

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 1  
5324337

BETWEEN	DAWN CHALMERS Applicant
AND	PHYSICAL THERAPY NELSON LIMITED Respondent
AND	NIGEL MCFADDEN, DAVID PHILLIPS, JOHN SANDSTON, GRAEME DOWNING and VICTORIA CHISNALL trading as MCFADDEN MCMEEKEN PHILLIPS First Party sought to be joined
AND	ACTIVE BODY CENTRE LIMITED Second Party sought to be joined

Member of Authority: Philip Cheyne

Representatives: Graeme Downing, Counsel for Applicant and for First  
Party sought to be joined  
John Levenbach, Counsel for Respondent  
Gerard Pratt, Counsel for party sought to be joined

Submissions Received: 10 November 2011 from Respondent  
21 November 2011 from Applicant and First Party  
sought to be joined  
23 November 2011 from Second Party sought to be  
joined

Determination: 9 January 2012

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Dawn Chalmers worked in Nelson in a business known as Sports Therapy from July 2007 until the employment ended in October 2010.

[2] Following the termination of her employment Ms Chalmers lodged a statement of problem with the Authority concerning her personal grievance claims. Ms Chalmers identified her employer as Candace Donovan and Alan Donovan, the principals of the company called Physical Therapy Nelson Limited. However, in a determination dated 13 July 2011, I found that Ms Chalmers was employed by the company as at the time any grievances arose.

[3] Following that determination Ms Chalmers lodged a new statement of problem identifying the company Physical Therapy Nelson Limited as the respondent to her personal grievance claims. The company then lodged a statement in reply setting out its answer to the personal grievance claims but also seeking to join as parties the firm of solicitors who have been instructed by Ms Chalmers (McFadden McMeeken Phillips) and a company which Ms Chalmers has an interest in (Active Body Centre Limited). Both intended parties objected to being joined to these proceedings. Active Body Centre Limited supported its objection with an affidavit from Andrew Spittal who is a director of the company.

[4] I convened a phone conference and counsel for the parties and the intended parties agreed that I should determine the following matters as preliminary issues based on submissions:

- a. Whether McFadden McMeeken Phillips should be joined as a party.
- b. Whether Active Body Centre Limited should be joined as a party.
- c. Whether Ms Chalmers raised any personal grievance claim within 90 days.

[5] The parties and intended parties have lodged submissions in accordance with the agreed timetable. This determination resolves the three issues just mentioned.

### **Joinder of McFadden McMeeken Phillips**

[6] Ms Chalmers was overseas on leave competing at a sporting event but was due to return to work on 29 September 2010. Physical Therapy Nelson Limited's solicitor wrote to Ms Chalmers care of her solicitors on 24 September 2010 setting out the

employer's requirements of her before she could resume work. However Ms Chalmers, apparently unaware of this correspondence, returned to work on 29 September 2010 without complying with the requirements and was told by her employer that she could not work. Approximately a week later Ms Chalmers resigned with immediate effect. Physical Therapy Nelson Limited says that Ms Chalmers breached her employment agreement by resigning without giving notice and claims damages and salary in lieu of notice as a result.

[7] Physical Therapy Nelson Limited says that McFadden McMeeken Phillips breached their contractual obligations and duty of care to Ms Chalmers by not advising her of the 24 September 2010 correspondence. That contributed to the breakdown of trust and confidence between the company and Ms Chalmers, causing her to resign and incur liability for damages and salary in lieu of notice.

[8] I am referred to several provisions of the Employment Relations Act 2000 which I shall paraphrase. S.221 permits the Authority to join parties so as to more effectually dispose of any matter before it according to the substantial merits and equities of the case. S.3(a) sets out the object of the Act which includes reducing the need for judicial intervention. Finally s.161(1)(r) states that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally including actions arising from or related to an employment relationship.

[9] There is no contractual relationship between Physical Therapy Nelson Limited and McFadden McMeeken Phillips. The company is relying on an alleged breach of a contract or duty between Ms Chalmers and her solicitors however that is not an employment relationship. I agree with the submission that the intended claim by the company against McFadden McMeeken Phillips is in tort. S.161(1)(r) specifically excludes the Authority having jurisdiction over an action founded on tort. See also *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205.

[10] Accordingly I decline to join McFadden McMeeken Phillips as a party to these proceedings.

[11] It is not necessary to address the further submission that the attempt by Ms Chalmers' former employer to join her lawyer as a party to her personal grievance claim is an abuse of process.

### **Joinder of Active Body Centre Limited**

[12] When first employed Ms Chalmers had a written employment agreement with Candace Donovan and Alan Donovan identified as her employer. In my earlier determination I found that there was a mutually agreed change so that the company Physical Therapy Nelson Limited became Ms Chalmers' employer. However the original written employment agreement was not amended or replaced. That agreement included restraint of trade and non-solicitation provisions expressed to apply for six months following the termination of the employment.

[13] Ms Chalmers is a director and a shareholder in Active Body Centre Limited. That company was incorporated on 30 November 2010 about seven weeks after Ms Chalmers resigned from Physical Therapy Nelson Limited. It has premises about 50 metres away from Physical Therapy Nelson Limited's premises. Physical Therapy Nelson Limited says that Ms Chalmers has used Active Body Centre Limited to aggressively and specifically target Physical Therapy Nelson Limited's clientele in breach of her restraint of trade provision.

[14] Physical Therapy Nelson Limited's claim against Active Body Centre Limited is for damages equivalent to its gross turnover from the commencement of trading until the end of the restraint period (April 2011). This is additional to the damages claim against Ms Chalmers personally.

[15] Counsel for Active Body Centre Limited submits that there is no employment relationship or contract between it and Physical Therapy Nelson Limited so that the latter company's claim must be in tort, meaning that the Authority's exclusive jurisdiction to make determinations about employment relationship problems generally including actions arising from or related to the employment relationship does not arise: see s.161(1)(r).

[16] In *BDM Grange v Parker* [2005] ERNZ 343, when considering the boundary between jurisdictions, the High Court stated that *A careful exercise of characterisation of the dispute and its components ...is required.* As noted Ms Chalmers is both a director and a one-third shareholder of Active Body Centre Limited. This claim has been characterised by Physical Therapy Nelson Limited as Ms Chalmers using that company to breach her contractual restraint of trade. Other than that it is not explained how Active Body Centre Limited could be liable in damages to Physical Therapy Nelson Limited. I agree with the submission, mentioned above, that any claim by Physical Therapy Nelson Limited has to be in tort. Any such claim is outside the Authority's jurisdiction, for the reasons explained above.

[17] Accordingly I decline to join Active Body Centre Limited as a party to these proceedings.

### **Were grievances raised within 90 Days?**

[18] On 7 October 2010 Ms Chalmers gave written notice of resignation effective forthwith. On 13 October 2010 Ms Chalmers' solicitor wrote to the solicitor acting for Ms Chalmers' employer comprehensively setting out the basis of Ms Chalmers' personal grievance claims. The letter says:

*The Employer is Candace and Alan Donovan (trading as Sports Therapy) as clearly set out in the Employment Agreement signed between the parties dated 5 July 2007. However, if contrary to our client's understanding, the Employer is established to be Physical Therapy Nelson Limited (as you have recently asserted), then so be it.*

[19] Physical Therapy Nelson Limited says that Ms Chalmers gave notice of a personal grievance claim to Candace Donovan and Alan Donovan personally and not to the company.

[20] As happens, there was a dispute over the employer's identity. The letter dated 13 October 2010 makes it clear that Ms Chalmers was raising her grievance against her employer, whether the company or Mr & Mrs Donovan. The correspondence drew a detailed response about the merits of the grievance claims from the company's solicitor. The response dated 18 October 2010 also asks *Please identify conclusively whom you are lodging the Notice of Personal Grievance Claim against. You cannot use a scattergun approach.* This extract demonstrates that it was understood at the

time that Ms Chalmers was raising her grievance with either the company or Mr & Mrs Donovan, depending on who her employer was. As noted above, the dispute about the employer's identity is now resolved. None of that detracts from Ms Chalmers's actions in making a representative of her employer aware of her grievance that she wanted her employer to address.

[21] For the foregoing reasons I find that Ms Chalmers has complied with s.114 of the Employment Relations Act 2000.

### **Summary**

[22] I decline to join either McFadden McMeeken Phillips or Active Body Centre Limited to these proceedings, except to the extent necessary to determine costs as below.

[23] Ms Chalmers raised her grievances within time. The Authority will arrange a conference call shortly to progress the investigation.

[24] Costs are reserved. As between Ms Chalmers and Physical Therapy Nelson Limited, costs can be dealt with following the conclusion of the Authority's investigation. However, McFadden McMeeken Phillips and Active Body Centre Limited may seek costs by lodging and serving memoranda with 28 days. Physical Therapy Nelson Limited may then have 14 days to lodge and serve any reply.

Philip Cheyne  
Member of the Employment Relations Authority