

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 203
5535432

BETWEEN KAIPARA DISTRICT COUNCIL
Applicant

A N D ALAN McKERCHAR
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Samantha Turner, Counsel for Applicant
Anthony Drake, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 21 June 2016

DETERMINATION OF THE AUTHORITY

- A. The claims of Kaipara District Council under File No 5535432 and the counterclaims by Mr Alan McKerchar are removed to the Employment Court pursuant to s.178(1) of the Employment Relations Act 2000.**

Employment relationship problem

[1] Mr McKerchar was employed by the Kaipara District Council (the Council) as its Chief Executive in August 1993.

[2] Mr McKerchar's most recent individual employment agreement (the employment agreement) was dated 1 October 2007. The employment agreement stipulated that Mr McKerchar's position would expire on 31 October 2012 (expiry date).

[3] On 2 August 2011, the Council and Mr McKerchar entered into a deed of settlement (“the Deed”). The Deed recorded the terms of an agreement between the Council and Mr McKerchar whereby Mr McKerchar’s employment with the Council was to terminate prior to the expiry date. The Deed was not a record of settlement under s.149 of the Act.

Council’s claims

[4] Following the signing of the Deed, the Council raised multiple claims against Mr McKerchar arising out of his employment by it. The Council alleged Mr McKerchar was in breach of the express terms of his employment agreement with it, that Mr McKerchar had breached his statutory duties as chief executive of a local authority under the Local Government Act 2002 (LGA) and was in breach of his express and implied contractual obligations to it, by failing to comply with the Local Government (Rating) Act 2002.

[5] The Council filed a statement of problem in the Authority on 19 December 2014.

Mr McKerchar’s response and counter claims

[6] Mr McKerchar denies the Council’s claims and says the Deed was in full and final settlement of all matters arising from his employment by the Council. Mr McKerchar says the Deed prevents the Council from bringing its claims against him.

[7] Mr McKerchar also alleges that the Council breached the Deed by releasing it to the media and by releasing details of the Deed to a member of the public. Mr McKerchar says these breaches have caused him loss and damages. Mr McKerchar is seeking damages for breach of contract and compensatory damages for distress and loss of reputation from the Council.

[8] Mr McKerchar filed his statement in reply and counterclaim in the Authority on 27 January 2015.

Preliminary issue

[9] The Council seeks to have the issue of whether the Deed operates to prevent it from commencing a claim against Mr McKershar, dealt with by the Authority as a preliminary issue.

[10] There have been delays in dealing with this matter for various reasons including the parties attempting to resolve requests for information between themselves. The parties now seek for this preliminary matter to be determined by the Authority.

Accord and satisfaction

[11] The issue is whether or not the Deed means there has been accord and satisfaction between the parties which prevents the Council from pursuing its claims against Mr McKerchar.

[12] The Council claims that Mr McKerchar breached the terms of his employment agreement with it, it was not aware of those breaches at the time the Deed was entered into and so the Deed does not prevent it pursuing claims against Mr McKerchar.

[13] The Council says the Authority has exclusive jurisdiction to deal with the matter under s.161(1)(r) of the Employment Relations Act 2000 (the Act).

[14] Mr McKerchar says the Deed bars the Council from raising its claims against him in the Authority and that he must pursue his claims in the civil courts.

Post employment obligations

[15] Mr McKerchar has a counterclaim in respect of alleged breaches by the Council of the Deed post termination of his employment.

[16] The Council says as this counterclaim is founded on post employment obligations, it falls squarely under the decision of the Court of Appeal in *JP Morgan Chase Bank NA v. Robert Lewis*¹.

Removal to the Court

[17] Section 178(1) of the Act enables the Authority to:

... on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the Court to hear and determine the matter without the Authority investigating it.

[18] Section 178(2) of the Act sets out the grounds for removal which include:

¹ [2015] NZCA 255

- (a) An important question of law;
- (b) The case being of such a nature and of such urgency that it is in the public interest that it be removed;
- (c) The Court already having before it proceedings which are between the same parties and which involve the same or similar or related issues;
- (d) The Authority being of the opinion that in all the circumstances the Court should determine the matter.

Important questions of law

[19] This is a matter which involves important questions of law in relation to the enforceability of the Deed in the Authority when it was not entered into by the parties pursuant to s.149 of the Act.

[20] Further, Mr McKerchar's counter claims appear to be founded on post-employment obligations. In *JP Morgan*, a dispute arose between JP Morgan and its former employee, Mr Lewis in respect of a settlement agreement entered into between them upon the termination of Mr Lewis' employment. The settlement was not a record of settlement under s.149 of the Act.

[21] Mr Lewis claimed a breach of the settlement agreement by JP Morgan and sought damages. The Court held that the matter before the Authority was not one that arose from or was related to the employment relationship between the parties. At para [92] the Court stated:

...we do not consider the matter before the Authority was one that either arose from or was related to the employment relationship. In essence it was a claim under the settlement agreement, and concerned the alleged breach of post-employment obligations. Of course the claim would not have arisen but for the fact that Mr Lewis was once the bank's employee, but the claim is founded on the settlement agreement.

[22] The Council says the effect of *JP Morgan* is that Mr McKerchar must pursue his counter claims against it in the civil courts, not in the Authority.

Public Interest

[23] The matters between the parties have been the subject of intense media scrutiny. The statement of problem filed by the Council includes wide ranging allegations against Mr McKerchar and his alleged failure in his role as Chief Executive to comply with his statutory and contractual duties.

[24] These failures allegedly led to, among other things, serious issues concerning the assessment and setting of rates by the Council and the withholding of rates by a number of ratepayers in the Community.

[25] On 6 September 2012, Commissioners of the Council were appointed by the Minister of Local Government pursuant to powers under the LGA. In March 2013, the Mangawhai Ratepayers and Residents Association filed judicial review proceedings against the Council.

[26] Attached to Mr McKerchar's statement in reply and counterclaim are various extracts from newspapers covering the issues between the parties. Newspaper attachments include:

- (a) The Kaipara Lifestyler;
- (b) Stuff.co.nz;
- (c) The Northern Advocate;
- (d) The Dargaville District News; and
- (e) The Rodney Times;

[27] I consider the issues between the parties are matters of public interest. I am of the opinion that in all the circumstances the Court should determine the matter.

Order

[28] Pursuant to s.178(1) of the Act, the Authority orders the removal of this matter to the Employment Court.

Anna Fitzgibbon
Member of the Employment Relations Authority