from the interpretation or operation of any provision of an employment contract is excluded under s 27(1)(b).
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> On that analysis of para (b) we consider there was no basis for Judge Finnigan's conclusion that the matters he relied on could constitute unjustifiable action for the purposes of s 27(1)(b), which applying well-settled principles amounts to an error of law. The personal grievance claim was made in October 1993 during the currency of the second two-year contract. It asserted a claim to a tenured position, and Judge Finnigan's finding was that

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7 *Auckland College of Education v Hagg* [1996] 2 NZLR 402 (CA).
8 At 407.

> by December 1991 the college had twice assessed Mr Hagg's suitability for the job and surely that was enough. The claim to a tenured position, whether arising in December 1991 or later, was not a grievance arising out of the employment activity, the on-the-job situation. Further, the advice from the college in the letter of 10 September 1993 of the expiry date of the contract was an action derived solely from the interpretation or operation of the employment contract, or at the least from the disputed interpretation or operation of the contract. From its perspective the college had no legal option but to allow the term contract to expire and to advertise any position. In that regard any dispute about the interpretation or operation of the contract could have been pursued under Part IV of the Act.
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> It follows in our view that Judge Finnigan erred in law in his conclusion that s 27(1)(b) applied.

[17] The following points emerge from the Court of Appeal's judgment. The way in which a litigant crafts their claim (as a personal grievance or as a dispute) is not the central issue and does not impact the jurisdictional bar imposed by (now) s 103(3). The central issue is what the claim derives from. If it derives solely from the interpretation and/or operation of the employment agreement, or derives solely from a dispute about the interpretation and/or operation of the agreement, it must be pursued by way of the disputes procedure – it cannot be pursued by way of personal grievance.

[18] As subsequent judgments reflect, the circumstances in which an action will be found to "derive solely" from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement will vary.

[19] In *Cruickshank v Alliance Group Ltd* Judge Palmer noted the Employment Tribunal's finding that the action complained of was contrary to the provisions of the employment agreement and was, therefore, an unjustified action.[9] However, the company's actions were based on a genuine interpretation of the award as allowing for seasonal layoffs. While the company's interpretation was found to be wrong, the action was held to derive solely from a disputed interpretation of an employment agreement. Therefore, the Tribunal had held that the dispute procedure applied, and no personal grievance based on disadvantage arose, or could be pursued.

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9 *Cruickshank v Alliance Group Ltd* [1992] 3 ERNZ 936 (EmpC) at 956.

[20] A similar approach was adopted in *Red Beach School Board of Trustees v New Zealand Educational Institute (Inc)*, which involved a potential personal grievance to be pursued by teacher aides.[10] The Board of Trustees contended that its position was appropriate on a proper interpretation and application of the collective employment agreement. Judge Couch held that the Authority had lacked jurisdiction to deal with the teacher aides' potential claim as a personal grievance and accordingly set the determination aside.

[21] What might be described as a broader, more contextual, approach was adopted in *Clarkson v Department of Child Youth and Family Services.* There Chief Judge Goddard held:[11]

> Looking at this case from a broad perspective, it seems to me that this is precisely the kind of case in which the Authority should have shunned technicalities, including the technicality that the plaintiff's case may involve construing an employment agreement. As it seems to me, it includes much more than a dispute and does not turn solely upon a disputed interpretation, application, or operation of an employment agreement. What it turns on is how the employer in this case handled the situation that had arisen and whether it treated the plaintiff with respect and dignity having regard to the fact that he was a long-standing departmental employee.

[22] In *Matthes v New Zealand Post Ltd (No 3)* a number of New Zealand Post employees had been allocated new positions after a restructuring; they would have preferred voluntary severance.[12] They argued that New Zealand Post's good employer obligations and duty of fairness were engaged and that their claim did not, accordingly, solely derive from the application of the collective agreement to their personal circumstances. While the interpretation and application of relevant provisions in the collective agreement were at issue, and had to be decided, the Court found that the dispute exclusion did not apply.[13]

[23] As s 10 of the Interpretation Act 2019 makes clear, the meaning of legislation must be ascertained from its text and in the light of its purpose and context. Parliament

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10 *Red Beach School Board of Trustees v New Zealand Educational Institute (Inc)* EmpC Auckland AC13/07, 20 March 2007 at [106]–[114].

11 *Clarkson v Department of Child Youth and Family Services* EmpC Christchurch CC9/04, 5 May 2004, at 21.

12 *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 (EmpC) at 853.

13 At 871.

clearly intended to draw a distinction between a "dispute" and a "personal grievance". Section 161, for example, confers on the Authority exclusive jurisdiction to make determinations about employment relationship problems generally, including "disputes about the interpretation, application, or operation of an employment agreement", "matters related to a breach of an employment agreement" and "personal grievances". The deliberate distinction is also reflected in the different resolution mechanisms provided for under the Act. Section 129 provides that disputes are to be dealt with in accordance with Part 10. On the other hand, personal grievances are primarily dealt with in accordance with Part 9. Section 162, which is in Part 10, confers on the Authority the powers of the District Court and the High Court in respect of contracts, including in relation to their interpretation.

[24] It may be said that at its heart every unjustified disadvantage claim engages issues about the interpretation, application and operation of an employment agreement, and what was referred to in *Clarkson* as a "technical" approach may lead to practical difficulties in particular cases, including the case currently before the Court.[14] However, an interpretation which recognises, without blurring or undermining, the distinctions drawn by the Act between disputes and personal grievances, along with the processes Parliament had in mind for their resolution, is to be preferred. I have found the analysis referred to in *Cruickshank* helpful in this regard.

[25] Applying that analysis to this case leads to the following. The actions complained of (reduction in pay and late payment) were allegedly contrary to the provisions of the employment agreement and were unjustified. However, the company's actions were based on a genuine interpretation of cl 4 of the employment agreement. The company's interpretation may well have been wrong (a point I do not need to decide), but the claim was an action deriving solely from a disputed interpretation of an employment agreement. Therefore, the dispute procedure applied, and no grievance based on disadvantage arose.

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[14] *Clarkson*, above n 11, at 21.

[26] For completeness I deal with a point raised by counsel for Mr Breen, namely that the company's action could not be said to derive solely from the interpretation or application of the contract because it also engaged a claim under the Wages Protection Act 1983. Although the Wages Protection Act provides guardrails for interpreting the deductions clause in the employment agreement, no separate or connected claim has been brought against the company under that Act, so the dispute remains contractual in scope. That is not to say that a separate claim under the Wages Protection Act could not be advanced.[15]

[27] I conclude that there is a jurisdictional bar to the defendant's personal grievance claim, and the company's challenge must succeed on that basis.

[28] Given my conclusion on the jurisdictional point, it is not necessary for me to consider the company's claim that the Authority erred in finding that Mr Breen was underpaid for August because he had worked fulltime and erred in finding that the late payment for August gave rise to an unjustified disadvantage.

Conclusion

[29] The Authority did not have jurisdiction to investigate Mr Breen's claim as a personal grievance, nor does the Court have jurisdiction to do so. The company's jurisdictional challenge succeeds. The Authority's determination is accordingly set aside and this judgment stands in its place.

[30] Mr Breen is entitled to feel frustrated at this result. The merits of his claim were compelling. If there had been no jurisdictional bar to the claim proceeding, I would likely have dismissed the company's challenge against the Authority's finding of unjustified disadvantage and upheld Mr Breen's challenge to the Authority's determination as to relief. I make this point because I see it as being of relevance to issues of costs, and where those costs should lie, particularly in light of the belated raising of the jurisdictional argument.

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15 See *Red Beach School Board of Trustees*, above n 10, at [113].

[31] In the circumstances I strongly encourage the parties to seek to resolve any costs issues as between themselves. If that does not prove possible, I will receive memoranda, which must be filed within 20 working days of the date of this judgment.

Christina Inglis
Chief Judge

Judgment signed at 10.00 am on 15 November 2023