

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 269  
3028353

BETWEEN Sam Ward  
Applicant

AND Concrete Structures (NZ)  
Limited  
First Respondent

Perpetual Guardian Trust  
Second Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Greg Bennett, Advocate for Applicant  
Kevin Badcock, Counsel for First Respondent  
Fraser Wood, Counsel for Second Respondent

Investigation Meeting: On the papers

Submissions received: 7 August 2018 from Applicant  
23 July 2018 from Second Respondent

Determination: 23 August 2018

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. The Authority has no jurisdiction to hear the Applicant's claim against the Second Respondent.**
- B. The Applicant's claim against the Second Respondent is dismissed.**
- C. Costs are reserved.**

**Employment Relationship Problem**

[1] Mr Ward was employed by the First Respondent, Concrete Structures (NZ) Limited on 17 February 2004. He claims that on 11 November 2016 he was unjustifiably dismissed. Concrete Structures denies unjustifiably dismissing Mr Ward. The investigation of this dispute will be investigated by the Authority separately.

[2] In an amended statement of problem Mr Ward named Perpetual Guardian Trust as a Second Respondent. Perpetual Guardian Trust is the trading name of Perpetual Trust Limited and the New Zealand Guardian Trust Company Limited. Mr Ward claims that he is owed approximately \$40,000 by the Second Respondent.

[3] Perpetual Guardian denies it owes any money to Mr Ward. The position it takes is that the Authority does not have jurisdiction to hear the claim against it.

[4] With the consent of the parties the Authority has agreed to investigate and determine the following preliminary issue on the papers: Does the Authority have jurisdiction to consider Mr Ward's claim against Perpetual Guardian?

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

**Issue 1: Does the Authority have jurisdiction to consider the Applicant's claim against the Second Respondent?**

*The relevant background*

[6] Pursuant to a Deed of Trust dated 23 May 2008 New Zealand Guardian Trust Company Limited was appointed as the sole Trustee of the CS Employees Investment Trust (the Trust).

[7] The purpose of the Trust was to establish a trust fund under which employees of Concrete Structures, that had completed specified periods of continuous full-time employment, were entitled to share in the maturity value of specified investment pools. The Trust was intended to reward and incentivise long standing employees of Concrete Structures.

[8] The initial investment pool was set up with a \$200,000 transfer from Concrete Structures. Particular employees were named as qualifying under that pool. Thereafter, the terms of the Trust provided for a new Investment Pool to be created each year with the amount applied being at Concrete Structure's discretion.<sup>1</sup>

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<sup>1</sup>Trust Deed, Clauses 1.1(1) and (2).

[9] At the time of making payment of the annual investment pool to Perpetual Guardian, Concrete Structures was required to provide it with a list of all beneficiaries who qualified in respect of that pool and their percentage or unit entitlement.<sup>2</sup>

[10] To become eligible as a beneficiary of an investment pool an employee had to have completed five years continuous full-time employment with Concrete Structures. To remain eligible to receive any distribution, an employee must still be employed on the expiry of ten years from the date when the investment pool was established.<sup>3</sup>

[11] Clause 1.1(7) of the Trust Deed provides:

If any Beneficiary ceases to be an employee of the Employer [Concrete Structures] within the Trust Period for a particular investment pool [ten years] that Beneficiary will lose all his or her entitlement of that Investment Pool. That entitlement thus forfeited will then be allocated, at the Employer's direction to a Beneficiary or Beneficiaries of that Investment Pool or any other Investment Pool. If allocation is made to more than one Beneficiary, the Employer may allocate in equal or unequal proportions. The Employer's decision will be final and binding on all Beneficiaries.

[12] Consistent with the terms of the Trust Deed, Mr Ward received a letter dated 14 April 2009 advising him that, as he had completed five years' continuous employment with Concrete Structures, he qualified as a beneficiary of the second investment pool of the Trust. That second investment pool was established on or about 1 April 2009. The letter also advised:

If you continue with full-time employment you will also qualify for subsequent investment pools, and likewise you will benefit once the ten-year distribution date of those subsequent investment pools is reached. All investment pools will be wound up after ten years and the distributions made to remaining beneficiaries, based on their unit entitlement.

If you cease to be an employee within the ten-year period, you will lose all your entitlements in respect of any of the investment pools you have qualified for.

[13] Thereafter, Mr Ward became eligible for investment pools three through to investment pool eight.

[14] Mr Ward's employment with Concrete Structures ended in November 2016.

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<sup>2</sup> Trust Deed, Clause 1.1(3).

<sup>3</sup> Trust Deed, Clauses 1.1(5) and 1.1(7).

[15] Thereafter, Perpetual Guardian notified Mr Ward that, as he had left the employment of Concrete Structures prior to the ten year anniversary of the establishment of the Trust's second investment pool, he was no longer eligible to receive any distribution from the Trust in relation to that pool or the investment pools that were formed subsequently.

### *The Law*

[16] The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.<sup>4</sup> However, it does not have jurisdiction to determine all claims or problems that arise out of the employment relationship, only those that directly and essentially concern the employment relationship.<sup>5</sup>

[17] In *Pain Management Systems (NZ) Ltd v McCallum* the High Court stated:

[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? In this regard it may be necessary to distinguish between situations where the opportunity to breach the right or interest at stake arose in the context of an employment relationship as opposed to those where some employment right or interest is truly at stake.

[23] ... I find the judgment in *Pike v Semi Plastics* helpful, in particular for the focus upon the gist of the claim, the rights or interests asserted by the plaintiff as having been infringed. Where the subject matter is property rights and the claim is tortious, equitable or statutory it may be unlikely that the case is one within the exclusive jurisdiction of the Authority. Put another way where the rights or interest claimed by the plaintiff do not derive from a contract of service the general jurisdiction of this Court is unlikely to be ousted.<sup>6</sup>

[18] This statement of law was accepted by the Court of Appeal in *JP Morgan v Chase*. The Court in that case confirmed that where the employment relationship is not a necessary component of the available cause of action, this indicates that the essence of the claim is not employment related and should not be regarded as falling within the

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<sup>4</sup> Section 161 of the Employment Relations Act 2000.

<sup>5</sup> *JP Morgan Chase Bank NZ v Lewis* [2015] NZCA 255 at [95].

<sup>6</sup> *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001.

Authority's exclusive jurisdiction.<sup>7</sup> Cases that have followed *JP Morgan v Chase* have confirmed the position taken by the Court of Appeal.<sup>8</sup>

### *Analysis*

[19] The starting point is to identify the nature of the problem, the “gist” of the dispute between Mr Ward and Perpetual Guardian, and ask whether it is truly an employment relationship problem that must be dealt with in the Employment Relations Authority.<sup>9</sup>

[20] The “problem” identified in the Statement of Problem, which Mr Ward asks the Authority to investigate in terms of Perpetual Guardian, is “*whether the applicant is entitled to funds held in Trust*”.

[21] Mr Ward submits that his claim against Perpetual Guardian, for monies owed under the Trust Deed, is based upon Sections 12, 16 and 43 of the Contract and Commercial Law Act 2017 (the CCL Act).

[22] Section 12 of the CCL Act provides that where a promise is contained in a deed that confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract, the promisor is under an obligation, enforceable by the beneficiary, to perform the promise.

[23] Mr Ward submits the Authority has jurisdiction to award relief to him under the CCL Act by virtue of its powers under s 162 of the Act. This section provides:

162 Application of law relating to contracts

Subject to sections 163 and 164, the Authority may, **in any matter related to an employment agreement**, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts, including—

- (a) Part 2 of the Contract and Commercial Law Act 2017;
- (b) the Fair Trading Act 1986.

[Emphasis added]

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<sup>7</sup> *JP Morgan Chase Bank NZ v Lewis* [2015] NZCA 255 at [97]

<sup>8</sup> See for example *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152 and *Ecostore v Worth* [2017] NZHC 1480.

<sup>9</sup> *Ecostore v Worth* [2017] NZHC 1480 at [22].

[24] The difficulty with Mr Ward’s argument is that the Authority only has the power to make orders under the CCL Act “in any matter related to an employment agreement”.

[25] Employment Agreement is defined in the Act as meaning:

- (a) a contract of service; and
- (b) includes a contract for services between an employer and a homemaker;  
and
- (c) includes an employee’s terms and conditions of employment in—
  - (i) a collective agreement; or
  - (ii) a collective agreement together with any additional terms and conditions of employment; or
  - (iii) an individual employment agreement

[26] There is no allegation that the Trust Deed is an employment agreement. The undisputed evidence is that there was no employment relationship between Mr Ward and Perpetual Guardian.

[27] The relief sought by Mr Ward arises out of an alleged statutory breach of the provisions of the CCL Act. The underlying problem that Mr Ward is asking the Authority to resolve is not one relating to, or arising out of, an employment relationship. It is not therefore a matter within the jurisdiction of the Authority.

[28] I find the Authority has no jurisdiction to hear Mr Ward’s claim against Perpetual Guardian. Mr Ward’s claim against Perpetual Guardian is dismissed.

#### **Issue 5: Costs**

[29] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[30] If they are not able to do so, and an Authority determination on costs is needed, Perpetual Guardian may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Ward will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[31] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup>

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>10</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].