IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 175
EMPC 79/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application that the Court determine a preliminary legal issue
BETWEEN	JACQUELINE SARAH HARTE Plaintiff
AND	MIDWIFERY EMPLOYEE REPRESENTATION AND ADVISORY SERVICE INCORPORATED Defendant

Hearing: On the papers

Appearances: L Acland, counsel for plaintiff
S Mitchell KC, counsel for defendant

Judgment: 17 September 2024

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for order that the Court determine a preliminary legal issue)

Introduction

[1] In the context of a de novo challenge to a determination of the Employment Relations Authority,[1] an application has been made for the hearing of a preliminary legal issue. The issue relates to whether the Authority or the Employment Court has jurisdiction to award compensation for a breach of good faith as between a member of

[1] *Harte v Midwife Employer Representation and Advisory Service Inc* [2024] NZERA 65 (Member David Beck).

a union and the union; and if not, whether the Court has jurisdiction to hear a claim where it is asserted there would be no effective remedy.

Brief procedural history

[2] The Authority determined that the Midwifery Employee Representation and Advisory Service Inc (MERAS) owed a duty of good faith to one of its members, Jacqueline Harte, when dealing with concerns raised on behalf of other members of MERAS.[2] Those concerns were passed on by a union official to Ms Harte's employer, which instituted an employment-related investigation.[3] In that context, the union official was interviewed. The Authority found the official did not remain neutral in circumstances where members, one of whom was Ms Harte, had competing interests.[4] When interviewed for the purposes of the employment investigation, the official had strayed into an area of potential disloyalty to Ms Harte on the basis of previous dealings with her.[5]

[3] The Authority declined to order a penalty against MERAS because the breach of good faith was found not to be deliberate, sustained or intended to undermine the employment relationship.[6] It did, however, issue recommendations that the union develop and publish guidelines for its officials and members who may be involved in inter-member conflicts.[7]

[4] Ms Harte then filed a de novo challenge, founded on an alleged breach of s 4 of the Employment Relations Act 2000 (the Act), an alleged breach of a fiduciary duty, and an alleged defamation/injurious falsehood.

[5] MERAS responded through its counsel, Mr Mitchell KC, stating that the statement of claim set out two causes of action which were founded in tort. He said that under s 161(1)(r) of the Act, the employment institutions had no jurisdiction to deal with such a claim. Ms Harte's concerns could only be pleaded as breaches of the

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2 At [28]–[31].
3 At [34].
4 At [41]–[43].
5 At [55].
6 At [59].
7 At [60].

duty of good faith. Ms Harte was invited to file an amended statement of claim; otherwise, the union would submit the Court had no jurisdiction to deal with the tortious claims.

[6] This resulted in an amended statement of claim being filed, which alleged two breaches of good faith on the part of MERAS. In the first instance, it is alleged that MERAS misled and deceived Ms Harte as a member of the union by making misrepresentations about her; a compensation remedy and penalty were accordingly sought. In the second instance, it is alleged that MERAS made statements about Ms Harte that were false and to her discredit; a compensation remedy was accordingly sought.

[7] Soon after, and so as to protect Ms Harte's time limitation position, proceedings under the Defamation Act 1992 were also brought by her in the District Court against a union official and a midwife who were alleged to have made defamatory statements about her. Damages are sought.

[8] This step resulted in Mr Mitchell asserting that having pleaded that there were breaches of good faith in the Employment Court, it was not now appropriate for the plaintiff to "venue shop" in the District Court by way of a defamation claim. A protest to jurisdiction was filed on behalf of the two defendants.

[9] The Court was advised that the District Court has adjourned the defamation claim to a case management conference which is to be held after November 2024. It is understood that this is to enable this Court to consider the issue of jurisdiction of the claims brought by Ms Harte for the purposes of her challenge.

The application for determination of a preliminary issue

[10] Against this background, the plaintiff has applied for determination of a preliminary legal issue as to whether the Court has power to award compensatory remedies to her against the defendant, despite those parties not being in an employer-employee relationship.

[11] The application went on to state that the plaintiff was seeking a judgment that compensatory remedies are available according to the "Court's inherent jurisdiction" under s 189 of the Act. After reciting the background, the application recorded that if the Court had no power to order compensatory relief, then it would have no jurisdiction to determine Ms Harte's claim that she was entitled to compensation. In effect, it is asserted that Ms Harte would have a claim without an effective remedy, and for this reason there would be no jurisdiction to hear the claim.

[12] The application was also brought on the basis that determining such a legal issue as a preliminary matter would be in the interests of securing a speedy, fair and just determination of the proceedings. Otherwise, time and expense of the parties and the Court may be wasted in undertaking a full evidential hearing if in fact that was not necessary. Determining the issue as a preliminary matter was also said to be in the interests of justice more broadly, since it would also clarify the position in the District Court.

[13] A supporting affidavit from Ms Harte was filed outlining the procedural history.

[14] MERAS filed a notice of opposition to this application, stating in essence that it was not for the Court to identify any particular remedy that may or may not be available to a party on a preliminary basis. It says that the plaintiff has an obligation to identify a cause of action and remedies and that it is then for the Court to determine the matter. Further, it says the Court does not have jurisdiction to grant what is effectively declaratory relief as to remedies.

Legal framework

[15] In *Nisha v LSG Sky Chefs New Zealand Ltd*,[8] Chief Judge Colgan held that if it is in the interests of justice to do so, the Court is empowered to identify and determine, as a preliminary point, a question of law that properly arises in a case. Although there is no express power under the Act or the Employment Court Regulations 2000 to give such a direction, reg 6(2)(a)(ii) allows the Court to dispose

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8 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 22.

of the case as nearly as may be practicable in accordance with the provisions of the High Court Rules 2016. He said that r 10.15 makes provision for a procedure such as was proposed in that case, and he adopted that model for the decision of the application.[9]

[16] Rule 10.15 provides:

> **10.15 Orders for decision**
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> The court may, whether or not the decision will dispose of the proceeding, make orders for—
>
> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[17] Mr Acland referred to the analysis of the applicable principles involved in a r 10.15 application as outlined in *Haden v Attorney-General*.[10] After referring to numerous previous authorities, Kós J suggested that there were five important questions that could inform the exercise of the Court's discretion:[11]

(a) Will there be difficult demarcation questions between the issues to be addressed at the first trial and those left for the second?

(b) Will the separate question bring the proceedings to an end?

(c) What potential time saving does the separate question offer?

(d) How will appeals be dealt with?

(e) Are there any other practical considerations tending one way or the other?

[18] As I will indicate shortly, I was addressed on these criteria. I agree that they are useful.

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9 At [7].
10 *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC).
11 At [50].

The proposed question

[19] Before considering whether a preliminary legal question should be approved, it is necessary to outline a debate which occurred at the hearing and which led to an enlargement of the proposed preliminary question.

[20] In order to explain this development, reference should be made to jurisdictional issues arising from Ms Harte's claim. In summary, the question is whether the claim as pleaded can be properly characterised as being a qualifying employment relationship problem under s 161 of the Act.

[21] Section 161 relevantly provides:

> **161 Jurisdiction**
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
> …
> (f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:
> …
> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[22] An important judgment which informs the analysis of the section is that of the Supreme Court in *FMV v TZB*.[12]

[23] There are two passages in the judgment which were highlighted by Mr Acland. The first is contained in the judgment of the majority, where emphasis was placed on the fact that there would be a right to a remedy that resolves an underlying problem if the problem fell under one of the numerous categories contained in s 161(1). However, it went on to say that:[13]

> … if there is no applicable … category under s 161(1) – that is, where the problem, though work-related, cannot be addressed within another of the examples in the subsection – the tort exception in s 161(1)(r) should be read as preserving the right to bring those tort actions in the ordinary courts. …

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12 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.
13 At [129].

[24] Mr Acland said he also proposes to submit that a similar conclusion was reached by William Young J,[14] and that the same Judge concluded that s 189(1) could be understood as conferring a general power on the Employment Court to grant such remedies as may be necessary to determine any matter before it.[15]

[25] In light of these statements, it became apparent from my discussion with counsel that the plaintiff wishes to have two questions resolved. The first is a legal point concerning the scope of s 189(1). The second is that if s 189(1) cannot be invoked to provide a compensatory remedy for a breach of the duty of good faith in the present circumstances, then the plaintiff would not have a viable remedy and Ms Harte's claim should not be characterised as falling under s 161(1)(f). Her claim would properly be in defamation in the District Court. Such a claim would fall under the tort carve out of s 161(1)(r).

[26] Mr Acland then proposed that a broader question should be approved, namely whether the Court has power to order compensatory relief for breach of good faith pursuant to s 189(1) of the Act, or whether the controversy between the parties was excluded pursuant to s 161(1)(r).

[27] On the basis of this reformulation, Mr Acland traversed the five factors identified earlier, all of which he submitted led to a conclusion that it would be appropriate for the preliminary legal question to proceed.

[28] For his part, Mr Mitchell agreed that the expanded question was more appropriate than the version which had originally been suggested. However, he said that, from a procedural perspective, problems could still arise that were even broader than those indicated by the amended question. He was concerned that an action in defamation could still be repleaded in the Court, leading to yet further complexity and unnecessary delay. He suggested that the question might be expanded to cover this contingency. As Mr Acland said there was no current intention to do so, I place this issue to one side.

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14 At [165](c).
15 At [162].

Analysis

[29] It is convenient to assess the potential exercise of the Court's discretion by reference to the five points described by Kós J in *Haden v Attorney-General*.[16]

Question one: Will there be difficult demarcation questions?

[30] This question is perhaps more relevant in a case where split trials are under consideration, and where evidence would be placed before the Court for the purposes of the initial question resulting in findings of fact that could lead to problems when a proceeding progresses to a substantive hearing.

[31] That is not the situation here. What is proposed is legal analysis only, albeit on questions which are of some complexity. The proposed question would not entail any findings of fact but would focus on certain statements of law made by the Supreme Court in *FMV v TZB*.

[32] Mr Acland submitted that the proposed questions are discrete and contained. I agree. This factor suggests the proposed questions should be approved.

Question two: Will the separate question bring the proceedings to an end?

[33] As currently framed, the proposed legal question would give rise to one of three outcomes:

(a) The current legal concerns raised by Ms Harte are properly characterised as employment relationship problems (breaches of duties of good faith), where a compensatory remedy may be considered (under s 189). Were this to be the outcome, there would be clarity for both parties in advance of the substantive hearing when the relevant findings of fact would be made. Further, the District Court would likely be assisted by a finding that the Employment Court had exclusive jurisdiction.

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16 *Haden v Attorney-General*, above n 10.

(b) Section 161(1)(f) is the correct characterisation of the legal issues raised by Ms Harte, but there is no compensatory remedy under s 189(1). Such an outcome would result in jurisdictional clarity. The plaintiff could proceed on that basis if she wished. Again, the District Court would likely be assisted by the conclusion that the Employment Court had exclusive jurisdiction.

(c) In the absence of the availability of a compensatory remedy under s 189(1), the claims are not properly characterised as falling under s 161(1)(f) but under s 161(1)(r) because a claim in defamation is the only means by which a compensatory remedy could be considered. The Employment Court would have no jurisdiction. Thus, the matter could proceed in the District Court. Clarity would be provided accordingly.

[34] This analysis points strongly to the utility of resolving the legal issues involved on a preliminary basis because either the District Court proceeding would be brought to an end, or the Employment Court proceeding would be brought to an end.

Question three: What potential time saving does the preliminary question offer?

[35] The preliminary question can be resolved promptly by this Court.

[36] It would lead to a witness action in this Court if it has jurisdiction; and if it does not have jurisdiction, the proceeding in the District Court could continue.

Question four: How will appeals be dealt with?

[37] Mr Acland submitted that by dealing with the legal issues on a preliminary basis, any appeal could be resolved ahead of trial, meaning again that there was an opportunity for clarification before proceeding with a witness action in either this Court or the District Court.

[38] This factor also supports the approval of the present questions.

Question five: Are there any other practical considerations tending one way or the other?

[39] Mr Acland submitted that proceeding in this fashion would provide clarity at the outset. It would mean the parties could proceed within the context of a clearly understood framework. It would avoid difficult jurisdictional arguments relating to the scope of the employment jurisdiction having to be considered by the District Court. I accept these submissions.

[40] Mr Acland also submitted that findings made by this Court on the preliminary question could have implications for other claims. I am less persuaded by this consideration. The legal question which is before the Court relates only to a claim of breach of the duty of good faith owed by a union to a member. Any findings as to the possible application of s 189(1) would not necessarily apply to other types of employment relationships where compensation may be available, such as a claim brought by an employee who might bring a personal grievance in order to claim statutory remedies under s 123.

Result

[41] I am satisfied that the interests of justice warrant an approval of the following preliminary legal question:[17]

> For the purposes of this proceeding where it is alleged by the plaintiff that the defendant is in breach of its duty of good faith, does the Court have power to order compensatory relief under s 189(1) of the Employment Relations Act 2000, or is the controversy between the parties excluded pursuant to s 161(1)(r)?

[17] I gave notification of this conclusion in a minute (dated 3 September 2024) so that the parties could prepare submissions in advance of a hearing of the preliminary question, now scheduled for 17 October 2024.

[42] I reserve costs.

B A Corkill
Judge

Judgment signed at 3.30 pm on 17 September 2024