

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 223/09
5102849

BETWEEN SEAN MILLER
Applicant

AND FONTERRA CO-OPERATIVE
GROUP LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: Tony Drake, counsel for applicant
John Rooney, counsel for respondent

Investigation Meeting: 1 July 2009

Determination: 8 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Miller has filed an employment relationship problem with his former employer, Fonterra Co-operative Group Limited (“Fonterra”). The problem, as originally stated, is that Fonterra breached an implied term of the parties’ employment agreement that he be indemnified for losses arising as a result of criminal charges laid against him in circumstances he says were ‘as a result of my employment’.

[2] Subsequently there was a series of amended statements of problem and statements in reply. The outcome in respect of Mr Miller’s claim was the addition of requests for a compliance order in respect of the indemnity, damages for breach of the employment agreement including obligations in respect of good faith, and penalties. Fonterra made various applications to strike matters out, denied there was an obligation to indemnify Mr Miller, denied any breach of the employment agreement, denied that it was Mr Miller’s employer for the purposes of his claim, relied on

limitation periods in respect of aspects of the claim, and counterclaimed for alleged breaches by Mr Miller of his duty to his employer.

[3] Mr Miller has applied under s 178 of the Employment Relations Act 2000 for an order removing the entire matter to the Employment Court.

[4] The application was opposed.

[5] This determination addresses the application for removal.

Background

[6] Mr Miller had been an employee of Kiwi Co-operative Dairies Limited when, on the merger of that and another company, he became an employee of Fonterra in or about October 2001. His employment was terminated on the ground of redundancy in November 2002.

[7] In or about 2004 Mr Miller and others were charged with an offence under the Crimes Act 1961 in relation to 'Powdergate'. The charges were later withdrawn and replaced with charges under the Customs and Excise Act 1996. All but Mr Miller pleaded guilty and were convicted and fined in May 2006. Following a sentencing indication hearing in the Auckland District Court in or about May 2007, Mr Miller pleaded guilty to 6 counts under the Customs and Excise Act. The counts concerned the production on various dates in May 2001 to a customs officer of export entries that were erroneous in that dairy produce was mis-described as 'other protein substances'. Mr Miller was discharged without conviction in respect of all counts.

[8] According to the sentencing notes,¹ the Crown accepted that Mr Miller was removed as a person directly involved in the offending, but was involved in the overall scheme in that he was aware customs documents containing erroneous material would have to be tendered for the exports of dairy produce to be effected.² Mr Miller's position was that he was not the architect of the scheme, nor was he involved in the conception of its details. He was aware the scheme was devised with

¹ **The Queen v Miller**, 10 May 2007, Judge Roderick Joyce QC, CRI-2006-004-011965

² At [8]

the objective of circumventing the Dairy Board Act, but did not feel it was his place to challenge senior managers further.³

[9] Mr Miller says the charges restricted his ability to obtain ongoing employment. Among other things, he seeks damages from Fonterra in respect of the resulting loss of remuneration.

The application for removal

[10] The application for removal relies on s 178(2)(a) of the Employment Relations Act 2000, namely that one or more of the following questions of law is likely to arise in the matter more than incidentally, and that in all of the circumstances the court should hear and determine the matter:

- a. Did the applicant's contract of employment contain a term that the employer will reimburse the employee with respect to all expenses and indemnify him against all losses and liabilities incurred or suffered in consequence of him obeying his employer's orders or arising out of the reasonable performance of him carrying out his employer's work;
- b. Is the applicant entitled to be indemnified or reimbursed for loss of remuneration suffered as a consequence of having been drawn in as a defendant to a criminal proceeding arising out of the ways in which his employer sold its product to customers;
- c. Does the obligation of good faith and trust and confidence owed by statute or common law require an employer to disclose sufficient facts known to it to relevant agencies so as to protect its employees from a risk of being drawn into a criminal proceeding as a defendant when a criminal prosecution would likely not have been ever commenced had the relevant agencies been aware of the facts.

[11] The original, and deceptively simple, problem which Mr Miller framed has been overrun by subsequent claims and counterclaims, and the questions as formulated above.

³ At [21] - [23]

[12] Regarding the nature and existence of any obligation to indemnify Mr Miller in the terms sought, Mr Drake referred to:

- a. a duty implied in the English common law to indemnify or reimburse an employee in respect of actions carried out in the course of employment;⁴ and
- b. a decision of the Employment Court where an implied duty to indemnify a former employee in respect of legal expenses was found to exist.⁵

[13] Mr Drake submitted further that there is little other New Zealand authority on the issue of implied rights of indemnity in contracts of employment.

[14] In opposition, Mr Rooney said the Authority can and has addressed the existence of implied terms in employment agreements. Whether there is an implied term of the kind contended in question (a) will arise only if the Authority finds on the facts that Mr Miller was acting in the reasonable performance of his duties and on his employer's instruction. These facts are denied. Regarding the indemnity set out in question (b), Mr Miller will again have to establish on the facts that he was acting in the reasonable performance of his duties, that the criminal proceedings resulted from the way in which the employer sold its products, and that any lost remuneration was caused by his employer's actions.

[15] Mr Rooney said further that these questions of law are not 'important' because they are limited to the particular facts of this case and do not have wider significance for employment law generally. He also referred to difficulties for Mr Miller in establishing certain causal links and in proving several key allegations of fact, and said that because of the significance of these difficulties the questions of law will arise only incidentally.

[16] Regarding the third of the proposed questions, alleged breaches of the obligation of good faith and confidence were developed in amended statements of problem. They concern allegations that Fonterra knew or should have known of the

⁴ Halsbury's Laws of England (4th ed re-issue Vol 16 (1A) para 39)

⁵ **F v Attorney-General** [1994] 2 ERNZ 62

risk of criminal charges faced by its employees as a result of the manner in which the supply chain was being operated. Further, on becoming aware that a crown agency was intending to investigate the matter, it should have informed the agency that the activities in question were part of an industry-wide practice existing for a number of years and that the employees concerned were carrying out the instructions of their employer.

[17] Mr Rooney said the extent of the duty of good faith is within the jurisdiction of the Authority and has been considered by the Authority a number of times. He also said Fonterra denies the existence of the facts on which the question as formulated relies. Further, it is not possible to determine whether, had 'appropriate disclosure' been made, no criminal proceedings would have been commenced. Accordingly if the third question of law arises it does so incidentally. If it does arise, it is limited to the facts of this case. Accordingly there are no grounds on which to remove it to the court.

Determination

[18] I accept that there is little New Zealand authority on the existence of the implied duty of an employer to indemnify an employee in respect of actions carried out in the course of employment. The right to an indemnity Mr Miller is claiming raises an important question of law which arises more than incidentally.

[19] I accept, too, that if there is an implied duty to indemnify of the kind alleged, Mr Miller may face difficulties in establishing the facts on which the alleged breach is based as well as causal links between the breach and the loss asserted. Not having investigated the facts, however, I cannot express a final view on those matters.

[20] For these reasons I find that matters associated with the indemnity raise a question or questions of law which should be removed to the court under s 178(2)(a).

[21] Since question (c) concerns facts similar to those on which the right to an indemnity is based it is appropriate to remove it on that ground.

[22] Further, in addition to the matters the parties have referred to directly in respect of this application, I take into account the applications to strike out, the limitation issues and the counterclaim which Fonterra has filed. These matters have not yet been investigated. In the interests of avoiding a plethora of proceedings in different institutions, and in the exercise of the discretion in s 178(2)(d), I remove the entire matter inclusive of those applications to the court to determine.

Costs

[23] Costs are reserved.

[24] Mr Drake indicated he seeks costs in respect of the application for removal. The applicant shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter, and the respondent shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority