

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 293/08
5123621**

BETWEEN LAWRENCE KIESER
 Applicant

AND DATA PACIFIC LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Ian Williams, Counsel for Applicant
 Chris Patterson, Counsel for Respondent

Submissions Received: 18 July 2008
 25 July 2008
 29 July 2008

Determination: 15 August 2008

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

The application

[1] The above-named applicant Mr Lawrence Kieser ("Mr Kieser") by application dated 30 May 2008 seeks orders or directions that the Authority strike-out in whole or in part the respondent Data Pacific Limited's ("Data Pacific") claims against him as set out in a statement of problem dated 7 May 2008. In the alternative, Mr Kieser asks the Authority direct a stay of the proceedings pending resolution of contemporaneous proceedings in the High Court. Data Pacific opposes the application for strike-out. This determination disposes of the application as a preliminary matter.

[2] The Authority is not a court and so language and technicalities peculiar to courts are not used in the Authority. Accordingly, I refer to the application as one where the applicant asks the Authority to decline to investigate.

The facts

[3] Mr Kieser was formerly employed by Data Pacific until his dismissal on 20 July 2007.

[4] Data Pacific filed proceedings in the High Court at Auckland by statement of claim dated 30 November 2007. That statement of claim pleads eight causes of action against Mr Kieser arising out of his former employment including breach of confidence, inducing breach of contract, inducing breach of statutory duty, misuse of confidential information, unlawful means conspiracy and deceit. These proceedings are numbered CIV-2007-404-7514.

[5] On 7 May 2008 Data Pacific lodged a statement of problem in the Authority. The statement of problem described the employment relationship problem alleging that Mr Kieser and one Mr Rodney Franzoi, wilfully deceived Data Pacific and its customers and breached the duties they owed to Data Pacific by surreptitiously and without the knowledge of Data Pacific doing certain acts with the intention of misappropriating confidential information, business opportunities and Data Pacific's customers.

[6] Data Pacific seeks resolution from the Authority in the form of formal orders including a declaration that Mr Kieser has breached his duties of fidelity, good faith and confidence and trust to Data Pacific, an inquiry into damages, an account of profits, permanent injunctive relief restraining Mr Kieser from taking advantage of his alleged wrongful actions, exemplary damages, penalties, interest and costs.

The submissions

[7] This present application is said to be made because the claims alleged in the Authority duplicate exactly those already before the High Court. Counsel's memorandum specifies the grounds for the present application as follows:-

1. *The obvious risks of contrary results; and*
2. *The risk of double costs: the normal principles of damages and compensation for loss would apply and the plaintiffs/applicant should not be put in a position of advantage, the risk of double recovery; and*

3. *The conduct of litigation with precisely the same evidence and likely identical legal issues would inevitably lead to unnecessary duplication of legal costs, with obvious prejudice to the respondent.*

[8] The Authority is advised that the High Court proceedings have proceeded to the point of discovery and interlocutories and that "a trial date will be sought shortly".

[9] It is submitted that critically, it is inappropriate and unfair to have parallel proceedings of any sort given the intertwining of the evidential matrix and the legal submissions. The Authority is referred to *BDM Grange Limited -v- Parker* [2006] 1 NZLR 353 in which it is submitted unfairness has been recognised and a stay resulted.

[10] In reply Data Pacific says the two parallel proceedings have been brought because some of the matters between it and Mr Kieser fall within the exclusive jurisdiction of the Authority. Secondly, it is said that in the High Court proceedings, another entity Secureco Limited is also named as a plaintiff. Relying on section 161 of the *Employment Relations Act 2000*, it is submitted that the Authority is the only judicial body with jurisdiction to address the alleged breach of duty of good faith and implied contractual obligations being fidelity, trust and confidence and confidentiality. It is also submitted that it is unfortunate but not uncommon, that employers are "forced" due to the operation of section 161 to run parallel proceedings in both the Authority and the High Court. The Authority is referred to its determination in *Bradford Trust Limited & Roebeck and Pakieto*¹ as an example of concurrent proceedings in both the Authority and the High Court. Mr Patterson refers the Authority to paragraph [18] of a *BDM* interlocutory judgment where the Court referred to parallel proceedings in both the Court and the Authority. Ultimately Mr Patterson submits that there is no basis for the Authority to decline to investigate.

The merits

[11] There is provision for staying proceedings where a determination has been issued at Regulations 64 and 65 of the *Employment Court Regulations 2000*. Those regulations relate only to the grant of stay where there is either a determination which is challenged or an application for rehearing. In this present case there is neither.

¹ unreported, ERA, Auckland, AA60/08, 26 February 2008, L Robinson

There is no express provision dealing with staying investigations where the investigation has commenced but not finally determined. Accordingly, I prefer to consider this present application in the terms as I suggested to counsel in a preliminary conference, that it be dealt with as an application asking the Authority to decline to investigate.

[12] There is one other way the application can be considered. The *Employment Relations Act 2000* at section 159 refers to proceedings being "suspended". That suggests to me the legislature recognises investigations can be suspended and the Authority is authorised accordingly.

[13] The Authority has an exclusive jurisdiction in relation to employment relationship problems generally. I consider that the actions in the High Court proceedings are separate and distinct from the claims raised by the Data Pacific in this application. I note the submission that there is an additional plaintiff in the High Court proceedings. Most significantly however, I consider the claim in relation to the statutory duty of good faith is without question a matter within the Authority's exclusive jurisdiction. That action alone is severable and distinct from the actions in the High Court proceedings and the applicant is entitled to have it investigated irrespective of whether there is contemporaneous proceedings involving the same subject matter in some other forum.

[14] I accept that there may well be some overlap in terms of the factual findings given that the various claims in both proceedings arise out of an employment relationship. But as I said in the *Bradford Trust* determination, that factor alone is not sufficient in my view to require me to suspend or stay this investigation. The possibility of divergent factual findings, although undesirable, is only a neutral factor in my assessment, because it is no more than the empowering legislation of both institutions at work.

[15] I also said in *Bradford Trust* that this institution has objects which promote resolution between the parties themselves and an emphasis on prompt resolution

(section 143 ERA). So too is there an expectation of speedy, informal and practical justice (section 174 ERA). The parties to employment relationships are entitled to the benefit of the Authority's unique and flexible problem solving mode of operation according to the objects of the *Employment Relations Act 2000*.

[16] Since the submissions in support of this application were lodged, I understand that the High Court proceedings have been stayed. If that is so and on the basis that it is, there cannot be said to be parallel proceedings the foundation of the applicant's grounds for stay in this application.

[17] For all the foregoing reasons, I am not persuaded to exercise my discretion to decline to investigate or to suspend this investigation. **The application that I do so is refused.**

[18] I direct that the matter be scheduled for a preliminary conference to discuss arrangements for the substantive investigation.

[19] If costs are sought, the matter is reserved.

Leon Robinson
Member of Employment Relations Authority