IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 206
CRC 22/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROSAURO GAPUZAN Plaintiff
AND	PRATT & WHITNEY AIR NEW ZEALAND SERVICES trading as CHRISTCHURCH ENGINE CENTRE Defendant

Hearing:	(on documents dated 5 June, 29 August, 11, 17 and 23 September 2014)
Appearances:	plaintiff in person A Shaw, counsel for the defendant G Slevin, counsel for Official Assignee
Judgment:	11 November 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment decides two applications. The first is made by the defendant. The orders it seeks are:

(a) That the remedies sought by the plaintiff in paras 55(a), (c) and (d) of his fourth amended statement of claim be dismissed on the basis that these remedies vested in the Official Assignee under s 101 of the Insolvency Act 2006 (IA), and that upon the plaintiff's bankruptcy the Official Assignee determined that there was no merit in pursuing such remedies in this Court.

(b) That the remedies sought by the plaintiff in para 55(b) of his fourth amended statement of claim be dismissed on the basis that they are frivolous and/or vexatious under cl 15 of sch 3 to the Employment Relations Act 2000 (the Act).

(c) That as a result of the above dismissal of remedies, the fourth amended statement of claim be struck out pursuant to ss 162 and 221 of the Act and reg 6 of the Employment Court Regulations 2000 (the Regulations).

(d) That costs in relation to the application be fixed, and that the sum of $2,000 held as security for the costs awarded by the Employment Relations Authority (the Authority) be paid to the defendant.

[2] The plaintiff's application seeks leave to amend the fourth amended statement of claim. The application asserts in summary:

(a) He should be permitted to seek a penalty under s 149(4) of the Act, it being contended that a penalty is payable to the Court and not the plaintiff under s 136(1) of the Act.

(b) Alternatively, it is asserted that the alleged breach by the defendant of a settlement agreement between the parties resulted in Mr Gapuzan being denied treatment, rehabilitation and cover for injury by the Accident Compensation Corporation (the Corporation). A claim relating to such a breach is a claim personal to the plaintiff as a bankrupt. The right to claim a penalty for such a breach would not vest in the Official Assignee, and Mr Gapuzan should be permitted to pursue it.

Background

[3] This matter has been the subject of three previous interlocutory judgments. The first of those interlocutory judgments provided a convenient summary of the background to Mr Gapuzan's claims.[1]

[4] That summary is as follows:

> [4] The plaintiff is an aircraft engineer. The defendant is a joint venture between Pratt & Whitney and Air New Zealand to service aircraft engines. The plaintiff was employed by the defendant in its facility at Christchurch Airport. That employment began in January 2006.
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> [5] From 2008, the plaintiff had complained of pain in his left elbow which was diagnosed as epicondylitis. In early 2011, the plaintiff began working in what is known as the CX area. Before he did so, an assessment of the work involved was carried out and it was agreed that the work involved little or no risk of aggravating his condition.
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> [6] Beginning in early 2011, the plaintiff began to experience pain in his right elbow. The plaintiff believed his symptoms were related to his work and, in about October 2011, raised a personal grievance alleging that the defendant had failed to provide him with a safe workplace.
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> [7] On 5 December 2011, the plaintiff made a claim for accident compensation in relation to his right elbow. In response to that claim, the Accident Compensation Corporation (ACC) provided a standard form questionnaire for the defendant to complete as the plaintiff's employer. It appears the form was given to the plaintiff on or about 7 December 2011 but he did not pass it on to the defendant until some time later.
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> [8] On 14 December 2011, the plaintiff was examined by an occupational medicine specialist, Dr Souter, who provided a report to the defendant. The plaintiff's immediate manager, Brett Crackett, then completed the ACC questionnaire on 19 December 2011. In answer to one of the questions, Mr Crackett ticked a box to indicate that he did not agree that that the plaintiff's injury was caused by his work.
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> [9] On 20 December 2011, the parties met with a mediator from the then Department of Labour. At that meeting, they agreed terms of settlement which were signed by them and by the mediator pursuant to s 149(3) of the Employment Relations Act 2000 (the Act). The terms of settlement provided that the plaintiff would resign the following day, that he would receive substantial payments from the defendant and included the following terms:
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> > 6. Having attended mediation and resolved their employment relationship problem, Rosauro and CEC undertake that when speaking of each other to third parties they will do so in positive or neutral terms.

[1] *Gapuzan v Pratt & Whitney Air New Zealand t/a Christchurch Engine Centre* [2013] NZEmpC 158 [First interlocutory judgment].

…

8. This is the full and final settlement of all matters between CEC and Rosauro arising out of their employment relationship and its termination including but not limited to all or any statutory entitlements except as herein provided.

[10] The plaintiff duly resigned on 21 December 2011 and the payments provided for in the terms of settlement were made.

[11] Although he had completed the ACC questionnaire on 19 December 2011, Mr Crackett did not send it to ACC immediately. It is suggested that this was because he believed that the plaintiff's resignation meant that no further action was required.

[12] On 9 January 2012, ACC declined the plaintiff's claim and the plaintiff became aware that the defendant had not returned the employer questionnaire to ACC. He contacted the mediator who contacted the defendant's Human Resources Manager on 10 January 2012. She arranged for the questionnaire to be sent to ACC that day. ACC then reviewed the plaintiff's claim in light of the answers given in the questionnaire and confirmed its decision to decline the claim.

[5] It is also relevant to mention that on 23 August 2012, a Reviewer dismissed Mr Gapuzan's application for review in respect of the Corporation's decision. The Reviewer held that medical evidence showed Mr Gapuzan's right elbow epicondylitis was unlikely to be a gradual process injury caused or contributed to by his employment.[2]

Procedural matters

[6] The procedural background to the application now made is as follows:

> In the first interlocutory judgment of 29 August 2013, certain paragraphs of the second amended statement of claim were struck out; leave was granted to Mr Gapuzan to file and serve any further statement of claim.[3]

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2 *Application for Review by Rosauro Gapuzan* 485092, 23 August 2012 [ACC Review decision].

3 First interlocutory judgment, above n 1.

In the same decision an application for an order for security for costs was dismissed, the Court noting however that the plaintiff had paid $2,000 into Court on account of a costs order made by the Authority.[4]

(a) In the second interlocutory judgment of 12 February 2014, the Court considered an application to strike out paragraphs of the third amended statement of claim.[5] Again, certain paragraphs were struck out. Mr Gapuzan was granted leave to amend the remedies sought by way of a further amended statement of claim. This resulted in the filing and serving of the fourth amended statement of claim on 21 February 2014.

(b) Mr Gapuzan was adjudicated bankrupt on 30 May 2014. Pratt & Whitney applied for a stay of a fixture which had previously been scheduled for hearing on 14 -16 July 2014. Because the Official Assignee required time to evaluate the merits of the claim and confirm whether he would discontinue any aspects of the claim and/or whether any of the claims were personal to the bankrupt, the Court ordered that the fixture be vacated. The proceeding was stayed until further order of the Court to enable the issues arising from the bankruptcy to be dealt with.[6]

[7] Pratt & Whitney has now filed the application for strike-out which I described earlier, supported by evidence and submissions. Counsel for the Official Assignee helpfully filed a full memorandum setting out the conclusions the Official Assignee has reached as to Mr Gapuzan's claims. Mr Gapuzan has filed a notice of opposition to the defendant's application for strike out; it is supported by an affidavit.

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4 The Authority had dismissed the plaintiff's claim following an investigation meeting, *Gapuzan v Pratt & Whitney Air New Zealand t/a Christchurch Engine Centre* [2012] NZERA Christchurch 115; and subsequently in a costs determination ordered him to pay the defendant $2,000 for costs, *Gapuzan v Pratt & Whitney Air New Zealand t/a Christchurch Engine Centre* [2012] NZERA Christchurch 146.

5 Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre (No 2) [2014] NZEmpC 16.

6 *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 104.

[8] Two discreet issues arise from Pratt & Whitney's application. The first relates to the decision of the Official Assignee that he does not wish to pursue any of the claims or remedies which have vested in him; the second is the contention that the balance of the proceeding is frivolous and vexatious. Each raises different issues which require separate consideration.

The fourth amended statement of claim

[9] Since the fourth amended statement of claim provides the starting point for the applications which are before the Court, it is necessary to summarise its content. Mr Gapuzan alleges:

(a) Pratt & Whitney did not file the Corporation's Form 273 Employer Work Injury Questionnaire in a timely way, with the result that the Corporation declined the claim because such information had not been provided.

(b) When the Corporation did receive the questionnaire, it contained allegedly false and misleading information, namely the denial that Mr Gapuzan's injury was work related. This resulted in the Corporation declining the claim for cover and treatment.

(c) It is alleged that attached to the employment questionnaire was a report of 14 December 2011 from an occupational specialist, Dr Souter, which contained misleading information; it is alleged that it was misleading on the part of Pratt & Whitney to have submitted this information to the Corporation.

(d) Further misleading information is alleged to have been provided in the form of an outdated ergonomic risk assessment, completed almost a year prior to the injury reported by Mr Gapuzan.

(e) It is alleged that Pratt & Whitney failed to provide Mr Gapuzan with the results of certain workplace assessments that were carried out in

December 2011, contrary to statutory obligations alleged to exist under the Health and Safety in Employment Act 1992.

(f) Finally, it is alleged that the foregoing acts and omissions constitute bad faith on the part of Pratt & Whitney because they were deliberate and wilful. It is alleged that this was to ensure that Pratt & Whitney's experience rating classification would not be affected to its detriment.[7]

[10] The pleading goes on to assert that the issues are:

- The defendant's deliberate and wilful failure to send the employer questionnaire in a timely and effective manner is a breach of agreed terms of the settlement.
- Not providing ACC with vital information on the plaintiff's injury is a breach of the agreement to speak to the third party in positive or neutral terms.
- The defendant breached the agreement by denying that injury is work-related and provided false and misleading answers to the questionnaire submitted to ACC.
- The defendant breached the agreement by submitting false and misleading documentary [evidence] to ACC and the Authority.

[11] Then follows para 55 which is the subject of the applications that are now before the Court. It describes the relief sought as follows:

(a) For the breach of the agreed terms of settlement, penalty imposed under s 149(4) of the Employment Relations Act 2000 (the Act).

(b) For acting in bad faith resulting to the denial of the plaintiff's ACC claim, award for damages in the amount of $50,000 pursuant to s 123(1)(c) of the Act due to significant injury to feelings, significant pain and suffering, humiliation, loss of dignity and loss of benefits which the employee might reasonably have been expected to obtain.

(c) Reimbursement to the plaintiff in accordance with s 123(1)(b) of the Act of a sum equal to the whole or any part of the wages or other money lost as a result of the defendant's actions.

(d) Punitive or exemplary damages due to the defendant's wrongdoing, flagrant and malicious disregard of the plaintiff's rights and interest

[7] Pursuant to s 169(2) of the Accident Compensation Act 2001 and the Accident Compensation (Experience Rating) Regulations 2011.

> and fraudulent and misleading declaration and evidences to ACC and the Authority.

The Official Assignee's conclusions

[12] The Official Assignee submits through counsel that the claims described in paras 55(a), (c) and (d) are claims which constitute "property" under s 3 of the IA which vested in him on adjudication under s 101 of that Act. The Court is also informed that the Official Assignee does not wish to pursue any of the claims or remedies that have vested in him by virtue of Mr Gapuzan's adjudication.

[13] Although s 217(2) of the IA provides that under sch 1, cl (b) of that Act, the Official Assignee can "… discontinue … legal proceedings relating to the property of the bankrupt", the Official Assignee has not formally sought to discontinue the specified remedies originally claimed by Mr Gapuzan; rather the defendant seeks an order dismissing the claims which the Official Assignee considers have vested in him.

[14] It is accordingly necessary for the Court to consider whether those conclusions are correct.

[15] Counsel for the Official Assignee records that all of a bankrupt's property vests in the Official Assignee on adjudication;[8] and property acquired during bankruptcy vests in the Official Assignee without him having to intervene or take any other step in relation to it.[9]

[16] "Property" is defined in the broadest possible terms, as follows:[10]

> Property means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise.

[17] Having regard to legislative history and the absence of any statutory provision stating that a thing in action may not vest in the Official Assignee, he says

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8 Insolvency Act 2006, s 101(1). This is subject to s 104, which provides the property held by the bankrupt in trust for another person does not vest in the Assignee, a proviso which does not apply in this case.

9 Section 102.

10 Section 3.

it must be concluded that the provision is sufficiently broad to cover the vesting of a bankrupt's rights of action against his or her employer.

[18] It is noted that there is a common law exception to vesting which applies where a claim is personal to a bankrupt. Such claims are limited to those in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights and property".[11]

[19] Section 102 of the IA makes it clear that property which the bankrupt acquires or which passes to the bankrupt between the commencement of the bankruptcy and the discharge of the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to it. Such property is commonly called "after-acquired property".

[20] It is submitted that whether or not the Official Assignee decides to pursue rights in respect of property vested in him is a matter for him; such a decision may be reviewed under relevant provisions of the IA, but may not be reviewed by this Court. The only issue which may be considered in the present context is whether rights of action formerly held by Mr Gapuzan are correctly stated by the Official Assignee to have vested in him.

[21] Against the background of those factors, the Official Assignee considers:

(a) In respect of the claim for penalty at para 55(a) under s 149 of the Act, a penalty is imposed for the purpose of punishment of a wrongdoing, such as breaching the Act or another Act or an employment agreement.[12] Whether a penalty is awarded is a matter of discretion for the Court. In this instance it would arise from an alleged breach of contract measured not by reference to the applicant's pain and suffering but by reference to an agreement.

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[11] Reference being made to *Heath v Tang* [1993] 1 WLR 1421 (CA) at 1423 per Hoffman LJ; followed in *Cork v Rawlins* [2001] EWCA Civ 202.

[12] *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC) at [47].

Quantum would fall for determination by reference to the conduct of the defendant, not the impact on the plaintiff's person.[13]

(b) In respect of the claim at para 55(b) for compensation for injury to feelings, pain and suffering, humiliation, loss of rights and loss of benefits, the Official Assignee submits that the remedy is one which potentially falls under s 123(1)(c) of the Act, and is within the class of claims that are personal to a bankrupt. Accordingly it is accepted this right does not vest in the Official Assignee.

(c) In respect of the claim at para 55(c) for lost wages, the Official Assignee refers to s 147 of the IA which permits the Official Assignee to require a bankrupt to pay an amount or periodic amounts during a bankruptcy as a contribution towards payment of the bankrupt's debts subject to consideration of personal needs; and to s 163 of the same Act which permits the Official Assignee to make an allowance to the bankrupt for the purposes of support for the bankrupt or his or her relatives and dependants.

It is accordingly submitted that income needed for a bankrupt's support nominally vests in the Assignee, but may be used by the bankrupt for support. However the Official Assignee alone is entitled to consider whether or not a claim for reimbursement of lost income should be pursued.

(d) In respect of the claim at para 55(d) for punitive or exemplary damages, these are awarded to punish a wrongdoer and are quantified by reference to a wrongdoer's conduct rather than its impact on the plaintiff.

Insofar as a breach of contract impacts on a plaintiff's person, general damages would be awarded in an orthodox contract claim; in the employment jurisdiction the appropriate remedy is under s 123(1)(c)(i), and not by means of an exemplary damages award.

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[13] *Beckham v Drake* 9 ER 1213 (HL) and *Cork*, above n 11.

[22] Mr Gapuzan in his notice of opposition to the defendant's application for strike-out submits:

(a) The Official Assignee's position as to imposition of a penalty under s 149(4) does not have sufficient regard to s 136(1) of the Act, which provides that a penalty is payable to the Authority or the Court as the case requires, and not the plaintiff. Accordingly, it is submitted that a claim for a penalty is not a right that can vest in the Official Assignee.

(b) It would be contrary to the Court's equity and good conscience jurisdiction to strike out proceedings which claim remedies that "… the Court may or may not award without resolving the causes of action which would render a judgment on the defendant's culpability and vindicate the plaintiff's cry for truth, fairness and justice".

(c) Mr Gapuzan submits that the conclusion reached by the District Court in its decision of 15 July 2013[14] amounts to a miscarriage of justice because the District Court disregarded evidence, and reached a conclusion inconsistent with an interlocutory judgment of this Court dated 29 August 2013, with the result that the District Court decision is flawed.

(d) It is similarly asserted that there were procedural defects in the bankruptcy proceeding undertaken by the defendant in the High Court, so that the order of bankruptcy should not have been made.

(e) The Court should reach the same conclusion as was reached in *Young v Bay of Plenty District Health Board*, where it was held that certain claims which the Official Assignee in that case did not wish to advance could not be discontinued.[15]

(f) Mr Gapuzan submits that he has been deprived of accident compensation entitlements, declared bankrupt, and denied justice, so

[14] *Gapuzan v Pratt & Whitney Holdings SAS* DC Christchurch Civ-2013-009-000707, 15 July 2013.
[15] *Young v Bay of Plenty District Health Board* [2013] NZEmpC 131.

that it is now inappropriate for the defendant to be granted the relief which it seeks.

[23] It is also appropriate to refer to Mr Gapuzan's application for leave to amend his fourth amended statement of claim. The points made in that application overlap with points which are relevant with regard to the defendant's application. The two applications should be considered together. In his notice of application, Mr Gapuzan:

(a) Repeats the assertion made in the notice of opposition already referred to, to the effect that under s 136(1) of the Act any penalty is payable to the Authority or the Court as the case requires, and not to the plaintiff.

(b) Submits that for the same reason an award of exemplary damages could not be claimed as personal.

(c) Submits that the alleged breach by Pratt & Whitney of the settlement agreement has resulted in a denial of accident compensation entitlements, particularly treatment and rehabilitation. He says these are claims personal to him, and do not constitute "property" for the purposes of the IA.

(d) Submits that he should accordingly be granted leave to amend his pleading – apparently following any decision the Court might make in favour of the defendant with regard to its application.

[24] For its part, the defendant adopts the conclusions of the Official Assignee in respect of the claims under paras 55(a), (c) and (d). In relation to Mr Gapuzan's application for leave, the defendant pleads that leave should not be granted because the defendant does not accept the plaintiff is able to pursue a remedy under s 149(4) of the Act given the bankruptcy; that any right to seek a penalty or exemplary damages is not property which constitutes a claim that is personal to the bankrupt; and that the plaintiff's claim is frivolous and vexatious.

Discussion – paras 55(a), (c) and (d)

[25] The starting point for an assessment of the Official Assignee's position must be s 101 of the IA, which vests the bankrupt's property and the capacity to deal with such property in the Official Assignee. It is immediate and automatic on adjudication.

[26] The central issue in the present case relates to the scope of the term "property". That term is defined in s 3 of the IA and is expressed in wide terms. It is well established that the term is sufficiently broad so as to cover a right of action.[16]

[27] There is, however, a common law exception where a right of action relating to a bankrupt's person or reputation that is not property which vests in a bankrupt. This principle is well recognised, and has been summarised in many international and local cases.

[28] A starting point is the House of Lords decision in *Beckham v Drake*, decided in 1849.[17] Mr Beckham was employed by Mrs Drake as a foreman in a type-founding business. A written contract provided that Mr Beckham's employment should be for seven years at a certain weekly wage and that in the event of a breach of the contract by any of the parties, the defaulting party would pay the other £500 as damages. Mr Beckham was dismissed. He later became bankrupt. He subsequently sued his employers on the agreement. It was pleaded they had no right of action by virtue of his bankruptcy. Seven judges held that Mr Beckham's right of action passed to his assignees in bankruptcy whilst two did not. In the House of Lords, Lord Brougham held:[18]

> … you are not … to give damages to the assignees under bankruptcy for loss of character sustained by the bankrupt, by slander, or for the loss of service by the seduction of a servant or a daughter, or for criminal conversation with the wife … even when there is no actual damaged proved, or even where the damage is merely nominal for a breach of contract, still if that is in respect either of property or of a proprietary right, such as service or work and+ or labour, as in the present case, even in that case it passes.

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[16] See *De Alwis v Luvit Foods International* HC Auckland Civ-202-404-1944, 24 March 2010, at [13]-[16].

[17] *Beckham*, above n 13.

[18] At 1235.

[29] Lord Campbell stated:[19]

> It has been settled, over and over again, that for personal labour, or anything personal respecting the bankrupt, the assignees have no claim. … I really think that this case is free from difficulty, when we come to consider that this is an action upon an agreement, subject to a penalty, and that the action is brought for the penalty …

[30] In 1993, Lord Hoffman in *Tang* repeated the same proposition, stating that rights of action and liabilities which are personal to the bankrupt, such as defamation and assault, do not vest in the assignees.[20]

[31] A yet more recent example of this principle is found in *Cork v Rawlins* where the English Court of Appeal considered sums paid under two assurance policies effected by Mr Rawlins with Abbey Life Assurance Co Ltd before he became bankrupt.[21] The issue was whether a Whole of Life Policy which provided for earlier payment on receipt of proof that the life assured had become disabled was property for the purposes of a bankruptcy.[22] Mr Rawlins contended that the circumstances giving rise to the payment were so inherently linked to his pain and suffering that it would be inequitable and contrary to the principles underpinning the insolvency legislation for the payment to vest for the benefit of his creditors in the bankruptcy.

[32] The Court rejected the submission that as the insurance payments were conditional on the bankrupt's disability or that they were conditional on his pain and suffering, they did not vest. In doing so it referred to the above authorities including the following passage in *Beckham*:[23]

> There is no doubt that the right to bring an action for an injury to the person, character, or feelings of a bankrupt, does not pass to the assignees, and that the right to bring an action for the payment of money agreed to be paid to the bankrupt does pass. And it appears to me that the present action is in effect an action on a contract to pay money.

[33] These principles have been applied on many occasions in New Zealand. A recent example is *Official Assignee v Matete*, where the High Court concluded that

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19 At 1236.
20 *Tang*, above n 11, at 697.
21 *Cork*, above n 11.
22 The relevant definition of the term "property" was that found in s 3 of the IA.
23 At [26] citing *Beckham*, above n 13, at 1228.

the right to receive a redundancy payment was based on a contractual right to receive a specified sum upon the occurrence of a nominated event.[24]

[34] It is now necessary to turn to the paragraphs of the fourth amended statement of claim which the Official Assignee claims relate to property rights that vest in him, in light of the principles I have identified.

[35] The first is para 55(a), wherein a penalty is sought for breach of the agreed terms. The settlement agreement was a contract. If a breach is considered sufficiently egregious, the Court may impose a penalty. The penalty is fixed by reference to the defaulting party's misconduct. It is in the nature of a punishment. Just as Lord Campbell in *Beckham* held that a right to claim a contractual penalty vested in the Assignee,[25] so it was appropriate for the Official Assignee to conclude in this case that a right to claim a penalty under s 149 vested in him

[36] That conclusion is sufficient to deal with the issue. However, for completeness I refer to Mr Gapuzan's submission based on s 136(1) of the Act, which provides that a penalty is not payable to a plaintiff. He did not refer to s 136(2) which states that the Authority or the Court may order that the whole or any part of any penalty recovered be paid to any person, which could include a plaintiff. However, what is relevant is not the identity of the payee but the nature of the right of claim as discussed in the previous paragraph.

[37] It is next convenient to deal with the claim arising from para 55(d), where exemplary damages are sought. An award of exemplary damages expresses the Court's outrage where there has been a flagrant breach of a plaintiff's rights. Such damages are also intended to punish. Compensation to a plaintiff is not a purpose of exemplary damages.[26] In this case those rights are asserted to arise from a contractual breach. The same conclusion must be reached as per the claim for a penalty. They do not fall within the common law exception relating to person or reputation. Consequently the right of action must constitute property which vests in the Official Assignee.

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[24] *Official Assignee v Matete* [2014] NZHC 1685, [2014] NZAR 1060.
[25] See [29] above.
[26] *A v Bottrill* [2002] UKPC 44, [2003] 2 NZLR 721 at [64]-[66].

[38] Paragraph 55(c) seeks "the whole or any part of the wages or other money lost as a result of the defendant's actions". The first problem with regard to this claim is that remedies under s 123(1) of the Act can only be considered by the Court where there is a personal grievance. No personal grievance is asserted in the pleading, and nor could a personal grievance be raised because the alleged breach of the settlement agreement occurred after the employment relationship ended. The qualifying criteria of s 103(1) of the Act are not satisfied.

[39] Furthermore the claim is for the financial consequences of an alleged breach of a settlement agreement, not for an alleged breach of an employment agreement which but for the breach would have resulted in the plaintiff earning and being paid wages by the defendant. The case is directly analogous with the situations considered in *Beckham*, *Cork* and *Matete*.

[40] Mr Gapuzan invited the Court to follow the conclusion reached in *Young*, where the Court directed the Registrar not to accept for filing the Official Assignee's Notice of Discontinuance of claims he asserted had vested in him.[27] That case related to an employment agreement, the alleged breach of which resulted in the plaintiff not being able to work for the defendant under that agreement. He asserted a personal grievance which entitled him to the statutory remedies under the Act.[28] That situation is different from the present case and the decision must therefore be distinguished.

[41] For the foregoing reasons, I consider that the Official Assignee was right to conclude that the three claims considered to this point relate to property rights which have vested in him. He was therefore entitled to decide not to pursue the remedies which have vested in him by virtue of Mr Gapuzan's adjudication. They will accordingly be struck out.

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[27] *Young*, above n 15.

[28] In that instance the Court was required to consider the question of whether a Court of Appeal decision which considered the now repealed Insolvency Act 1967, *Re Bertrand* [1980] 2 NZLR 72 (CA), still applies under the IA. For the reasons given at [24] of *Young*, it was concluded that the provision which had been considered by the Court of Appeal, s 42(5) of the Insolvency Act 1967, now survives materially in s 105(2) of the IA. It appears not to have been drawn to that Court's attention that s 45(5) of the Insolvency Act 1967 was amended following the decision of the Court of Appeal in *Re Bertrand*. There may well now be some doubt as to whether the position relating to after acquired income is governed by the common law rule referred to in *Re Bertrand*, or whether such property is now the subject of specific statutory provisions, namely ss 102 and 147.

Paragraph 55(b)

[42] The defendant also submits that Mr Gapuzan's claim for remedies under para 55(b) of the fourth statement of claim should be dismissed, because the claim is frivolous and/or vexatious.

[43] The jurisdiction for considering such an application arises under cl 15 of sch 3 to the Act which provides:

> **15 Power to dismiss frivolous or vexatious proceedings**
>
> (1) The court may, at any time in any proceedings before it, dismiss a matter or defence that the court considers to be frivolous or vexatious.

[44] In para 55(b) as set out at [11] above, a claim is made under s 123(1)(c) of the Act, for injury to feelings, significant pain and suffering, humiliation, loss of dignity, and loss of benefits compensation. This is because it is asserted the defendant acted in bad faith resulting in a denial of the plaintiff's claim with the Corporation.

[45] The defendant submits that a claim for such remedies is frivolous because:

(a) After considering all the evidence and relevant legal tests, a Reviewer determined that Mr Gapuzan is not entitled to work injury cover or entitlements.

(b) Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith; the submission of the Employer Questionnaire to the Corporation occurred after the employment relationship had ended, when the good faith obligation no longer applied.

(c) The information was provided pursuant to the defendant's statutory obligations under the Accident Compensation Act 2001, and was not provided in the context of an employment relationship.

(d) There is no relevant personal grievance in these circumstances.

(e) The alleged conduct could not sustain an allegation of misleading or deceiving conduct, whether direct or indirect.

(f) Even if there was a breach of the duty of good faith, the remedy is a penalty; an action for a penalty vests in the Official Assignee not the bankrupt.

(g) The allegations could not sustain the necessary prerequisites of a penalty claim, where a breach must be deliberate, serious and sustained.

[46] In support of the contention that the plaintiff's claim is vexatious, the defendant submits:

(a) An extraordinary range of proceedings have been initiated by the plaintiff where the defendant has had to defend itself, expending significant resources. The plaintiff's claims have all been dismissed. In addition, significant negative and non-neutral comments about the defendant have been made by the plaintiff in social media contexts, contrary to the terms of the settlement agreement.

(b) Also indicating vexatious tendencies are the allegations pursued by Mr Gapuzan against third parties such as the Corporation and the occupational physician involved.

(c) Although Mr Gapuzan's interests are acknowledged, given that his claims are misconceived and the pleadings are unnecessarily complex, prolific and incomprehensible, including scandalous and exaggerated claims without substance, this is clearly a case which should be dismissed.

[47] In his notice of opposition Mr Gapuzan provided a brief outline of the matter, and then submitted in summary:

(a) It would be contrary to the Court's equity and good conscience jurisdiction to strike out the proceedings.

(b) A miscarriage of justice has occurred in the District Court. It reached a decision which it is alleged conflicts with a decision of this Court.

(c) There were procedural irregularities with regard to the obtaining of the bankruptcy order in the High Court.

(d) The conclusions reached by this Court in *Young v Bay of Plenty District Health Board* should be followed.

(e) It would be inhumane and unjust for the plaintiff's claim not to be expedited and resolved. It should not be struck out.

[48] There are several preliminary points to be made. At the time the Employer Questionnaire was submitted by Pratt & Whitney to the Corporation, the parties no longer had an employment relationship; consequently, there can be no claim based on ss 4 and 4A of the Act because good faith obligations can only exist between parties to an employment relationship.

[49] The next point is that relief under s 123(1)(c) can only be granted where the Court determines that an employee has a personal grievance, and that it is appropriate in settling the grievance to provide for such compensation. At the time the document was submitted by Pratt & Whitney to the Corporation, there was no longer an employment relationship so that it was not possible for a personal grievance to be raised in respect of that step.

[50] That finding is sufficient to conclude that para 53(b) be dismissed since the Court has no jurisdiction to grant the remedy sought. However, the Court should look behind the pleading to see whether there are genuine interests at stake.

[51] At its core, Mr Gapuzan's claim is one for breach of contract. There may be a question as to whether a claim for general damages for the personal effects of the alleged breach would be a claim that is frivolous or vexatious, and I turn to consider

that possibility. Since the defendant's application seeks a strike-out of the entire claim made by Mr Gapuzan, it is necessary to consider both liability and remedy issues. Accordingly I deal with the assertion that the claim is frivolous first, then the assertion that it is vexatious.

Is Mr Gapuzan's claim frivolous?

[52] It is clear from established case law that there must be extraordinary circumstances before the Court should conclude that a case is frivolous. In *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IUOW,* Chief Judge Goddard stated:[29]

> Frivolous cases are more than just cases which disclose no cause of action. A frivolous case is one, to use the words of Lush J in *Norman v Matthews*:
>
> > which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court."
>
> It is one which it is impossible to take seriously. ...

[53] Subsequently, Chief Judge Goddard stated in *Cresser v Tourist Hotel Corp of New Zealand* that:[30]

> … to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.

[54] In *Smith v Attorney-General* Judge Palmer considered that the term "futile" was an adequate synonym for the term "frivolous".[31]

[55] Rule 15.1(1)(c) of the High Court Rules (HCR) allows that Court to strike out a pleading if it is "frivolous or vexatious". In *Deliu v Hong,* the High Court found

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[29] *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IUOW* [1989] 3 NZILR 284 (LC) at 289 [citations omitted].
[30] *Cresser v Tourist Hotel Corp of New Zealand* [1990]1 NZILR 1055 (LC) at 1069.
[31] *Smith v Attorney-General* [1991] 3 ERNZ 556 (EmpC) at 589.

the following definition of "frivolous" from the N*ew Shorter Oxford English Dictionary* to be of assistance:[32]

> 1. Of little or no value or importance, paltry; (of a claim, charge, etc), and for a claim or charge having no reasonable grounds.
>
> 2. Lacking seriousness or sense; silly.

[56] The Court went on to find that the claims under consideration in that case – in tort – were frivolous. The Court held:[33]

> This proceeding is not being used to uphold interests which the law of torts sets out to protect. In the eyes of the law, the matters in issue in this proceeding are trivial. This proceeding lacks the seriousness required of matters for the Court's determination.

[57] *Black's Law Dictionary* defines "frivolous" as: "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful".[34] The definition contained in *Black's* has previously been endorsed by the New Brunswick Court of Appeal.[35]

[58] The underlying theme of these statements is that there must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously.

[59] The first point is that Mr Gapuzan's claim of breach of the settlement agreement fails to recognise that Pratt & Whitney had to provide information to the Corporation. Section 309 of the Accident Compensation Act 2001 specifically requires an employer or former employer of a claimant to provide the Corporation with any information or statement, when requested to do so by the Corporation, for the purposes of facilitating decisions about cover, and the timely and appropriate provision of entitlements. It is an offence not to do so. Pratt & Whitney had no option but to complete and submit to the Corporation the Employer Questionnaire which had been provided.

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[32] *Deliu v Hong* [2011] NZAR 681 (HC) at [21], citing Lesley Brown (ed) *New Shorter Oxford English Dictionary* (4th ed, Oxford University Press, 1993).

[33] At [22].

[34] Bryan A. Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul (MN), 2009) at 739.

[35] *University of New Brunswick Student Union Inc v Smith* (1987) 84 NBR (2d) 292 (NBCA) at [4].

[60] Secondly, after the Corporation declined cover, an application for review of its decision was made by Mr Gapuzan to a Reviewer as was his right under the Accident Compensation Act 2001. It is necessary to consider that decision in detail, because on the evidence before the Court it was ultimately determinative of Mr Gapuzan's application for cover and entitlements.

[61] It is evident from the Reviewer's decision that a full hearing took place on 26 July 2012. Mr Gapuzan was represented; also present were representatives of Pratt & Whitney, as well as the Corporation. The Reviewer recorded that he received detailed medical evidence.[36] This included the report of the occupational medicine specialist Dr Souter which Pratt & Whitney had provided to the Corporation dated 14 December 2011. It also, however, included more recent assessments from relevant medical specialists, apparently obtained for the purposes of the application for review. One such report was obtained from an occupational medicine specialist who examined Mr Gapuzan on 26 March 2012; and a second report was obtained from an occupational physician who had also examined Mr Gapuzan on 18 July 2012.

[62] The Reviewer found:

(a) The parties accepted that Mr Gapuzan has right epicondylitis.

(b) One specialist, after considering the observations contained in Dr Souter's report of 14 December 2011 but also the history provided by Mr Gapuzan, concluded that the relevant causal properties or characteristics were not present in the workplace.[37] The second specialist also examined Mr Gapuzan; he considered previous medical reports – including that of the first specialist – and concluded that Mr Gapuzan's employment tasks could be regarded as causative following a change of work activity in the workplace.[38]

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[36] ACC Review decision, above n 2, at 5.
[37] At 4.
[38] At 5.

(c) The Reviewer specifically dealt with issues arising from Dr Souter's report, noting that its contents were consistent with comments made by Mr Gapuzan in his claimant questionnaire of the previous day, 13 December 2011. The Reviewer concluded that this gave weight to the comments of that report writer.

(d) After considering all the medical evidence, as measured against the relevant statutory provisions and case law, the Reviewer concluded it was unlikely Mr Gapuzan had suffered a work related gradual process injury in his elbows.[39]

[63] No evidence has been placed before the Court suggesting that this decision was appealed to the District Court, a right which is available to a Corporation claimant who wishes to challenge the conclusions of the Reviewer.[40]

[64] Against that background, I turn to consider the particular allegations of bad faith which are asserted against Pratt & Whitney:

(a) It is contended that there was a breach of the settlement agreement by a wilful and deliberate failure to send the Employer Questionnaire to the Corporation in a timely way. I find that even if it could be construed that the submission of the document was a breach of the settlement agreement (which I do not accept), the fact is that the Corporation reviewed its decision to decline Mr Gapuzan's claim once it received the Employer Questionnaire, albeit late. This alleged breach could not be causative of any loss giving rise to a remedy.

(b) The second alleged breach is that Pratt & Whitney stated in the Employer Questionnaire that the injury was not work related. The former employer was required to complete the Questionnaire, which meant that it was required to express a view on the claim. This is a natural justice requirement given the potential consequences for an

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[39] At 7.
[40] Accident Compensation Act 2001, s 149(1).

employer or former employer. Pratt & Whitney simply expressed a non-binding opinion. But the key point is that, in this case, the Questionnaire played no part in the Reviewer's decision. The Reviewer relied only on medical evidence. This alleged breach could not support a claim for any remedy.

(c) It is next asserted that Pratt & Whitney breached the agreement by providing a "false and misleading medical assessment" – this being a reference to Dr Souter's report which Mr Gapuzan asserts contained errors of fact. There is no evidence – or even a pleading – that Pratt & Whitney was somehow party to a factual error made by an external specialist, if indeed there was an error. But more to the point, the issue was explored by the Reviewer in the presence of the parties, and he resolved the apparent conflict. This occurred in a context where the former employer had a statutory obligation to provide information; it did so. That information was ultimately tested. It is inconceivable that even if there were a breach of the settlement agreement, the submission of this report was somehow causative of loss arising from a decision to decline cover.

(d) In a similar assertion, Mr Gapuzan alleges that a misleading ergonomic assessment was provided to the Corporation by Pratt & Whitney. This was said to be misleading because it was prepared almost a year prior to the injury which was the subject of Mr Gapuzan's claim to the Corporation. As I have found, the former employer was required to cooperate with the Corporation and did. But also relevant is the fact that the Reviewer did not refer to the ergonomic assessment. He relied primarily on the recent medical assessments from occupational specialists which were placed before him by the parties. Mr Gapuzan could not establish that there was a breach of the settlement agreement by the submission of this material. It could not be held to be causative of loss arising from a decision to decline cover.

(e) The next assertion is that Mr Gapuzan was not told in December 2011 of the workplace assessments that had been carried out. This could not be held to be a breach of the settlement agreement. Furthermore, such a fact, if correct, has no relevance to the question of whether the Corporation would grant cover or entitlements. In any event, Mr Gapuzan was aware of this material, because it was the subject of evidence at the Reviewer's hearing. Such an alleged breach could not be established, or be regarded as causing loss because it led to a decision to decline cover.

(f) Finally, it is asserted that the foregoing acts and omissions were carried out in bad faith. Because none of the above allegations are capable of being established, and for the further reason that there is no pleaded fact capable of supporting such an assertion, it too is misconceived.

[65] Accordingly, I am driven to the conclusion that Mr Gapuzan's liability claims are entirely misconceived, and therefore frivolous in the legal sense.

Is Mr Gapuzan's claim vexatious?

[66] Pratt & Whitney also assert that Mr Gapuzan's claim is vexatious. *Black's Law Dictionary* defines the term thus as conduct "without reasonable or probable cause or excuse; harassing; annoying."[41]

[67] The term appears in s 88B of the Judicature Act 1908, where the High Court may, where a person has persistently without any reasonable ground instituted vexatious legal proceedings, order that such a person be subject to restrictions in instituting or continuing further proceedings. In *Heenan v Attorney-General* the Court of Appeal approved previous points made about this section a number of which I consider to be of assistance when assessing whether a proceeding is "vexatious" under cl 15: [42]

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[41] *Black's Law Dictionary*, above n 34, at 1701.
[42] *Heenan v Attorney-General* [2011] NZCA 9, 200 at [22]-[25].

(a) Recognition of the fundamental constitutional importance of the right of access to the courts must be balanced against the desirability of freeing defendants from the burden of groundless litigation.

(b) Relevant is the character of the proceeding. Did the proceeding have a reasonable basis and how has it been conducted; have such proceedings been issued persistently?

(c) Whether attempts have been made to re-litigate issues already determined, containing scandalous and unjustified allegations.

(d) A factor may well be whether the litigant is found to have had an improper purpose in commencing proceedings.

[68] Regrettably, it is necessary to conclude that Mr Gapuzan's claim is vexatious. I accept the submission made for Pratt & Whitney that it has been required to deal with a plethora of judicial proceedings which have all failed, and which have also required it to utilise extensive time and resources when defending those actions. These include the claim brought against five named employees of Pratt & Whitney for defamation ultimately struck out in the District Court; a claim against Pratt & Whitney in relation to allegations of perjury under the Crimes Act 1961 and breaches of the Health and Safety in Employment Act 1992 which was also struck out in the District Court; and a claim for judicial review in respect of the latter decision which was also dismissed.[43] These problems have been catalysed by Mr Gapuzan's failure to pay the Court ordered costs from these proceedings, which have ultimately resulted in his bankruptcy.

[69] Mr Gapuzan has suggested that incorrect conclusions have been reached in those proceedings. This Court has no jurisdiction to review the decisions of the courts which dealt with his clams.

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[43] See *Gapuzan v King* DC Christchurch CIV-2012-009-000042, 15 July 2013; *Gapuzan v Pratt & Whitney Holdings SAS* DC Christchurch CIV-2013-009-000707, 15 July 2013; *Gapuzan v District Court at Christchurch* [2014] NZHC 870; *Pratt & Whitney Holdings SAS v Gapuzan* [2014] NZHC 1195; *Gapuzan v Pratt & Whitney Air New Zealand t/a Christchurch Engine Centre* [2012] NZERA Christchurch 146.

[70] In addition, Pratt & Whitney has been required to deal with Mr Gapuzan's application that the record of settlement, and its obligations of good faith have been breached (now the subject of challenge to this Court). It also attended the Corporation's review hearing, although I do not consider its participation in that matter falls within the same category as the foregoing proceedings.

[71] Evidence has also been placed before the Court of a document which appears to be a petition lodged by Mr Gapuzan on a website, referring to the proceedings involving him and Pratt & Whitney. Highly critical statements of Pratt & Whitney have been made. There is also evidence that suggests Mr Gapuzan may be associated with YouTube clips, which refer in detail to proceedings in which Mr Gapuzan and Pratt & Whitney have been involved, and where derogatory statements are made of Pratt & Whitney. These are contrary to the settlement agreement that the parties are to speak only of each other in positive or neutral terms.

[72] In short, Mr Gapuzan has brought a series of repetitive complaints which have not been upheld by the courts; and has subjected Pratt & Whitney to pejorative and derogative statements. His conduct is persistent. The current proceeding is yet another example where misconceived and exaggerated claims have been made. This proceeding must be brought to a close.

Conclusion

[73] I am satisfied that the Official Assignee is correct with regard to the conclusions he has reached as to the vesting of property in respect of the rights pleaded at paras 55(a), (c) and (d) of the fourth amended statement of claim. Those rights of action vested in Mr Gapuzan's estate upon bankruptcy; since the Official Assignee has determined that he will not pursue the claims which have vested in him, they are dismissed.

[74] I am satisfied that the Mr Gapuzan's claim itself is entirely misconceived, and cannot possibly succeed; there is no remedy which could be awarded, either that which is currently claimed under para 55(b) or one of general damages. The proceeding is frivolous. The proceeding is also vexatious. For that reason the entire claim should be dismissed; for the avoidance of doubt that includes the claim for

relief under para 55(b). That the proceeding is both frivolous and vexatious means that the claims under paras 55(a), (c) and (d) would have been struck out even if the Official Assignee had determined that they should be pursued.

[75] I have considered Mr Gapuzan's application for leave to amend his fourth amended statement of claim. As explained earlier, however, it overlaps with his defence of the issues relating to para 55(a). Those issues have been resolved in favour of Pratt & Whitney when I concluded that the Official Assignee's views as to vesting are correct. I dismiss Mr Gapuzan's application.

[76] Turning to costs, Pratt & Whitney seek costs only in relation to the present application. No evidence or submissions have been presented in that regard. If pursued I direct that Pratt & Whitney is to file submissions and any evidence within 14 days of the date of this judgment; and Mr Gapuzan may file submissions and any evidence in reply 14 days thereafter.

[77] I direct that the sum of $2,000 paid into court by Mr Gapuzan, in relation to the costs order made in the Pratt & Whitney's favour by the Authority, is to be paid out to it within 20 working days after this decision.

B A Corkill
Judge

This judgment signed at 12.30 pm on 11 November 2014