

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 110  
5632484

BETWEEN                      BARBARA BUCKETT &  
ASSOCIATES t/a BUCKETT  
LAW  
Applicant

A N D                              TOTOĀ CAROLINE FARANI  
Respondent

Member of Authority:      T G Tetitaha

Representatives:              T Cooper, Counsel for the Applicant  
No appearance for the Respondent

Investigation Meeting:      27 July 2017 in Wellington

Submissions received:      27 July and 3 October 2017.

Date of Determination:      15 November 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.      This is not an employment relationship problem.**
- B.      This application is struck out.**

**Employment Relationship Problem**

- [1]      Totoā Caroline Farani was employed as an office manager by Barbara Buckett, a sole practitioner operating a law practice Barbara Buckett & Associates trading as Buckett Law.
- [2]      Between 27 July 2010 and 15 January 2011 Ms Farani is alleged to have defrauded Ms Buckett of \$106,509.52. Ms Farani's was suspended on 15

December 2010 following the detection of her alleged fraudulent activity. The same day she told colleagues she was leaving for another job. She did not return to work again.

- [3] On 4 February 2011 Ms Farani then left New Zealand for Australia. She has held addresses in Perth and more recently in Sydney Australia.
- [4] Ms Buckett made a complaint to the Police. Charges of using a document under s228(b) of the Crimes Act 1961 were laid in the District Court on 30 November 2011. A warrant for her arrest issued following her non-appearance. Unfortunately no progress on resolving these criminal charges has been made.
- [5] Some years after these events, Ms Buckett filed a statement of problem in the Employment Relations Authority on 30 June 2016 alleging Ms Farani:
- a) breached her employment agreement and the statutory duty of good faith by committing serious fraud against the applicant; and
  - b) was in a special position and breached the implied term of fidelity present in the employment relationship.

#### **Non-appearance of respondent**

- [6] Ms Farani was unable to be personally served. A relative had been served with a copy of the proceedings but advised they did not know of her whereabouts.
- [7] Service was then directed to occur by way of newspaper advertisement which has now occurred. I am satisfied service has now been effected upon the respondent.
- [8] Ms Farani has taken no steps to defend this matter. I am further satisfied there is no good cause shown by the respondent for the failure to attend or be represented. I intend determining this matter in her absence.

## Preliminary Issue

[9] A preliminary issue has arisen whether the Authority ought to determine this issue where criminal activity is primarily involved. There has been dicta from the Court of Appeal<sup>1</sup> that indicates the Authority should not retain jurisdiction in these circumstances.

[10] Ms Buckett submits there remains jurisdiction to bring a claim to the Authority under s161(1)(b),(f) and (r) of the Employment Relations Act 2000 (Act).

## Jurisdiction

[11] Section 161 of the Act sets out the Authority's jurisdiction to hear claims. The relevant subsections Ms Buckett seeks to engage are set out below:

### 161 Jurisdiction

(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—

...

(b) matters related to a breach of an employment agreement

...

(f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:

...

(r) any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[12] An “employment relationship problem” is defined in s5 of the Act as:

**employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

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<sup>1</sup> *JP Morgan Chase Bank NA v Lewis* [2015] 3 NZLR 618.

### Is this matter an employment relationship problem?

- [13] The Court of Appeal have considered the ambit of s161(1) of the Act in the context of the Authority and Employment Court’s jurisdiction to award damages for breach of a settlement agreement.<sup>2</sup>
- [14] As part of those deliberations the Court held the definition in s 5 of an “employment relationship problem” must relate to or arise out of an employment relationship. This means that the problem must be one that directly and essentially concerns the employment relationship.<sup>3</sup>
- [15] In obiter commentary, the Court considered the High Court decision of *The Hibernian Catholic Benefit Society v Hagai*.<sup>4</sup> There the High Court held a claim to recover stolen money was within the Authority’s jurisdiction in s 161(1)(b), (f) and (r).<sup>5</sup> The Court of Appeal disagreed noting:<sup>6</sup>

While Ms Hagai was clearly in breach of her employment contract, the essence of the Society’s claim was her dishonest theft of the money. This was not an employment-related problem, although it would undoubtedly have justified her dismissal. While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai’s conduct was such as would have made her liable to the plaintiff without any such relationship. In other words, the existence of the employment relationship was not a necessary component of many of the causes of action that could have been asserted against her. That indicates that the essence of the claim was not employment related, and should not have been regarded as within the Authority’s jurisdiction.

- [16] This was consistent with the previous line of authority in the High Court. In *Pain Management Systems (NZ) Ltd v McCallum*<sup>7</sup> the Court held:

Is the issue in a particular claim an employment relationship one, or is the subject matter of the claim some right or interest which is not directly employment related at all? In this regard it may be necessary to distinguish between situations where the opportunity to breach the right or interest at stake arose in the context of an

<sup>2</sup> *JP Morgan Chase Bank NA v Lewis* [2015] 3 NZLR 618.

<sup>3</sup> *JP Morgan Chase Bank NA v Lewis* [2015] 3 NZLR 618 at [97].

<sup>4</sup> [2014] NZHC 24, (2014) 11 NZELR 534.

<sup>5</sup> At [11]-[13].

<sup>6</sup> *JP Morgan Chase Bank NA v Lewis* [2015] 3 NZLR 618 at [97].

<sup>7</sup> *Pain Management Systems (NZ) Ltd v McCallum* (High Court, Christchurch CP72/01, 14 August 2001, Panckhurst J) at [22]-[23].

employment relationship as opposed to those where some employment right or interest is truly at stake.

[17] Again in *BDM Grange*<sup>8</sup> it held:

“relating to” in the definition of “employment relationship problem” must be read in a limited way to mean any cause of action, *the essential character of which is to be found entirely within the employment relationship itself*. This would not encompass claims arising from tortious conduct even if arising between an employer and employee, since the relationship merely provides the factual setting for the cause of action; the duty arises independently.[Emphasis added]

[18] Since *JP Morgan Chase Bank NA* the High Court has continued applying this approach holding:<sup>9</sup>

...an employment relationship problem must be one that directly and essentially concerns an employment relationship. Whether the problem essentially concerns an employment relationship depends on whether the relationship was a necessary component of any cause of action between the parties. If a cause of action within the jurisdiction of the Authority could alternatively be pleaded as another cause of action outside its jurisdiction, the case must be brought in a civil court.

[19] More recent High Court dicta has held the starting point is to identify the nature of the problem, the “gist” of the dispute, and ask whether it is truly an employment relationship problem that must be dealt with in the Employment Relations Authority.<sup>10</sup> Factors relevant to determining the matter ought not to remain with Authority included where there is no ongoing employment relationship and there is no employment right or interest at stake at all.<sup>11</sup>

***Application to these facts***

[20] In my view this matter is not a dispute related to or arising from an employment relationship.

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<sup>8</sup> *BDM Grange Ltd v Parker* (High Court, Auckland CIV-2005-404-993, 19 July 2005, Baragwanath and Courtney JJ) at [66].

<sup>9</sup> *Opai v Culpan & AG* [2016] NZHC 3004 at [70].

<sup>10</sup> *Ecostore Company Ltd v Worth* [2017] NZHC 1480 at [22].

<sup>11</sup> See above at [24] to [25].

- [21] The “gist” or “essential character” of this matter is criminal. The employment relationship provided a context for the behaviour to occur but it is not an essential component of it.
- [22] There was no ongoing employment relationship when this matter was filed. The statement of problem was filed five years and six and a half months after Ms Farani last reported for work. It is safe to assume the parties were no longer in an employment relationship. It would have ended by either mutual agreement or frustration.
- [23] As a consequence the principle objects of the Act to “build productive employment relationships”<sup>12</sup> cannot be achieved by retaining jurisdiction over this matter.
- [24] The legal obligation forbidding the activity alleged here arises independently of the employment relationship. This activity is a crime pursuant to the Crimes Act 1961. Therefore there is no need to engage any specialist employment jurisdiction to enforce this obligation before the Courts.
- [25] Criminal charges have been laid against Ms Farani. More extensive powers, knowledge and expertise are available to the Police prosecutors in the criminal jurisdiction. They can more properly (and appropriately) investigate this matter than the parties or the Authority.
- [26] The Police can seek Ms Farani’s return to New Zealand to face these charges. The Authority cannot. They may also seek to prosecute a defendant in their absence.
- [27] The Police have more extensive search and seizure powers than the Authority. This includes the ability to seize the proceeds of criminal activity. The Police can also seek repayment of the damages of \$106,509.52 sought here. There is no jurisdiction in the Authority to award damages for breaches of the statutory duty of good faith.<sup>13</sup>

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<sup>12</sup> Section 3(a) of the Act.

<sup>13</sup> *Hally Labels Ltd v Powell* [2015] NZEmpC 92 at [129].

[28] This is not an employment relationship problem. This application is struck out. There is no issue as to costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**