

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ernst & Young (Applicant)  
**AND** Terrance John Wilson (Respondent)  
**REPRESENTATIVES** Anthony R Drake, Counsel for Applicant  
Lawrence Herzog, Counsel for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 17 May 2005  
**DATE OF DETERMINATION** 17 June 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Terry Wilson was employed by Ernst & Young as a senior manager in its Entrepreneurial Business Unit from February 2001 until his resignation in February 2003. During 2002 Mr Wilson received and banked three cheques for his own benefit from a client of Ernst & Young, Paul O'Connor. These cheques totalled \$14,062.50. Mr Wilson says he was entitled to this money as a consequence of an agreement ("the fee agreement") he had with Ernst & Young to pay him a fee of \$20,000 following Ernst & Young's sale to Mr O'Connor of a tax solution in August 2000. Ernst & Young says it has no knowledge of any such agreement, but notwithstanding, Mr Wilson has breached express and implied terms of his employment by failing to account for the money received from a client. Ernst & Young seek the return of the money, interest on the sum and an award of exemplary damages and/or a penalty against Mr Wilson.

[2] To resolve this employment relationship problem I must determine:

- (i) whether the existence of the fee agreement precludes the Authority's inquiry into the alleged breaches;
- (ii) if it does not, whether Mr Wilson's actions amount to a breach the obligations under his employment agreement.

**Does the alleged fee agreement preclude the Authority's investigation into alleged breaches of the employment agreement?**

[3] Mr Drake submitted that I was unable to make any findings in relation to the existence of the agreement because it is beyond the jurisdiction of the Authority to make findings which are not based on employment relationships. He submits the alleged breaches of Mr Wilson's employment obligations are entirely separate to the existence of any fee agreement.

[4] Mr Herzog submits the Authority is precluded from investigating this employment relationship problem because the fundamental issue is the execution of the pre-employment agreement between Mr Wilson and Ernst & Young and the Authority does not have jurisdiction to deal with civil contracts.

[5] At the investigation meeting I received evidence from Mr Wilson and Andrew Tauber regarding the existence of a fee agreement and Mr Wilson's subsequent steps to implement it. Mr Tauber was Mr Wilson's managing partner during his employment at Ernst and Young. Mr Tauber is no longer with the partnership. There is no record held by Ernst & Young of any fee agreement reached between Mr Wilson and Mr Tauber on Ernst & Young's behalf, no record of any discussion between Mr Tauber and Mr Wilson regarding the recovery of Mr Wilson's fee, no record of Mr Wilson's advice to Mr O'Connor that no more invoices would be issued by Ernst & Young to Mr O'Connor in relation to the terms of engagement and no record of Mr Wilson receiving monies from Mr O'Connor.

[6] There is no dispute that Mr O'Connor had no knowledge of any fee agreement between Mr Wilson and Ernst & Young until advised of its existence by Mr Wilson in early 2002. During this telephone call Mr Wilson asked Mr O'Connor to directly pay him the fee owed to him by Ernst & Young and in exchange Ernst & Young would issue no further invoices to Mr O'Connor in relation to the tax solution. Mr O'Connor agreed to this proposal. There is no dispute regarding the sums sent to Mr Wilson by Mr O'Connor.

[7] Mr O'Connor paid Mr Wilson three cheques totalling \$14,062.50 following telephone calls from Mr Wilson. The first cheque was for \$5,625.00 and was paid to Mr Wilson on 5 May 2002. The second cheque was for \$5625.00 and was made out to Mr Wilson on 2 October 2002. The third cheque was for \$2,812.50 and was made out to Mr Wilson on 13 October 2002. Mr Wilson told Mr O'Connor he would issue invoices for those amounts but this did not happen.

[8] Why did Mr Wilson approach Mr O'Connor about the fee he says Ernst & Young owed him? Mr Wilson told me he had approached Mr Tauber about his fee after Mr O'Connor had paid the first \$20,000 owed under the sale, that Mr Tauber was not bothered about the remaining fees and told Mr Wilson it was up to him how he secured his fee. Mr Wilson said he contacted Mr O'Connor directly rather than invoice Ernst and Young because he had a long standing professional relationship with Mr O'Connor. Mr Wilson said Mr Tauber did not direct him to recover the fees directly from Mr O'Connor.

[9] Mr O'Connor and Mr Wilson agree Mr Wilson told Mr O'Connor in the telephone call in early 2002 that if the money was paid directly to Mr Wilson there would be no more invoices issued to Mr Wilson by Ernst & Young. During 2001 Mr O'Connor had been contacted by Ernst & Young's credit control department regarding non-payment of invoices and had been threatened with the debt being referred to a debt collection agency. Mr Wilson was aware of this because, as the billing manager, credit control had contacted him regarding the late payments.

[10] There was no evidence Mr Wilson advised Ernst & Young he had contacted Mr O'Connor and told him no more invoices would be issued if he paid the monies directly to him in satisfaction of his fee agreement with Ernst & Young. Mr Wilson did not advise Ernst & Young he had received funds from Mr O'Connor.

[11] Mr Wilson's request to Mr O'Connor to pay him the fee directly was not an execution of any term of the alleged agreement with Ernst & Young. Mr O'Connor was not party to that alleged agreement. The existence or otherwise of the alleged agreement does not preclude the Authority's investigation into this employment relationship problem.

**Did Mr Wilson breach the terms of his employment agreement?**

[12] Ernst & Young say Mr Wilson has breached the express and implied terms of his employment agreement. Clause 3.2 of the employment agreement provides:

“The Employee agrees to act in a manner conducive to good relationships with Ernst & Young’s clients and which is consistent with the highest standards of professional conduct and integrity.”

[13] The implied term Ernst & Young seek to rely on is that Mr Wilson would act honestly, with good faith and in accordance with his duty of fidelity.

[14] Mr Wilson accepts that he was bound by these terms of his employment agreement.

[15] The alleged fee arrangement was between Mr Wilson and Ernst & Young. I received no evidence Mr Wilson received authorisation from Ernst & Young to approach Mr O’Connor to recover the fees directly. Mr Wilson unexplainably failed to account to Ernst & Young for the monies he received from Mr O’Connor purportedly in satisfaction of a debt owed to Ernst & Young. Mr Wilson has breached the terms of his employment agreement by putting his own interests above those of his employer and his employer’s client. Such actions are inimical to the obligations owed under his employment agreement.

**Remedies**

[16] The \$14,062.50 was paid to Mr Wilson on the understanding fees outstanding to Ernst & Young would be satisfied. This did not occur. The payment was unauthorised and Mr Wilson failed to account for those payments received from a client of Ernst & Young. Mr Wilson is ordered to pay the sum of \$14,062.50 to Ernst & Young.

[17] Interest is to be calculated on the amount of \$14,062.50 at the rate of 7% from 30 October 2002.

[18] Ernst & Young seek an award of exemplary damages against Mr Wilson. It says this case warrants an award of exemplary damages because Mr Wilson abused his position with Ernst & Young to gain \$14,062.50 from a client, failed to account for that amount to Ernst & Young, has displayed an arrogant attitude towards Ernst & Young’s efforts to secure the returns of the funds since its discovery in July 2004 and shortly after the mediation Mr Wilson issued an invoice to Ernst & Young in the name of a company which did not exist at that time for the sum of \$8,437.50, a sum representing the remaining outstanding fees allegedly owed by Ernst & Young under the fee agreement. I record that invoice was subsequently withdrawn.

[19] Mr Wilson used his position with Ernst & Young and his knowledge of Mr O’Connor’s outstanding fees owed to Ernst & Young to gain payments from Mr O’Connor. He was trusted by Ernst & Young as a senior employee and trusted by Mr O’Connor as Ernst & Young’s representative and as someone with whom he had a longstanding professional relationship. Mr Wilson took advantage of that trust in proposing Mr O’Connor make payments to him, which he knew were unauthorised, receiving those payments without authorisation from his employer and failing to account for those sums to his employer. He has compounded those breaches of his employment obligations by failing to repay the monies to Ernst & Young when the matter was brought to his attention. The issuing of an invoice to Ernst & Young in the name of a non-existent company compounds Mr Wilson’s actions. An award of exemplary damages is warranted and I set that award at \$2000.00 to be paid by Mr Wilson to Ernst & Young.

**Costs**

[20] The issue of costs is reserved. I invite the parties to try to resolve this issue themselves. If they are unable to do so, application may be made to the Authority to determine this issue.

Marija Urlich  
Member of Employment Relations Authority