

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 473
5427324

BETWEEN CHRISTOPHER MANSON
TWIGLEY TRADING AS
EASTLAND LEGAL
Applicant

A N D LEONARD JAMES LESLIE
HEMI
Respondent

Member of Authority: Rachel Larmer
Representatives: Applicant in person
Respondent in person
Investigation Meeting: On the papers
Submissions Received: 03 October 2013 from Applicant
07 October 2013 from Respondent
Date of Determination: 16 October 2013

DETERMINATION OF THE AUTHORITY

A. Mr Twigley’s removal application does not succeed.

Employment relationship problem

[1] Mr Twigley identifies in his Statement of Problem (SoP) the problem he wants the Authority to resolve as “*breach of [the respondent’s] Individual Employment Agreement and the resulting loss of legal fees.*” The SoP also refers to a draft proposed Statement of Claim (SoC) relating to proceedings Mr Twigley appears to want to pursue before the Employment Court. The cause of action identified in the SoC is “*breach of contract and negligence.*”

[2] The SoP does not provide any information about what the alleged breach of employment agreement claim relates to. The SoC refers to breaches of implied terms that Mr Hemi would act in accordance with:

- a. the Employment Relations Act 2000 (the Act) and in particular with the good faith requirements of the Act;
- b. the Lawyers and Conveyancers Act (Lawyers: Client Care and Conduct) Rules 2008 (the Client Care and Conduct Rules), and in particular with the issuing of client care letters;
- c. the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations), and in particular with the issuing of trust account receipts to clients.

[3] Mr Twigley claims Mr Hemi's actions whilst employed breached the above legislation.

[4] The SoC also claims Mr Hemi breached an express restraint in clause 14.1 of his employment agreement that he would not encourage or persuade clients with whom he had dealt during his employment to terminate or restrict their relations with Mr Twigley.

[5] The remedy sought in the SoP is removal of the matter to the Employment Court to determine at first instance. The remedies claimed in the draft proposed SoC are special damages (relating to losses Mr Twigley claims arose from Mr Hemi's alleged breaches of his employment agreement), a penalty and costs.

[6] Mr Twigley operates as a sole practitioner trading as Eastland Law in Gisborne. He employed Mr Hemi as a barrister and solicitor from 30 May to 07 October 2011 on an individual employment agreement dated 30 May 2011. Mr Hemi was summarily dismissed on 07 October 2011 for serious misconduct. Mr Hemi admits taking money directly from two clients who he had done legal work for and keeping their money for himself because he was under financial pressure.

[7] Mr Twigley seeks removal of this matter under s.178(2)(a) of the Act on the grounds that it involves an important question of law which is likely to arise other than incidentally. Mr Hemi is neutral regarding the removal application.

Issues

[8] The following issues are to be determined:

- (a) Does this matter involve an important question of law which is likely to arise other than incidentally?
- (b) If so, should the Authority exercise its residual discretion to remove the matter to the Employment Court to determine in the first instance?

Does this matter involve an important question of law which is likely to arise other than incidentally?

[9] Mr Twigley's application for removal did not identify what the alleged important question of law was. When pressed to so by the Authority, Mr Twigley records in his written submissions that the important questions of law are:

- a. *Whether a number of [sic] Respondent's alleged actions fall under the head of breach of contract or tortious negligence?*
- b. *If the alleged actions are deemed to belong to the tort jurisdiction, is there jurisdiction to hear an application made under the Act?*

[10] In terms of the first question, Mr Twigley has not filed a negligence claim with the Authority. The only claim set out in the SoP is a breach of contract claim, which the Authority clearly has jurisdiction to investigate and determine.

[11] The breach of contract claim requires the Authority to investigate and determine whether:

- a. any of the legislation identified in paragraph [2] a-c above formed part of Mr Hemi's terms and conditions of employment;
- b. if so, did Mr Hemi breach any of the statutory obligations his employment agreement imposed on him;
- c. Mr Hemi breached clause 14.1 of his employment agreement.

[12] I do not consider the issue of negligence arises in respect of any of the above questions which are to be determined. Accordingly, I find that the first question posed by Mr Twigley does not fall within the requirements of s.178(2)(a) of the Act.

[13] In terms of the second question, it does not even arise when there is no negligence claim before the Authority. It is clear the Authority has jurisdiction under s.161(1)(b) to investigate and determine matters related to a breach of an employment agreement. I therefore find that the second question also does not fall within s.178(2)(a) of the Act.

[14] Mr Twigley's failure to establish that either of the questions he posed are important questions of law that arise other than incidentally means he cannot meet the necessary ground for removal under s.178(2)(a) of the Act. Failure to do so means the Authority does not get to the point where it must consider its residual discretion as to whether or not to remove the matter.

Outcome

[15] Mr Twigley's application to remove this matter to the Employment Court to determine at first instance is declined.

Mediation

[16] The parties are directed to attend mediation.

Costs

[17] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority