

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 131  
5587577

BETWEEN DONALD STUART FERGUSON  
Applicant

A N D PLACEMENT PAINTERS  
LIMITED  
Respondent

Member of Authority: David Appleton

Representatives: No appearance for the applicant  
Glenn Hunt, advocate for Respondent

Investigation Meeting: 8 August 2016 at Christchurch

Date of Determination: 8 August 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Ferguson and his counsel did not appear at the Authority's pre-arranged investigation meeting. His claims against the respondent are dismissed in their entirety.**
- B. The Authority does not have the jurisdiction to consider the counterclaim.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Mr Ferguson claimed that he was unjustifiably disadvantaged and unjustifiably dismissed from his employment when he was dismissed on 8 June 2015.

[2] The respondent denies that Mr Ferguson was unjustifiably disadvantaged or unjustifiably dismissed. It says he was dismissed by way of redundancy. The

respondent also claims that Mr Ferguson has unlawfully retained a people carrier (a Toyota Estima) which Mr Ferguson had agreed to purchase from the respondent company but which he has not paid for. Mr Ferguson disputed the amount that the respondent claims is due in respect of that vehicle.

[3] Whether the Authority has the jurisdiction to consider this counterclaim by the respondent will be addressed below.

### **Dismissal of the claim**

[4] Mr Ferguson has been represented throughout the proceedings by Mr Steven Rollo, counsel. The investigation meeting was originally set down for 19 July 2016, following a telephone conference.

[5] Mr Ferguson's brief of evidence, and that of his witness were lodged with the Authority on 18 April 2016. On 12 July 2016 Mr Rollo emailed the Authority to say he was having some personal difficulties<sup>1</sup>, but that the Authority could email him with anything the Authority wished to raise.

[6] On 15 July 2016, Mr Rollo emailed the Authority to say that he needed to seek an adjournment of the investigation meeting set down for 19 July because something urgent and personal had arisen which he needed to attend to on that day.

[7] The Authority attempted to join Mr Rollo to the telephone case management conference call on 18 July 2016 at which the adjournment request of Mr Rollo was discussed, but he was unable to be contacted. Nevertheless, although the adjournment was opposed by Mr Michael King, who represented the respondent at that point, the Authority agreed to adjourn the matter until Monday 8 August 2016.

[8] In the Notice of Direction following the telephone conference call, I made it clear that 8 August was the proposed date of the reconvened investigation meeting and that Mr Rollo was to advise whether he was able to attend that date. I also made it clear that, if he was unable to attend, Mr Rollo had sufficient time to brief the matter out. Mr Rollo was also to provide contact details for Mr Ferguson. That Notice of Direction was emailed to Mr Rollo and Mr King on 18 July.

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<sup>1</sup> Whilst the Authority is aware of the nature of these personal difficulties, they are not germane to the rationale of this determination, and so I shall not disclose them.

[9] The Authority sent an email to Mr Rollo on 3 August to tell him that, as it had heard nothing from him, the date of the investigation meeting on 8 August was confirmed. The Authority made it clear that, as Mr Rollo was on record as acting for Mr Ferguson, he was responsible for informing Mr Ferguson of the date of the investigation meeting.

[10] A Notice of Investigation Meeting was also sent which made clear that, if Mr Ferguson did not attend the investigation meeting, the matter may be dismissed and costs may be awarded against him. This message was reiterated in the email to Mr Rollo referred to.

[11] On Wednesday, 3 August the Authority Officer called Mr Rollo and he was invited to read the email of 3 August. Mr Rollo did not say he was unable to attend on 8 August, and he did not say he was no longer acting for Mr Ferguson.

[12] On the morning of 8 August, neither Mr Rollo, Mr Ferguson or his witness turned up. The Authority called Mr Rollo on both his land line and his mobile, but neither was answered. After waiting 10 minutes, I dismissed the claims against the respondent.

### **The counterclaim**

[13] Turning to the counterclaim against Mr Ferguson, I am bound by *JP Morgan Chase Bank NA v Robert Lewis*<sup>2</sup>, and must find that the Authority does not have jurisdiction to investigate it. In *Lewis*, the Court of Appeal, at [94] to [97], stated the following, when considering the jurisdiction of the Authority by reference to the meaning of “employment relationship problem” as defined in s. 5 of the Act<sup>3</sup>:

[94] ...Since the Authority had jurisdiction, the High Court did not. In a passage relied on by Mr O’Brien, the Judge said:

...a claim that one party to an employment relationship should pay a sum to another party to the relationship on account of a liability incurred in the context of that relationship comes comfortably within the meaning of employment relationship problem under s 5 and is therefore within the jurisdiction of the authority under s 161.

[95] We do not agree with this reasoning. It effectively treats all issues that arise between employer and employee as exclusively

<sup>2</sup> CA587/2013, [2015] NZCA 255. Case citations omitted.

<sup>3</sup> “**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”.

within the Authority's jurisdiction because of the existence of that relationship. We do not think that can have been Parliament's intention when it passed the Act. In accordance with the definition in s 5 an "employee relationship problem", must relate to or arise out of an employment relationship. We consider this means that the problem must be one that directly and essentially concerns the employment relationship.

[96] At [19], Associate Judge Bell quoted and purported to apply what was said by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*:

[22] To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. 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? ...

[97] We accept that statement of the law as sufficient for present purposes, but consider its application to the facts in *Hibernian Catholic Benefit Society* should have led to a different conclusion. 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.

[14] The employment relationship between Mr Ferguson and the respondent was not a necessary component of the agreement that was reached between them regarding the sale to Mr Ferguson of the Toyota Estima. Accordingly, the Authority does not have the jurisdiction to consider this counter claim, and I dismiss it.

### **Costs**

[15] I reserve costs. The respondent was represented by counsel until shortly before the reconvened investigation meeting. Mr Hunt indicated that the respondent had incurred costs in defending the claims against it. If Mr Hunt wishes the Authority to consider making an award of costs to it against Mr Ferguson, he must, no later than

14 days from the date of this determination, lodge in the Authority, and serve on Mr Ferguson (via Mr Rollo if it does not have any separate means of communicating with Mr Ferguson) copies of all the invoices it relies upon, with a description of the work carried out. Mr Ferguson will then have 14 days to lodge in the Authority and serve on the respondent a reply. The Authority will then make a determination on the papers.

David Appleton  
Member of the Employment Relations Authority