

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 412
3244779

BETWEEN	MITCHELL PERRY Applicant
AND	KIWIRAIL LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Tim Carter, counsel for the Applicant Matthew McGoldrick, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	Up to and including 10 April 2024 from Applicant Up to and including 28 March 2024 from Respondent
Determination:	10 July 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mitchell Perry was employed by KiwiRail Limited (KiwiRail) as a Cabin Attendant on the Interislander ferry service between 21 October 2022 and 4 February 2023.

[2] Mr Perry has lodged a statement of problem claiming remedies relating to breach of contract, unjustified disadvantage, and breach of good faith. The claims relate to what Mr Perry contends were pre-contractual representations made by Madison Recruitment Limited (Madison), he says as agent for KiwiRail, as to the hourly rate of pay that would be applicable to his employment with KiwiRail, and KiwiRail's alleged failure to pay Mr Perry in accordance with those pre-contractual commitments.

[3] KiwiRail contends that the Authority does not have jurisdiction to determine Mr Perry's claims. In summary terms, the jurisdictional objection raised by KiwiRail relates to the alleged pre-contractual representations having been made by Madison prior to Mr Perry's employment rather than in the course of the employment relationship between Mr Perry and KiwiRail.

[4] Mr Perry contends that the Authority does have jurisdiction to deal with the claims made.

[5] This determination deals with the preliminary jurisdictional question only.

The Authority's investigation

[6] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' based on a statement of agreed facts and written submissions.

[7] Written submissions were received in accordance with directions issued, and on 19 March 2024, having received submissions from both parties as to the relevant issues, I issued a Minute inviting further submissions, which were subsequently received, from the parties.

[8] As permitted by s 174E of the Employment Relations Act (2000) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are Mr Perry's claims?

[9] The statement of problem lodged on behalf of Mr Perry includes several claims. I summarise those claims below:

- (a) Mr Perry claims that he entered an employment contract with KiwiRail in reliance of a representation made by Madison in pre-contractual negotiations. He says that Madison's actions are attributable to KiwiRail on the basis that it was acting as agent for KiwiRail;
- (b) Mr Perry claims that he has been unjustifiably disadvantaged in his employment on the basis that KiwiRail failed to make payment to him at the advertised rate, as opposed to the contracted salary rate;

- (c) Mr Perry claims that KiwiRail breached s 4 of the Act by “...defaulting on their duty to honour the hourly rate...” and by not genuinely engaging with him when he raised the issue with them; and
- (d) The statement of problem seeks that the Authority to resolve a claim for damages for misrepresentation in terms of s 35 of the Contract and Commercial Law Act 2017 (the “CCL Act”).

Relevant facts

[10] The parties lodged a statement of agreed facts. I summarise the relevant facts as follows:

- (a) Madison was engaged by KiwiRail as a recruitment consultant, including for the position of Cabin Attendant, and placed an online advertisement of the role of Cabin Attendant. The advertisement represented that the role would be paid on an hourly basis and at the rate of \$27.80 per hour.
- (b) Mr Perry applied for the role in reliance on the advertisement.
- (c) Mr Perry was offered the role on 10 October 2022.
- (d) Mr Perry signed a fixed term employment agreement on 17 October 2022 prior to commencing work. That agreement provided that Mr Perry would be paid \$57,828 per annum in accordance with the KiwiRail (Interislander) Limited and Maritime Union of New Zealand Incorporated Collective Agreement 2021-2023.
- (e) Mr Perry commenced work on 21 October 2022. Mr Perry was paid based on \$57,828 per annum, that being \$2,218.06 gross per fortnight.
- (f) KiwiRail wrote to Mr Perry on 15 December 2022 stating that an error had been made by Madison in the advertisement in that Madison mistakenly advertised the role at an hourly rate rather than the annual salary.
- (g) Mr Perry resigned from his employment on 4 January 2023 and then wrote to KiwiRail on 12 January 2023 seeking compensation for an alleged underpayment of wages. Mr Perry’s email of 12 January 2023 asserted that the advertisement said the role would be paid at \$27.80 per hour for a 60-hour week. He said that those who had applied for the role indicated they would not have done so if it were advertised at \$23.50 per hour.
- (h) A letter was sent on 13 March by the Workers’ Rights Service on behalf of Mr Perry which referred to the relevant representations as being “a breach of section 12 of the Fair Trading Act 1986”.

Discussion and analysis

[11] The Supreme Court in *FMV v TZB*¹ analysed the jurisdiction of the Authority in its significant judgment dealing with s 161 of the Act and what constitutes an “employment relationship problem”. The following passage from Williams J, for the majority, sets out the approach to be taken:²

[92] In enacting s 161(1), the legislature specifically chose not to ground the Authority’s jurisdiction in the way claims might be pleaded or traditionally categorised. It used a non-technical term, “problem”, to ensure legal form did not distract the decision maker from focusing in the factual substance of the difficulty confronting the parties. That is the reason “problem” is not a category alongside property, or tort, or equity, but a supervening class that may encompass all of these legal forms as long as the problem relates to or arises from an employment relationship. And that means the character of a problem is not to be found in its legal presentation.

[93] If a “problem” encompasses any kind of difficulty or controversy, when does it relate to or arise out of the employment relationship? In our view, the “essence” test articulated in *Pain Management* invites an inappropriately narrow inquiry in light of the broad language of the section. The question is simply one of fact. If the controversy arises during the course of the employment relationship *and* in a work context, then it will be an employment relationship problem. That is because the expectations arising out of an employment relationship apply only in a work context. This does not necessarily mean only “at work during work hours”, though if the problem arises in that context, it will almost certainly be an employment relationship problem. Rather, an assessment of all the facts is required, not just time and location. We accept this will sometimes be a question of judgement and degree, but given the statutory language, that is unavoidable.

[94] To be clear, given the test is factual, it will not matter whether other causes of action may also arise from the controversy between the parties. That a controversy can also be pleaded without reliance on what is described (with unhelpful circularity) as an “employment right or interest” does not itself take it outside the scope of “employment relationship problem”. All that matters is whether the controversy arose during the course of the employment relationship and in the work context. This necessarily means that if a controversy *can* be framed in terms of one or more of the examples in s 161(1)(a)-(qd), it *must* be brought in the Authority as an employment relationship problem. If it does not fit within any of those examples, it will then be a question of whether the problem nevertheless relates to or arises out of an employment relationship in terms of the open-textured introductory language of s 161(1) and the catch-all in paragraph (r).

[95] It is therefore misleading to ask whether a pleaded claim *is* an employment relationship problem. Claims cannot *be* problems in the factual sense; problems can only give rise to claims. The correct question is whether the claim *reflects a problem* that relates to or arises from an employment relationship.

[12] The substance of Mr Perry’s claim is that the advertisement misrepresented the pay rate that would be applicable to the role and that he relied on that misrepresentation

¹ *FMV v TZB* [2021] NZSC 102.

² *FMV v TZB*, above n1 at [92] to [95], Williams J for the majority. Footnotes omitted.

to his detriment in entering the employment relationship. In terms of the test described in *FMV v TZB* a question arises as to whether that controversy arose during the course of employment and in a work context.³

[13] KiwiRail submitted that Mr Perry's claim does not reflect a problem that relates to or arises from an employment relationship. It referred to s 161 of the Act and the Supreme Court's judgment in *FMV v TZB* in submitting that the matter raised by Mr Perry does not fit within any of the grounds at s 161(a) through (s) of the Act. It contends that the claim is based entirely on alleged pre-employment representations made by a third-party prior to Mr Perry being offered employment.

[14] KiwiRail submitted that the representation was made by Maddison and was made prior to Mr Perry having had any contact with KiwiRail. It submitted that s 12 of the Fair Trading Act 1986 is the fundamental basis for Mr Perry's claim.

[15] Mr Perry contends that Madison was not a "third party", but rather that they were acting as KiwiRail's agent and that the alleged misrepresentations formed part of the pre-employment bargaining.

[16] I do not consider it makes any difference for present purposes that it was Madison that made the alleged misrepresentation. The statement of problem lodged identifies KiwiRail as the sole respondent and whether the relevant actions are attributable to KiwiRail is a matter for any substantive investigation.

[17] Mr Perry submitted that *FMV v TZB* can be distinguished on the basis that it dealt with a situation involving simultaneous actions being commenced in the Authority and the District Court, and that in the present case Mr Perry has only commenced proceedings in the Authority. He also submitted that the emphasis was on the nature of the relationship giving rise to the relevant problem and that contractual negotiations by an employer through their agent "relate to" an employment relationship.

[18] Mr Perry contends that the controversy arose either when the written contract was proffered or when Mr Perry's "first payslip did not honour that undertaking", as opposed to being an issue that arose prior to the commencement of employment. There is some merit in that submission. On the evidence before the Authority, the

³ *FMV v TZB*, above n1 at [92], Williams J for the majority.

representation was made prior to either of those events. However, I do not consider that issue critical to the jurisdictional issue to be determined.

[19] Mr Perry seeks damages for misrepresentation in terms of s 35 of the CCL Act. Section 35 falls within Part 2 of the CCL Act. As such, if the Authority otherwise has jurisdiction, the Authority may, in any matter relating to an employment agreement, make any relevant order that the High Court or District Court may make under that part.⁴ KiwiRail's actions are also said by Mr Perry to also give rise to additional claims in the form of an unjustified disadvantage personal grievance and breach of good faith.

[20] KiwiRail submitted that s 161 acts as a "gateway" in relation to the remedial powers that may be exercised by the Authority pursuant to s 162 of the Act under the CCL Act and the Fair Trading Act 1986. I agree that s 162 of the Act does not itself confer jurisdiction on the Authority in relation to any matter which is not an employment relationship problem in terms of ss 5 and 161 of the Act.⁵

[21] In addressing "post-employment" problems in *FMV v TZB Williams J*, for the majority said:

[99] While the parties must always be able to point to an employment relationship, the "work context in the course of employment relationship" test does not cover all relevant situations....

[22] Williams J went on to observe that the Authority had jurisdiction as to compliance with settlement agreements, whether the obligations arise from the employment contract or a later severance agreement, emphasising the inclusive language of s 161(1) of the Act is inclusive.⁶

[23] I consider the present situation one that is analogous in the sense that the "work context in the course of the employment relationship" test does not necessarily cover the situation. While also concerning a pre-employment representation, the controversy here in my view directly relates to an employment relationship. The precipitating representation was made prior to the existence of the employment relationship, or the entering into of any employment contract. However, I consider the problem directly relates to an employment relationship as defined at s 5 of the Act, albeit that it may not fit neatly into the "work context in the course of the employment relationship" test.

⁴ Employment Relations Act 2000, s 162(a).

⁵ *JP Morgan chase Bank NA v Lewis* [2015] NZCA 255 at [108].

⁶ *FMV v TZB*, above n1, Williams J for the majority at [99] to [101].

[24] Mr Perry's claims originate from a representation made prior to his employment but the substance of his claims go directly to an alleged discrepancy between what he says was represented to him on the one hand, and what was received during his employment on the other. Another way of looking at the matter is that Mr Perry is seeking to advance his contention that his eventual employer induced him into entering the employment relationship by misrepresentation and that it then refused to pay him on that basis when in the employment relationship.

[25] Section 35(1)(a) of the CCL Act deals with damages for misrepresentation and provides that a party may be entitled to damages in the same manner, and to the same extent, as if the representation were a term of the contract that has been breached. Here, the contract is an employment contract and Mr Perry is in effect claiming that he should be entitled to damages accounting for the allegedly misrepresented rate of pay.

[26] While the representation occurred prior to any offer of employment, the representation is inextricably linked to the employment relationship that followed and the terms and conditions of employment. This is not a case where the controversy is independent of the employment relationship, rather, it directly concerns the employment agreement. The formulation of Mr Perry's claims is in no way determinative. However, what is clear is that the matter not only relates to the representation itself, but also the alleged subsequent conduct of the employer.

[27] Setting aside the formulation of the claim itself, what is being sought is in my view related to the employment relationship in terms of s 161(1)(r) of the Act. On one view the issue also relates to an alleged breach of the employment agreement in terms of s 161(1)(b) of the Act.

[28] Mr Perry also claims he was unjustifiably disadvantaged by KiwiRail's actions, that being a personal grievance in relation to which the Authority has jurisdiction in terms of s161(1)(e) of the Act. He further claims that KiwiRail failed to act in good faith in terms of s 4 of the Act, a matter in relation to which the Authority has jurisdiction in terms of s 161(1)(f) of the Act.

[29] Mr Perry's claims may or may not be successful and there may be issues as to the timing of any relevant alleged actions or omissions and the application of the Act. However, I consider the Authority has jurisdiction to deal with the claims.

[30] I find that the matter raised by Mr Perry is an employment relationship problem and is one which the Authority has jurisdiction to deal with.

Conclusion

[31] I conclude that the Authority does have jurisdiction⁷ in relation to the claims made by Mr Perry.

Next steps

[32] A case management conference will be convened to discuss the procedural arrangements for the Authority's substantive investigation.

Costs

[33] Costs are reserved pending the determination of Mr Perry's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority

⁷ Including in terms of s 161(1)(a) and (b), (e) and (f) and (r) of the Act.