IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 109
CRC 12/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for an order striking out the proceedings
BETWEEN	ROLLING THUNDER MOTOR COMPANY LIMITED Plaintiff
AND	DIANE KENNEDY Defendant

Hearing: on the papers - memoranda received 29 June, 20 July and 27 July 2010

Appearances: David Burton, counsel for the plaintiff
David Clark, counsel for the defendant

Judgment: 19 August 2010

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

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[1] The issue decided in this judgment is whether these proceedings should be struck out for want of jurisdiction.

[2] The defendant was employed by the plaintiff as general manager of its business. The plaintiff alleges that, during the period she was employed, the defendant used a BarterCard account in the plaintiff's name to purchase goods for herself and failed to reimburse the plaintiff for the cost of those goods.

[3] The plaintiff commenced proceedings in the Employment Relations Authority to recover the debt said to be owing for BarterCard purchases. The Authority struck out the proceedings on the grounds that it lacked jurisdiction to order repayment of "an unpaid loan".[1] The plaintiff has challenged that determination and seeks a hearing de novo. The defendant has responded with an application to strike out the proceeding on the grounds that the Court also lacks jurisdiction to hear and decide the matter.

Strike-out principles

[4] Counsel both relied on the summary of principles set out in *Attorney-General v Prince*[2] and approved by members of the Supreme Court in *Couch v Attorney-General.*[3]Those principles are:

> (a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.
>
> (b) The cause of action for defence must be clearly untenable.
>
> (c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.
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> (d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.
>
> (e) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation.

[5] Amplifying the principle in paragraph (b) above, in *Couch* Elias CJ and Anderson J said: "It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."[4]

[6] Although these principles have been developed in the courts of general jurisdiction, I accept Mr Clark's submission that they are equally appropriate in this jurisdiction.

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[1] CA 45/10, 3 March 2010
[2] [1998] 1 NZLR 262
[3] [2008] NZSC 45 [2008] 3 NZLR 725
[4] At [33]

[7] In deciding a challenge to a determination of the Authority, in most cases the Court may make any order which the Authority could have made. Thus, the Court's jurisdiction in this matter is derived from that of the Authority and is no wider than the jurisdiction of the Authority.

Pleaded facts

[8] The parts of the statement of claim relevant to this issue are:

> 7 During the Defendant's employment with the Plaintiff she put forward a proposal to open an account with BarterCard. BarterCard operates on the basis of using "BarterCard Trade Dollars" to purchase or sell goods or services from other businesses in the BarterCard scheme. It operates in a similar way to company credit cards.
>
> 8 The Plaintiff agreed to open the account with BarterCard.
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> 9 To make the BarterCard scheme more relevant to the Plaintiff the Defendant requested that some employees of the Plaintiff (including herself) have their own personal accounts on the Plaintiff's BarterCard account. This would allow them to make personal purchases for themselves and the employees would then reimburse the Plaintiff. The Plaintiff agreed to this.
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> 10 The Plaintiff's accountant set up an internal accounting system by opening personal debtor accounts for employees participating in the BarterCard scheme.
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> 11 The Plaintiff received a statement from BarterCard each month itemising all transactions on its BarterCard account.
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> 12 Each month the Plaintiff's accountant requested that the Defendant identify which of the expenses on the statement were her personal expenses. The expenses marked by the Defendant as personal were then charged by the Plaintiff to the Defendant's personal debtor account and the Defendant was issued with a corresponding monthly statement of that account.
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> 13 Throughout the Defendant's employment she did not dispute any of the statements of her personal debtor account.
>
> 14 The Defendant was made fully aware of the size of her personal debtor account on an ongoing basis. In addition to receiving monthly statements the Defendant had constant access to the account details in her position as General Manager.

Discussion and decision

[9] Mr Burton and Mr Clark both provided me with submissions which were detailed and thoughtful. I have derived considerable benefit from them. Without

recording their submissions here, I confirm that I have considered them fully and that I have regard to the decided cases referred to in them.

[10] The jurisdiction of the Authority is principally conferred by s161 or the Employment Relations Act 2000 (the Act). That is a lengthy section but, for the purposes of this case, the relevant parts of it are:

> **161 Jurisdiction**
>
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
>
> (a) disputes about the interpretation, application, or operation of an employment agreement:
>
> (b) matters related to a breach of an employment agreement:
>
> ...
>
> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[11] The term "employment relationship problem" is defined in s5 of the Act:

> **employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

[12] In his initial submissions, Mr Clark submitted that the alleged debt arising out of the defendant's use of the BarterCard was simply a loan, unrelated to the employment relationship. He noted that neither loans nor debts were expressly referred to in s161 and submitted that the jurisdiction in s161(1)(g) to deal with "matters about the recovery of wages or other money under s131" could not assist the plaintiff because it was limited to claims by employees. As far as those submissions went, Mr Clark was undoubtedly correct, but that does not decide the matter.

[13] For the plaintiff, Mr Burton submitted that the arrangements made by the plaintiff for use of its BarterCard were incorporated into the employment agreement between the parties and that, as a result, the debt alleged to be owing in relation to use of the BarterCard was a "term of the employment agreement" and therefore within the Authority's jurisdiction under s161(1)(a) and/or (b). In advancing this

argument, Mr Burton relied on propositions of fact not pleaded in the statement of claim and sought to draw inferences from them. He also invited me to rely on the content of a website not referred to in the statement of claim. In deciding this application, I cannot properly have regard to any of that material. It must be decided on the basis of what is pleaded and on the assumption that what is pleaded can be proved. I reject this submission.

[14] Mr Burton's alternative submission was that the plaintiff's claim to recover the alleged debt arising out of the defendant's use of the plaintiff's BarterCard was an action "arising from or related to the employment relationship" and was therefore within the scope of s161(1)(r). Mr Clark addressed this submission in his reply.

[15] One of the decisions in which the scope of the jurisdiction conferred by s161(1)(r) was considered is *Pain Management Systems (NZ) Limited v McCallum*[5], a decision of the High Court. In that case, the claim was for infringement of intellectual property rights and breach of the Fair Trading Act. The claims had been brought in the High Court and the defendant was asserting that the Authority had sole jurisdiction to determine them. In that context, Panckhurst J said:

> [22] ...To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about employment relationship problems. In the words of the definition of that concept, is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in a particular claim an employment relationship one, or is the subject-matter of the claim some right or interest which is not directly employment related at all? In this regard it may be necessary to distinguish between situations where the opportunity to breach the right or interest at stake arose in the context of an employment relationship as opposed to those where some employment right or interest is truly at stake.
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> [23] ...Where the subject matter is property rights and the claim is tortious, equitable or statutory it may be unlikely that the case is within the exclusive jurisdiction of the Authority. Put another way where the rights or interest claimed by the plaintiff do not derive from a contract of service the general jurisdiction of this Court is unlikely to be ousted.

[5] Christchurch CP72/01, 14 August 2001

[16] In another decision of the High Court involving claims in tort, *BDM Grange Limited v Parker*[6], Baragwanath and Courtney JJ expressed a similar view:

> [66] ... We express our essential agreement, at greater length, with the analysis of Panckhurst J that "relating to" in the definition of "employment relationship problem" must be read in a limited way to mean any cause of action, the essential nature of which is to be found entirely within the employment relationship itself. This would not encompass claims arising from tortious conduct even if arising between an employer and an employee, since the relationship merely provides the factual setting for the cause of action; the duty arises independently.

[17] In *Waikato Rugby Union v New Zealand Rugby Football Union*[7], Judge Shaw adopted a significantly wider construction of the expression "related to" in s161. In doing so, she had regard to the associated expression "arising from". The simple test she adopted was that an action will arise from or be related to an employment relationship if the action would not have arisen if the employment relationship did not exist.

[18] While decisions of the High Court are not binding on the Employment Court, they are deserving of considerable respect and will usually be persuasive where the issues decided are sufficiently similar. In this case, however, I prefer the wider interpretation of s161(1)(r) adopted by Judge Shaw in the *Waikato Rugby* Union case. I do so for two principal reasons.

[19] Firstly, the two High Court decisions are largely distinguishable on their facts. They both involved actions in tort and breach of statutory duty and the judgments were directed at whether the High Court's jurisdiction to hear such matters was ousted in favour of the Authority. The claim in this case is in contract. The distinction was recognised in the *BDM Grange* case where, after noting the range of specific powers to make orders in relation to contracts conferred on the Authority by s162, the Court said:

> [65] ... Parliament has not equipped the Authority with any tort equivalent to the battery of resources accorded contract claims by s162. Had Parliament intended that it have general tort jurisdiction one could reasonably have expected that the power to deal with such matters as defamation, conversion

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[6] [2005] ERNZ 343
[7] [2002] 1 ERNZ 752

> and breach of copyright, would have been given specific acknowledgement as part of the new provisions.

[20] Secondly, it seems to me that the High Court has adopted a construction of the expression “arising from or relating to” which departs further from the plain meaning of the words used than is necessary to reflect the purpose of the legislation. In particular, the limitation to actions “the essential nature of which is to be found entirely within the employment relationship itself” is, in my view, unduly narrow and deprives the statutory language of much of its intended meaning.

[21] All courts must be guided by s5(1) of the Interpretation Act 1999 which provides: “The meaning of an enactment must be ascertained from its text and in the light of its purpose.” I see nothing in Part 10 of the Act, or indeed in the Act as a whole, which requires the plain meaning of the words used in s161(1)(r) to be read down to the extent suggested in the High Court decisions. Rather, it seems to me that Judge Shaw has struck the right balance in adopting the “but for” test she propounded in the *Waikato Rugby Union* case.

[22] Applying that test to this case, the question is whether the alleged debt by the defendant to the plaintiff would have been incurred had there not been an employment relationship between the parties. In the context of a strike out application, that question must be answered on the basis of what is alleged in the statement of claim. Somewhat surprisingly, there is no express allegation to that effect. There is however, an allegation in paragraph 9 of the statement of claim that the defendant proposed that some “employees” of the plaintiff, including her, be permitted to use the plaintiff’s BarterCard and that the plaintiff agreed to this. On its face, this allegation makes a direct connection between the employment relationship and the arrangement whereby the debt is alleged to have been occurred.

[23] This connection is somewhat tenuous but I have regard to the principle that the jurisdiction to strike out a claim is to be exercised sparingly and only in clear cases. In the context of this case, it should only be exercised if it is clear that the plaintiff’s action is not one “arising from or related to the employment relationship”. That is certainly not clear. On the contrary, it is tolerably clear that the plaintiff

alleges that the defendant was permitted to use the BarterCard and thereby incur the alleged debt because she was an employee.

[24] On this basis, I find that the plaintiff's claim is within the scope of s161(1)(r) of the Act and therefore within the jurisdiction of the Authority. It follows that the Court has jurisdiction to decide the plaintiff's challenge. The application to strike out is dismissed.

Comment

[25] Had I not concluded that the plaintiff's claim as currently pleaded was within the Court's jurisdiction, I would have granted the plaintiff leave to amend its pleading rather than striking out the claim at this early stage.

[26] A good deal of counsel's submissions related to the distinction between a "loan" and a "debt". I have not dealt with this argument because it misses the point. The issue is not the particular description of the claim but the circumstances in which it arose. In particular, the issue is whether the claim is sufficiently connected to the employment relationship.

[27] This matter should now proceed in the usual way. The defendant is directed to file and serve a statement of defence within 30 days after the date of this judgment. The Registrar should then arrange a directions conference with counsel.

Costs

[28] The plaintiff is entitled to costs on this application. I fix costs at $1,200.

A A Couch
Judge

Signed at 2.30pm on 19 August 2010