

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 151/08  
5104798

BETWEEN                      BRETT DODSON  
   Applicant  
  
AND                              PULSE UTILITIES NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:      Dzintra King  
  
Representatives:            Rodger Pool, Counsel for Applicant  
   Ray Parmenter, Counsel for Respondent  
  
Investigation Meeting:      On the Papers  
  
Submissions received:      4 April 2008 from Applicant  
   9 April 2008 from Respondent  
  
Determination:              23 April 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

The amended Statement in Reply and counterclaim set out seven counter claims. The applicant says the Authority does not have jurisdiction to hear three of the counterclaims and seeks to have them struck out. The claims are:

- A claim for \$15,000 being money allegedly misappropriated by the applicant;
- A claim for GST;
- A claim for PAYE.

[1] Section 161 Employment Relations Act 2000 empowers the Authority to make determinations about employment relationship problems. Section 161 (1) (r) empowers the Authority to make determinations on “any other action ... arising from or related to the employment relationship problem”.

[2] The applicant refers to *BDM Grange Ltd v Parker* [2005] 1 ERNZ 343 and says that an employment relationship problem is to be read in a limited way as

meaning 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 as the relationship merely provides the factual setting.

### **Claim for \$15,000**

[3] The respondent alleges that Mr Dodson paid himself \$15,000 after his employment ended. At the time there was no employment relationship. Any duty of fidelity ends with the cessation of employment.

[4] The respondent claims quasi-contract. The applicant says this is not a cause of action per se but a label for several different causes of action that now fall within the broad heading of restitution. Furthermore, the Authority does not have jurisdiction to hear claims in quasi contract/restitution generally. The respondent has not identified the particular quasi-contract/restitutionary cause of action if relies upon.

[5] The applicant says that the decision in *BDM Grange* (supra) applies equally to restitutionary claims as to tortious claims.

[6] The respondent says that “cloaked with his ‘employee authority’” Mr Dodson misappropriated money from his employer. Money had and received is a quasi-contractual claim and is applicable where money has been obtained by fraud. Section 161 (1) (r) applies as the claim is not tortious and arises from or is related to the employment relationship.

[7] There is an assertion by the applicant that the payment was made during employment.

[8] At this stage, given the disputed state of affairs regarding when the payments were made, to strike this out.

### **GST Claims**

[9] The tax claims relate to a change in employment status. The applicant became an employee but continued to render tax invoices. The respondent did not pay PAYE to the IRD and did pay GST to the applicant. The applicant now has a claim for annual and public holidays.

[10] The respondent seeks the repayment of GST payments made to Mr Dodson during his employment. The applicant says that no cause of action has been

identified. Furthermore, if there is an obligation to repay the GST payments that arises independently of the employment relationship.

### **PAYE Claims**

[11] The applicant says the respondent's claim that it has an obligation to make PAYE payments to the IRD identifies no cause of action and is not a matter which is to be found in the employment relationship itself.

[12] The respondent says the basis for the tax claims lies in s94A Judicature Act 1908 – payments made under a mistake of fact, that is, that Mr Dodson was a contractor. Mr Parmenter says the quintessence of the claim is Mr Dodson's underlying employment relationship: the claims arise because Mr Dodson was an employee.

### **Decision**

[13] Not having heard any evidence and having only the Statement of Problem and Statement in Reply in addition to counsels' submissions on the strike out issue, in my view there are a number of unclear and contested issues that would make it unsafe for me to strike out these issues at this stage.

[14] The circumstances and timing of the \$15,000 claim are contested; it may be, for instance, that the applicant was an employee at the time. That would clearly place the issue within the Authority's jurisdiction.

[15] As to the taxation issues, the circumstances under which invoices were rendered and GST paid are not clear. I do not know that there was a mistake or, if there was, whose it was.

[16] In *Waikato Rugby Union (Inc) v NZ Rugby Football Union (Inc)* [2002] 1 ERNZ 752 the Employment Court found that the jurisdiction of the Authority had been widened by the insertion of the words "any other action" and "arising from" in s 161 (1) (r). While I am aware that in *BDM Grange Ltd* (supra) the High Court preferred the views of Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*, 14/8/01, Panckhurst J, HC Christchurch CP72/01 to those of Shaw J in *Waikato Rugby Union* (supra) Shaw J's view that the stance taken in *Pain Management* (supra) was unduly restrictive it one that needs to be given serious consideration if I need to determine whether the contested claims fall within the ambit of s 161 (1) (r).

[17] I reserve the issue of costs to be dealt with once the substantive matter has been dealt with.

Dzintra King

Member of the Employment Relations Authority