

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 125
5561786

BETWEEN S
 Applicant

AND N
 Respondent

Member of Authority: Trish MacKinnon

Representatives: L Clark, Counsel for Applicant
 A Sherriff, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 30 September 2015, from the Applicant
 31 August and 7 October 2015, from the Respondent

Determination: 21 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns preliminary matters in respect of an application made by S on 15 June 2015. The application sought orders cancelling a settlement agreement and ordering the repayment of monies paid to N under that agreement. It also sought a penalty for a breach of good faith.

[2] N's statement in reply, filed on 1 July 2015, denied any wrongdoing. Its main focus, however, was to query the applicant's right to bring and pursue the proceedings, and the Authority's jurisdiction to make the orders sought by S.

[3] A telephone conference was convened with the parties in which it was agreed the Authority would determine the issues raised by N as a preliminary matter, to be dealt with on the papers by way of submissions. A timetable was set for that purpose.

[4] At the request of the respondent, and with the consent of the applicant, I made an interim order on 8 July 2015 for non-publication of the pleadings filed in the Authority, any and all documents filed with the pleadings, and the information contained within those documents. That order will be reviewed in the event that this matter progresses further. To preserve the parties' confidentiality I refer to each of them by a letter which bears no resemblance to their respective names.

Background

[5] N was employed in a senior managerial position by S. An employment relationship issue arose between the parties in 2014 and was resolved by mutual agreement by way of a settlement agreement. This was signed by the parties but was not certified by a mediator under s.149 of the Employment Relations Act 2000 (the Act).

[6] By the terms of the settlement agreement N's employment was to cease on an agreed date by virtue of the written resignation he would tender. Various monetary payments were agreed to be made to N on cessation. He would continue his professional involvement in certain specified matters relating to S's sphere of interest after that date.

[7] The settlement agreement recorded an acknowledgement by the parties that it evidenced an accord and satisfaction and a resolution of all and any issues between them. It also recorded the parties' agreement that they were precluded from bringing or pursuing any claims against each other under any statute, the common law, in equity or otherwise. The wording of this part of the settlement agreement made clear that the clause was intended to capture claims and rights that were known, and those that were unknown, relating to facts and circumstances arising up to, and including, the date of the agreement.

[8] Several months after N's departure S commenced an internal inquiry, and concurrently commissioned a review by an external organisation, into matters pertaining to N. As a result of those inquiries S concluded that N had, during his employment, breached his fiduciary duty to it in several ways; breached express and

implied duties, including duties of trust and confidence; and breached his obligation of good faith to his employer by, *inter alia*, not disclosing the other breaches during his employment when negotiations over the settlement agreement were in progress.

[9] This has led to S seeking the cancellation of the settlement agreement. S seeks orders for the recovery of monies paid to N under that agreement and other monies it claims were unauthorised payments made to N during his employment. Interest on those sums is sought. Additionally S seeks the imposition of a penalty on N for breaching his statutory duty of good faith.

Issues

[10] The preliminary issues for determination are whether:

- a. it is within the Authority's jurisdiction to cancel a settlement agreement;
- b. it is within the Authority's jurisdiction to order the respondent to repay monies paid to him by the applicant pursuant to the settlement agreement;
- c. the settlement agreement is a valid contract of accord and satisfaction which precludes the applicant from bringing and pursuing these proceedings.

Submissions

[11] Counsel for N provided comprehensive submissions encompassing the jurisdiction of the Authority and whence that jurisdiction derives. I do not intend to quote from those submissions in detail. However, I note that Mr Sherriff argues from the basis of an analysis of applicable sections of the Employment Relations Act 2000 (the Act), and from relevant case law, in particular *JP Morgan Chase Bank NA v. Lewis*,¹ that the Authority does not have the jurisdiction to cancel a settlement agreement as sought by S.

[12] He notes that the Authority derives its jurisdiction in relation to contracts from s.162 of the Employment Relations Act 2000 (the Act), which gives the

¹ [2015] NZCA 255.

Authority power in relation to seven specified pieces of legislation,² but only in relation to employment agreements. In Mr Sherriff's submission a settlement agreement does not come within the definition of an employment agreement.³ Therefore s.162 does not confer jurisdiction on the Authority regarding those seven statutes in respect of a settlement agreement.

[13] Mr Sherriff also submits the Authority lacks jurisdiction to order N to repay monies paid to him under the settlement agreement he entered into with S, or to award damages for breach of an agreement which has not been certified by a mediator. Citing *Lewis*,⁴ he asserts S would need to pursue any claim against N in the High Court.

[14] Notwithstanding that assertion, Mr Sherriff submits S is precluded from bringing and pursuing any such claim by virtue of the settlement agreement being a valid contract of accord and satisfaction.

[15] In a memorandum to the Authority on the matter of jurisdiction, counsel for S acknowledges that *Lewis* appears to have overturned a number of the principles arising from earlier decisions on which S would have sought to rely to support its position that the Authority had jurisdiction to make determinations about this matter. Ms Clark canvasses other arguments which she says S would have made in the absence of the Court of Appeal judgment in *Lewis* before referring to a subsequent decision of the High Court⁵ which considered *Lewis* and which she speculates may have narrowed the scope of the Authority's jurisdiction even further.

[16] Ms Clark submits that the impact of these two recent judgments on the current proceedings before the Authority is to throw into doubt whether the Authority has the requisite jurisdiction to consider any of the preliminary matters raised by the respondent. She considers the issue of jurisdiction needs to be determined before the Authority (or the High Court) can consider whether N's reliance on the doctrine of accord and satisfaction can be determined.

² Contracts (Privity) Act 1982; Contractual Mistakes Act 1977; Contractual Remedies Act 1979; Fair Trading Act 1986; Frustrated Contracts Act 1944; Illegal Contracts Act 1970; & Minors' Contracts Act 1969.

³ As defined in s.5 of the Act.

⁴ n1 at [119].

⁵ *Internet Traders Ltd v. Williams* [2015] NZHC 1809

Discussion

[17] The Court of Appeal in *Lewis* did not rule out the possibility that a settlement agreement could be considered to be a variation of an employment agreement. Whether a settlement agreement rescinds the employment agreement, or varies it, can be determined by applying contractual principles. After referring to various academic texts and case law, the Court noted the following statement by Lord Sumner in *British and Beningtons Ltd v North Western Cachar Tea Co Ltd*:⁶

...The question is whether the common intention of the parties ...was to "abrogate", "rescind", "supersede", or "extinguish" the old contracts by a "substitution" of a "completely new" and "self-contained" or "self-subsisting" agreement...

[18] The Court concluded it was clear from an application of the statements of the law it had considered that the settlement agreement entered into by Mr Lewis and his employer could not be described as a variation of his employment agreement. Instead it was "*intended by the parties to replace the employment agreement and operate as a stand-alone statement of their obligations to each other after Mr Lewis ceased to be employed by the bank*"⁷.

[19] While noting that the settlement agreement altered the termination provisions of Mr Lewis' employment agreement, the Court found it did so for the very purpose of bringing his employment to an end. In those circumstances the Court expressed the view that "*it would be artificial to describe the settlement agreement as a variation of the employment agreement.*"⁸

[20] A similar situation applies to the settlement agreement signed by N and S. Although in their case there was a longer period between the signing of the agreement and the agreed date for cessation of N's employment, the employment agreement was intended, until that date, to remain in place and regulate the terms of the employment relationship.

[21] The settlement agreement set the terms by which N's employment would come to an end and specified what terms would apply on and after that event. Until the agreed date for cessation, N's employment, and employment agreement, would

⁶ [1923] AC 48 (HYL) at 62.

⁷ n1 at [65].

⁸ n1 at [65].

continue on a business-as-usual basis. On cessation, and after that event, the provisions of the settlement agreement would regulate the relationship between N and S, not as an employment agreement, but as a "*stand-alone statement of their obligations to each other*"⁹ to borrow the words of the Court.

[22] The Authority's jurisdiction derives from statute. As the Full Court of the Employment Court stated in *South Tranz v Strait Freight Ltd* the Authority has "*no inherent jurisdiction and can only carry out functions and exercise powers to the extent that they are conferred on it by statute.*"¹⁰

[23] It follows that, as the settlement agreement is not an employment agreement as defined in s.5 of the Act, the Authority has no jurisdiction to consider the current matter as a dispute between the parties or as a breach of an employment agreement under s.161(1)(a) or 161(1)(b). The settlement agreement was not certified by a mediator under s.149 of the Act. That rules out access to the enforcement processes of ss.149(3) and 151 of the Act even if such actions were applicable which they are not.

[24] Nor is the Authority able to deal with the matter under s.162, under which it can make any order that the High Court or a District Court might make under any enactment or rule of law relating to contracts, including the seven statutes referred to earlier.¹¹ As its discretion under this provision is restricted to matters relating to an employment agreement it follows that the Authority has no jurisdiction to deal with the current matter under that section. It also follows from the above that the Authority has no jurisdiction to cancel the settlement agreement or to order the repayment of monies paid to N pursuant to that agreement.

[25] In *Lewis* the Court found s.161(1)(r) could not be relied on to give the Authority (or Employment Court) jurisdiction relating to matters that do not arise from or are related to the employment relationship. In that case the breach alleged by Mr Lewis was a breach of the settlement agreement that occurred after the employment relationship had ended. In the current situation no breaches of the settlement agreement have been alleged: what is at issue is the conduct of N during

⁹ n1 at[65].

¹⁰ [2007] ERNZ 704 at [20].

¹¹ n2.

his employment and throughout the period of negotiating the settlement agreement. There may be scope under this provision for the Authority to investigate the matter.

[26] In *Lewis* the Court of Appeal considered the High Court's judgment in *The Hibernian Catholic Benefit Society v Hagai*¹² in which the Hibernian Society sued Ms Hagai to recover money she had stolen in the course of her employment. The Judge in that case held the court did not have jurisdiction to hear the claim as it fell within the exclusive jurisdiction of the Authority. He said a claim that one party to an employment relationship should pay money to another party to that relationship, because of a liability incurred in the context of the employment relationship, fitted comfortably into the category of "*employment relationship problems generally*" as defined by s.5 of the Act. The Judge held that the claim came within s.161(1)(b) for breach of employment agreement; s.161(1)(f) for breach of a good faith obligations; and s.161(1)(r) for breach of fiduciary duty and for money had and received.

[27] The Court of Appeal disagreed with the conclusion reached by the Judge on an application of the same statement of law by Panckhurst J that he had quoted. That statement distinguished between a claim that may have had its origins in an employment relationship and a claim the essence of which was related to or arose from the employment relationship of the parties.¹³ The Court found an application of this distinction should have led to a different conclusion:

While Ms Hagai was clearly in breach of her employment contract, the essence of the Society's claim was her dishonest theft of the money. This was not an employment-related problem, although it would undoubtedly have justified her dismissal. While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai's conduct was such as would have made her liable to the plaintiff *without* any such relationship.¹⁴

[28] Applying the Court of Appeal's reasoning to the current case, S's claims of breaches of fiduciary duty and the breaches of trust and confidence that were alleged would not come within the Authority's jurisdiction. However, the claims for a breach of the duty of good faith is a different matter.

¹² [2014] NZHC 24.

¹³ *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP 72/01, 14 August 2001.

¹⁴ n1 at [97].

[29] Good faith behaviour is a legislative requirement.¹⁵ It is a fundamental component of the employment relationship and it underpins that relationship.¹⁶ It provides that employees and employers have, broadly speaking, an obligation to act honestly, fairly, openly and proactively throughout the employment relationship to ensure they have a communicative and constructive relationship.

[30] I find the essence of the claims made by S relating to breaches of N's duty of good faith during his employment arises from the employment relationship of the parties. As such it falls within the jurisdiction of the Authority to investigate.

[31] The next issue is whether the settlement agreement is a valid contract of accord and satisfaction which precludes the applicant from bringing and pursuing these proceedings. I have already noted that the settlement agreement specifically records the parties' acknowledgements that it evidences an accord and satisfaction and a resolution of all and any issues between the parties, including those known and those unknown to them at the time. The clauses of the agreement which record this are comprehensive and clearly intended to be all-encompassing.

[32] The wide-ranging acknowledgements, restrictions and exclusions in the settlement agreement appear to preclude any possibility of action being taken by either party against the other. That may effectively thwart any action relating to the settlement agreement. However, I am not persuaded that it precludes the claim of a breach of good faith relating to actions of a party under the employment relationship.

[33] S and N remained in an employment relationship until the date of cessation of N's employment. N had an obligation to act in good faith towards S until that date. While the settlement agreement may preclude all other actions by one party against the other I find it could not exclude the possibility of an action relating to an alleged breach of such a fundamental aspect of the employment relationship as good faith.

[34] That being so, the breach of good faith claim is one that remains open for the Authority to investigate. However, in practical terms S may wish to consider whether it wishes to pursue this claim in light of what it could hope to achieve if successful. The maximum penalty for a breach of good faith by an individual is \$10,000.¹⁷ This

¹⁵ s. 4 of the Act.

¹⁶ Section 3 of the Act.

¹⁷ Section 135(2)(a) of the Act.

falls well below what is sought by S in its current application. No other remedy, except a contribution to costs, would be available.

Determination

[35] For the reasons given above I find the Authority does not have the jurisdiction either to cancel the settlement agreement signed by S and N or to order N to repay monies paid by S to N.

[36] The Authority can investigate the claim for a breach of good faith during N's employment.

Costs

[37] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority