

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 355
5456416

BETWEEN	JAMES LAWRENCE SCANDLE Applicant
A N D	BRYCE GULDE and CHANTAL KARAUNA First Respondents
A N D	MARGARET MARY PEPPER and MURRAY BERNARD PEPPER Second Respondents
A N D	CAHERSIVEEN FARMS LIMITED Third Respondent

Member of Authority: James Crichton

Representatives: Lou Yukich, Advocate for the Applicant
Murray McKechnie, Counsel for the Second and Third
Respondents

Investigation Meeting: 22 August 2014 at Tokoroa

Date of Determination: 28 August 2014

DETERMINATION OF THE AUTHORITY

History

[1] A Statement of Problem initiating this matter was filed in the Authority on 16 April 2014 citing just the first respondent (Mr Gulde and Ms Karauna).

[2] A Statement in Reply was filed and served by the first respondent on 7 May 2014 and then on 15 May 2014, the applicant (Mr Scandle) caused a Notice of

Application for Joinder to be filed in the Authority which sought to join to the proceedings then on foot, the second and third respondents.

[3] There were a variety of exchanges between the Authority and the parties' representatives, not all germane to the issue now for determination, but in any event by Notice of Partial Discontinuance filed in the Authority on 5 June 2014, Mr Scandle notified the Authority and the respondents that a full settlement of all matters between himself and the first respondent had been achieved.

[4] Notwithstanding that settlement of all matters with the first respondent, who by common consent was Mr Scandle's employer, Mr Scandle sought by filing just a Notice of **Partial** Discontinuance to signal that he still wished to proceed against the second and third respondents.

[5] This was because of Mr Scandle's conviction that the second and third respondents were in breach of s.134 of the Employment Relations Act 2000 (the Act).

[6] In that regard, Mr Scandle relies on s.134(2) of the Act which is in the following terms:

(2) *Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[7] In essence, Mr Scandle contends that the second and third respondents were the grey eminences who determined on his dismissal, and Mr Gulde and Ms Karauna simply carried those instructions out.

[8] The evidence for this view is based essentially on the testimony of Mr Scandle himself and his partner, Ms Carissa Jensen, who attended a disciplinary meeting with Mr Gulde and Ms Karauna on 6 April 2014 at which Mr Scandle was dismissed from his employment.

[9] The testimony given to me in my investigation meeting from Mr Scandle and Ms Jensen was to the effect that, put broadly, Mr Gulde indicated that he was acting as a cipher for Ms Margaret Pepper and/or the third respondent, Cahersiveen Farms Limited.

[10] For the sake of completeness, I should emphasise that Mr Gulde, Ms Karauna and Ms Pepper all flatly deny that the second and/or the third respondent had any

involvement at all in the dismissal of Mr Scandle and that the decision to dismiss Mr Scandle and the way in which that dismissal was effected, was exclusively the province of Mr Gulde and Ms Karauna.

Employment relationship problem

[11] As I noted in the last section of this determination, when the matter came onto my list, there were a number of exchanges between me and the representatives culminating in a telephone conference I convened on 6 June 2014 at which I determined that I wished to conduct an investigation meeting on the interlocutory issues and I identified those issues as being:

- (a) Whether the second and third respondents ought to be joined in these proceedings; and
- (b) Whether the Authority had any jurisdiction to deal with the issues between the parties.

[12] In a practical way, I decided that I wished to hear the evidence of the principal protagonists in the investigation meeting while at the same meeting giving the parties' representatives the opportunity of making submissions on the issues.

[13] At the commencement of the investigation meeting, I was at pains to emphasise to the parties and their witnesses, that the fact that I was hearing evidence about what actually happened ought not to be taken as support for the view that I had already reached a conclusion as to whether or not I had jurisdiction to deal with the claim at all. It was simply a better use of the Authority's time to approach the matter on that basis than to have two separate hearings, one dealing with the parties' submissions and then, if required, another dealing with the evidence.

[14] In preparation for the investigation meeting, the parties helpfully agreed to file and serve opening submissions and in addition, at the suggestion of Mr Yukich, evidence from the witnesses was filed and served in affidavit form.

Issues

[15] I am satisfied that the issues I need to resolve in this determination are as follows:

- (a) Does the Authority have jurisdiction;
- (b) Does the evidence support the claim in any event?

[16] I am satisfied that there is a full and final settlement between employer and employee in this matter. That much is common ground. I am also satisfied that that settlement is confidential to the parties. It follows that, as a matter of principle, I cannot be seen to be trying to unpick the terms of that settlement or inquire into any or all of the aspects of it.

[17] I had an exchange with counsel for the second and third respondents during the investigation meeting on just this point and emphasised to the parties my conviction that it was no part of my function, in considering the claim against the second and third respondents, to inquire into the basis of the settlement between Mr Scandle and the first respondent. I was satisfied I had no legal power to do that and, in any event, was equally satisfied that any such inquiry would not assist me to determine the questions at issue here as between Mr Scandle and the second and third respondents.

Does the Authority have jurisdiction to deal with the issues between the parties?

[18] Mr Yukich's argument seeking to create jurisdiction for the Authority relies on a distinction between subsections (1) and (2) of s.134 of the Act. While subsection (1) refers to parties to an employment relationship, subsection (2) is expressed in broader compass and refers simply to persons. It is suggested that the second and third respondents, both of them legal persons, are caught by subsection (2) if the evidence is that they or any of them did "*incite, instigate, aid or abet ...*" a breach of an employment agreement.

[19] Moreover, it is suggested that the various failures allegedly made by the first respondent in dismissing Mr Scandle would, taken together, or perhaps even singly, constitute breaches of an employment agreement.

[20] I pause at this point of the argument to accept the last mentioned proposition as a good statement of the law.

[21] It is good law that an unjustifiable dismissal or unjustifiable disadvantage may amount to a breach of an implied term because, as Chief Judge Colgan has often

pointed out in various judgments, a good and fair employer would comply with the legal obligations and a failure to do that is self-evidently a breach.

[22] But the real question which that submission skates over is whether there can be a claim against third parties for the breach of an employment agreement which post-dates the settlement of the claim with the principal party.

[23] Here, as a matter of fact, Mr Scandle has settled with his employer and it follows that, to adopt the language used by Mr McKechnie in his submissions, there is no extant unresolved employment issue. This is because the settlement of that employment relationship problem has already occurred.

[24] Contrary to Mr McKechnie's submissions on this point, there is no mystery in how the Authority became aware that Mr Scandle had settled his employment relationship problem with his employer; a Notice of Partial Discontinuance was filed on 5 June 2014 and the Authority referred to that settlement in its Minute of 11 June 2014.

[25] But the substantive point is well made by Mr McKechnie that without an extant unresolved employment relationship problem, it is difficult in logic to see how there can still be a live claim against other parties in relation to the same factual matrix.

[26] The employment relationship problem has been settled and so there is no employment relationship problem and without the employment relationship problem extant, I am satisfied there is no basis on which I can properly assert jurisdiction to investigate whether Mr and Ms Pepper on the one hand and their company, Cahersiveen Farms Limited, on the other may or may not have been in breach of s.134 of the Act.

[27] Even if that argument is resisted, based as it is on the settlement between the principal parties predating the inquiry into whether third parties had any culpability, the next difficulty with the argument is that it is impossible for me to ascertain whether there were in fact breaches of the employment agreement by the employer given there is a binding and confidential settlement between employer and employee which, amongst other things, apparently denies liability of the employer.

[28] Certainly, I am satisfied there is no proper basis on which I can try and unpick the events leading up to the dismissal in order to see whether there may have been incitement by third parties, precisely because the matter has been disposed of. There is a full and binding settlement and I cannot inquire into that. At best, all I have are allegations and counter-allegations.

[29] If I cannot satisfy myself there has been a breach of an existing employment agreement (and I cannot for reasons just advanced), then I cannot make a finding that a third party has incited or aided such a breach. The necessary precursor to the existence of a third party inciter is the existence of the breach in the first place by the principal party.

[30] Accordingly, I conclude that it is impossible for the Authority to adopt jurisdiction in this matter, first because I am satisfied that without an extant unresolved employment dispute, there cannot be any consideration of whether s.134(2) of the Act applies, and second because the fact of the settlement between the principal parties makes it impossible to identify there has been a breach, especially because the settlement apparently included a failure to acknowledge any liability on the part of the employer.

Is there evidence of breach in any event?

[31] Even if the arguments I advance in the previous section of this determination are not accepted, I am satisfied on the evidence I heard that there was no breach of s.134(2) of the Act by either the second or the third respondents.

[32] There was a clear dispute between Mr Scandle and Ms Jensen, his partner, on the one hand and Mr Gulde and his partner, Ms Karauna, on the other as to what happened at the dismissal meeting on 6 April 2014.

[33] First, both Mr Scandle and Ms Jensen say that the text message they received from Mr Gulde summoning them to the disciplinary meeting used the words "*I have been told*" in reference to the calling of the meeting. They assumed that Mr Gulde was saying that he had been told to call the meeting by Ms Pepper.

[34] In actual fact, Mr Gulde, who impressed me as a straightforward and honourable witness, did not deny using the words referred to, but said that he was not referring to Ms Pepper at all but to two other persons, namely Mr Scandle's former

employer and Mr Nick Pepper who is Ms Pepper's son but who has no involvement whatever in Ms Pepper's business affairs although he is in the dairy industry.

[35] So from all of that, I discern that Mr Gulde did say that he had been told to call the meeting but he had not been told to call the meeting by either the second or the third respondent.

[36] Next, Mr Scandle and Ms Jensen both say that Mr Gulde told them at the meeting that Ms Pepper had said to get rid of Mr Scandle and she wanted him off the farm in two days. Mr Gulde denied making any such statement and for the avoidance of doubt I prefer his evidence.

[37] Mr Gulde did not deny speaking to Ms Pepper prior to speaking with Mr Scandle at the disciplinary meeting, but he did deny getting any instructions from her, and he denied making the remark which Mr Scandle and Ms Jensen thought they heard.

[38] Ms Jensen remembered Mr Gulde saying that he had spoken with Ms Pepper prior to the disciplinary meeting but that contact has no significance unless I can be persuaded that Mr Gulde was given instructions by Ms Pepper.

[39] Ms Jensen also remembered Mr Gulde saying something to the effect that Ms Pepper wanted to be present at the meeting. Mr Gulde rejected that allegation completely and said he said nothing of the kind and when I had the opportunity of talking to Ms Pepper, she also confirmed that she had never suggested that she would attend the meeting. She said that she had only seen Mr Scandle on an occasional basis, hardly knew him and as she was not his employer, and there was no reason for her to attend the meeting.

[40] Ms Pepper also told me that she remembered being briefed by Mr Gulde prior to the disciplinary meeting, certainly did not give him any instructions about what to do, had no responsibility for the staff that Mr Gulde employed as that was clearly his contractual responsibility, and was only told that Mr Scandle had been dismissed after the dismissal had been effected.

[41] Again I have to say that Ms Pepper was a compelling witness and I have no reason to doubt the evidence that she gave me.

[42] On balance then, I am satisfied that Mr Scandle and Ms Jensen are mistaken in their contention that Ms Pepper or indeed Cahersiveen Farms Limited connived at Mr Scandle's dismissal and thus came within the terms of s.134 of the Act. In my judgment, what happened was that Mr Gulde and his partner, Ms Karauna, acted entirely independently, as was appropriate given they were the employer, and that the efficacy or otherwise of the dismissal rested solely with the employer, Mr Gulde and Ms Karauna, and involved no other party.

[43] This is one of those cases where the Authority is required to make an assessment of differing recollections of a critical meeting. On the one hand Mr Scandle and his partner have a view about what they heard and the contrary view is advanced by Mr Gulde and his partner, Ms Karauna. Mr Gulde and Ms Karauna have the supporting evidence of Ms Pepper who satisfied me that she had not given Mr Gulde any instructions and had not even been involved in the matter except to the extent of knowing that there was a problem. I believed her when she said that she did not know that Mr Scandle had been dismissed until after that event had happened.

[44] It follows from the foregoing analysis of the evidence I heard that even if my principled conclusions about jurisdiction are mistaken, I am satisfied there is no basis whatever on which there can be any claim by Mr Scandle against the second or third respondents because I consider that the evidence available does not support that conclusion.

Determination

[45] I am satisfied that the Authority has no jurisdiction to consider Mr Scandle's claim against either the second or the third respondents because, first, the employment relationship problem between the principal protagonists had been settled and there is no logical way in which a claim against subsequent parties can proceed without a live employment relationship problem, and second, because the fact of the settlement between employer and employee makes establishing whether there was indeed any breach of the employment relationship impossible.

[46] Moreover, I have concluded that even if I am wrong on the issue of jurisdiction, the evidence does not support Mr Scandle's claim that either the second or third respondent had any involvement in the events leading up to his dismissal.

Costs

[47] Costs are reserved, although I do note that Mr Scandle is unemployed and were the successful respondents to seek a costs award against him, which in principle they are entitled to do, issues about Mr Scandle's ability to pay would come into consideration.

James Crichton
Member of the Employment Relations Authority