IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 156
ARC 39/11

IN THE MATTER OF	an application to strike out plaintiff's additional cause of action
BETWEEN	DAVID NEWICK Plaintiff
AND	WORKING IN LIMITED Defendant

Hearing: 21 August 2012
(Heard at Auckland)

Counsel: David Neutze, counsel for plaintiff
Michael O'Brien and Courtney Walker, counsel for defendant

Judgment: 7 September 2012

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendant (Working in Limited (WIL)) seeks orders striking out one of the plaintiff's causes of action.[1] The cause of action relates to a claim of estoppel. The defendant submits that the claim is not within the Employment Court's jurisdiction and is otherwise an abuse of process. The abuse of process argument is advanced on two grounds. Firstly, that the estoppel claim was not before the Employment Relations Authority and is excluded by the limitations on the Court's jurisdiction on a *de novo* challenge created by s 179 of the Employment Relations Act 2000 (the Act). Secondly, that the estoppel claim is not based on an employment relationship.

[1] Paras 8-13 of the Amended Statement of Claim dated 9 May 2012.

Jurisdiction to strike out

[2] There is no dispute that the Employment Court has power to strike out all or part of a pleading.[2] The criteria applying to strike out applications are well accepted, and can be summarised as follows: [3]

a) It is assumed that facts pleaded are true;

b) The cause of action must be so clearly untenable that it cannot possibly succeed;

c) The jurisdiction is to be exercised sparingly;

d) The jurisdiction to strike out is not excluded where the claim includes difficult questions of law requiring extensive argument;

e) The Court should be slow to strike out a claim in a developing area of law.

[3] A claim should not be summarily struck out unless the Court can be certain that it cannot succeed.[4]

[4] The Court can strike out a pleading where it constitutes an abuse of the Court's process.[5]

Facts as pleaded

[5] On a strike out application the Court proceeds on the assumption that the facts as pleaded are true. Whether or not they can be established is an issue that will be determined at the substantive hearing. The facts set out in the plaintiff's amended statement of claim accordingly provide the basis for consideration of the present application.

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[2] High Court rule 15.1 and reg 6(2)(a)(ii) Employment Court Regulations 2000.
[3] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267;*Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
[4] *Couch* at [33].
[5] Rule 15.1(1)(d).

[6] The plaintiff was employed by the defendant company from 15 December 2009. Prior to that time he was engaged by WIL as chief executive officer of a new start-up business, Working in Visas Ltd (WIV). He did not receive any salary in this capacity but it was agreed that he would receive a 25% shareholding in the company. It was also agreed that after six months, or by earlier agreement, the parties would carry out a review of arrangements.

[7] A draft shareholding agreement was prepared, which confirmed the plaintiff's entitlement to a 25% shareholding in WIV, but it was never signed. Unbeknown to the plaintiff, WIV was incorporated on 15 December 2009. The plaintiff was not listed as a shareholder. Mr Scott Mathieson was.

[8] The plaintiff commenced employment with WIL on 15 December 2009, on an agreed salary of $180,000. He was presented with a draft employment agreement two days later. He refused to sign the draft agreement as it did not attach a job description and he took issue with a number of the proposed clauses in it.

[9] On 12 February 2010, Mr Ross Mathieson (who was a proposed investor in WIL) advised the plaintiff that he would not invest in WIL unless WIV was integrated into WIL, and that the plaintiff would need to relinquish his rights to a shareholding in WIV. On 15 February 2010 the plaintiff met with Mr Scott Mathieson and Ms Hayley Roberts, both of whom were directors of WIL. The plaintiff was told that WIV would be consolidated into WIL and that he would not be offered a 25% shareholding in WIV. However, he was verbally offered a 5% shareholding in WIL.

[10] On 17 February 2010 the plaintiff was formally offered a new role of Director of Visa and Relocate with WIL. The offer of a shareholding in WIL was reiterated. On 19 February 2010 the plaintiff sought clarification on the proposed recompense for his work with WIV prior to his employment with WIL, and the status of his chief executive role. Mr Scott Mathieson confirmed that the plaintiff would be paid for all the time he had worked, regardless of whether he stayed or not.

[11] On 23 February 2010, the plaintiff was formally offered the position of Chief Operating Officer, WIL. This role appeared to the plaintiff to be the same as the Director of Visa and Relocate staff role that he had been offered six days earlier. Mr Scott Mathieson confirmed that, regardless of whether the plaintiff accepted the role, he would be recompensed for the work he had performed on a pro rata basis, based on a salary of $180,000 per annum.

[12] The following day the plaintiff advised WIL that he needed to resolve a number of matters before he could consider a new role, and sought clarification on certain issues. Mr Scott Mathieson and Ms Roberts confirmed that a recompense payment for the plaintiff's work with WIV would be paid whether or not he accepted a new role with WIL.

[13] A further meeting took place on 26 February 2010 and the plaintiff was advised that the Chief Operating Officer role with WIL could not now be offered to him, due to WIL's financial position. He was told that his last day with the company was that day. The plaintiff received a letter, dated 26 February 2010, giving him formal notice of redundancy with immediate effect. Mr Scott Mathieson advised the plaintiff that he was theoretically owed $111,180.37 for the work he had performed without "formal remuneration", namely in the period prior to his employment with WIL. A payment of $85,810 was offered to the plaintiff by way of settlement, subject to him agreeing to a six month restraint of trade. Further discussions took place on a without prejudice basis. No agreement was reached.

[14] It appears that Mr Ross Mathieson invested in WIL around 26 March 2010. On 13 April 2010 WIL paid the plaintiff the sum of $10,766.49 net (being the after tax amount of $15,476.64 (gross)), comprising the shortfall in salary paid to the plaintiff between 15 December 2009 and 28 February 2010, interest, and two weeks' notice.

[15] The plaintiff contends that he was unjustifiably dismissed for redundancy on 26 February 2010, and that his dismissal was both procedurally and substantively unjustified. It is said that there was no consultation about the prospect of redundancy, that the offers of redeployment were not genuine, and that he was not

given an adequate opportunity to consider the offers of redeployment before they were withdrawn. It is said that WIL breached its agreements with the plaintiff. It is pleaded, under the heading "estoppel", that WIL promised the plaintiff that he would be paid a "recompense" payment of six months' salary, whether he accepted a new position with WIL or not, that the plaintiff relied on this promise to his detriment and that WIL reneged on the promise. It is pleaded that it is unconscionable to allow WIL to resile from this promise, and that the plaintiff accordingly has a cause of action in estoppel against WIL for the $90,000 he should have been paid.

Scope of Court's jurisdiction on *de novo* challenge

[16] Section 179(1) of the Act provides:

> A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

[17] Section 187(1)(a) provides that the Court has exclusive jurisdiction:

> to hear and determine elections under section 179 for a hearing of a matter previously determined by the Authority, whether under this Act or any other Act conferring jurisdiction on the Authority.

[18] Counsel for the defendant submit that the plaintiff's estoppel claim was not a matter before the Authority in terms of s 187 and, accordingly, cannot be pursued in this Court. In this regard it is said that the estoppel claim was not argued in the Authority. Rather, the plaintiff relied (unsuccessfully) on an argument that he was an employee during the initial period of 15 June 2009 until 15 December 2009 as the basis for seeking payment for that period. Counsel pointed out that the plaintiff is not challenging the Authority's finding that he was not in an employment relationship with either WIL or WIV between those dates.

[19] In the course of argument, counsel for the defendant accepted that it was sufficient (in terms of the requirements of s 187) for the plaintiff to point to some evidence or reference in the pleadings or submissions that might otherwise support the claim now being advanced. It was also accepted that the fact that a separate cause of action in estoppel was not pleaded in the Authority was not fatal.

[20] The plaintiff submits that, although he did not pursue a separate estoppel cause of action in the Authority, the Court's role in a *de novo* challenge is not restricted to the claim that was investigated and determined by the Authority. As counsel for the plaintiff (Mr Neutze) observed, the estoppel claim concerns matters that were before the Authority. The amended statement of problem refers to the recompenses offered by WIL (which underpin the estoppel claim). And it is plain that the plaintiff sought payment for the first six months of his relationship with WIL in the Authority.

[21] The Court's jurisdiction in relation to challenges against determinations of the Authority was considered by the full Court in *Sibly v Christchurch City Council*.[6] The full Court held that:[7]

> … a broad approach to the meaning of "the matter" in s 179(1) is to be taken. If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

[22] The full Court considered that adopting a narrow construction of s 179(1) would be to reintroduce restrictions of the nature of s 95 of the Employment Contracts Act 1991 (ECA), which generally prevented the Court from considering (on appeal) issues, explanations or facts that had not been placed before the Employment Tribunal.[8]

[23] The analysis in *Sibly* was subsequently endorsed (with one qualification) by a differently constituted full Court in *Abernathy v Dynea New Zealand Ltd (No 1)*.[9] The Court held that the reference in *Sibly* to "any other matter" in respect of which the Authority has jurisdiction was too broad, and that the scope of a challenge to the Court was limited to a matter which was in fact before the Authority.[10]

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[6] [2002] 1 ERNZ 476.
[7] At [47].
[8] At [46].
[9] [2007] ERNZ 271.
[10] At [33].

[24] In *Bourne v Real Journeys Ltd*[11] Judge Couch referred to *Abernathy* and held that the Court could hear and decide matters which were not actually determined by the Authority, provided they were part of the Authority's investigation.[12]

[25] Issues relating to the alleged promise of payment were before the Authority and were part of its investigation, although it concluded that they fell outside the scope of its jurisdiction as the plaintiff and the defendant were not in an employment relationship in the period 15 June to 15 December 2009. While the plaintiff pursued claims in contract and quantum meruit before the Authority, instead of a claim in estoppel for this payment, I accept Mr Neutze's submission that the issue relating to the promise of payment did not need to have been pursued as a separate cause of action to comprise a matter before the Authority. Such an interpretation would be contrary to the purpose of the Act to avoid technicalities,[13] and would trump form over substance.

[26] Additional causes of action, not advanced in the Authority, can be pursued on a *de novo* challenge, provided the "twin statutory requirements"[14] (of having been questions before the Authority (s 179) and having been brought within time (ss 114 and 142) are met and the claim is within the overall jurisdiction of the Court. There is, accordingly, no objection to re-couching a legal claim, provided the matter itself was before the Authority.

[27] I conclude that while the plaintiff did not pursue a cause of action in estoppel before the Authority that does not, of itself, amount to an abuse of process in terms of pursuing such a claim on a *de novo* challenge in this Court. The offer of payment for the six month's work was a matter before the Authority and can be pursued in a re-formulated claim in the Court.

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[11] [2011] NZEmpC 120.
[12] At [13]. See too *Patel v Pegasus Stations Ltd* [2011] NZEmpC 129 at [23] per Judge Ford. And also *Clark v The Board of Trustees of Dargaville High School (No2)* AC 3A/09, 20 April 2009, where the Chief Judge held that although claims in tort for defamation and tortious breaches of duty of care are not justiciable in the Authority or Court, he was not prepared to strike out the impugned causes of action on the basis that they were "discernibly employment relationship problems and justiciable as personal grievances if they meet the twin statutory requirements of having been questions before the Employment Relations Authority (s 179) and having been brought within time (s 114)" at [18].
[13] *Sibly* at [46].
[14] *Clark* at [18].

Estoppel jurisdiction?

[28] Counsel for the defendant submits that while estoppel has been acknowledged as a legitimate cause of action outside the employment jurisdiction,[15] it does not operate as a cause of action in employment law. It is further submitted, by way of alternative argument, that even if estoppel can be pleaded in this jurisdiction, it must either arise from or relate to the employment relationship.[16] In relation to the alternative argument, it is said that the plaintiff's estoppel claim meets neither qualifying criteria. The primary focus of the defendant's argument is on the fact that during the period of work for which the plaintiff seeks recompense, the plaintiff was not in an employment relationship with the defendant.

[29] The plaintiff submits that the cause of action relates to the employment relationship as it centres on promises made to the plaintiff in the context of restructuring discussions and redeployment offers while he was employed by the defendant, and which he relied on to his detriment in considering his employment options.

[30] The Authority (and the Court) enjoy exclusive, although limited, jurisdiction. The precise location of the delineating line between the employment institutions and the courts of ordinary jurisdiction has been the subject of ongoing consideration.

[31] The starting point for any analysis of the Court's jurisdiction is the empowering statute. In *Attorney-General v Benge*[17] the Court of Appeal determined whether proceedings for breach of New Zealand Police employment contracts could be brought in the Employment Court. While the focus of the argument was on whether the Police Act 1958 excluded the Employment Court's jurisdiction under the ECA, the Court made the following general comments which are instructive:[18]

> … In general terms, the Employment Contracts Act removed a right of access to the "ordinary courts" and in particular the High Court. The Employment Court is thus a creature of statute. It does not have the inherent

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[15] *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 at 86 (CA).
[16] Section 161(1)(r).
[17] [1997] ERNZ 109 (CA).
[18] At 113-114.

> jurisdiction of the High Court. The assumption of jurisdiction by the Employment Court must therefore always be referable to a given statutory provision. In the event that the Employment Court has jurisdiction it is then empowered to adjudicate the rights of the parties under such employment agreements.
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> …
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> …the appropriate approach to a question of statutory construction as to the jurisdiction of the Employment Court on employment contracts (and one which is consistent in any event with the canons of construction) is to recognise first the generality of the Employment Court's jurisdiction; and then secondly, to require a clear expression of legislative intent in recognising any subtraction from the specialist jurisdiction. It is not so much that there is an onus of proof on the proponent of a suggested derogation from the Employment Court's general jurisdiction, for the question is one of construction, not proof. Rather, the usual principle should obtain that the plain words of the legislature should obtain, unless such would produce a manifest absurdity. Mere inconvenience in having "fragmented" jurisdiction is not enough. At the end of the day, the principle is that Parliament speaks through statutes, and the question for this Court is the proper construction of the relevant legislation. Demarcation problems between statutes routinely arise in areas such as employment law. Whilst that may be an argument for having an absolutely exclusive jurisdiction, if this subject area ever fell to be reviewed by Parliament, it is not a present argument for reading down plain parliamentary language where a specialised arrangement for a given employment context has been created by Parliament.

[32] In the leading decision on jurisdiction under the ECA, the Court of Appeal in *Conference of the Methodist Church of New Zealand v Gray*[19] considered the jurisdiction of the Court under s 3 (which gave the Tribunal and Court exclusive jurisdiction to hear and determine proceedings "founded on" an employment contract) and s 104 of that Act, which provided:

> 104 Jurisdiction of Court—
>
> (1) The Court shall have jurisdiction—
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> …
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> (f) To hear and determine any question connected with any employment contract which arises in the course of any proceedings properly brought before the Court:
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> (g) To hear and determine any action founded on an employment contract:

[19] [1996] 1 ERNZ 48 (CA).

[33] Lord Cooke found that "an action for the tort of inducing breach of contract is not in the natural and ordinary meaning of words, or in standard legal classification, an action founded on the contract. Proof of a breach of contract is an essential ingredient in establishing the tort, but it is on the alleged tort that the action is founded."[20] The Court of Appeal held that the Employment Court did not have jurisdiction to hear such a tort claim under s 104 or, in that case, under s 73, which provided for torts to be pleaded in relation to strikes or lockouts.

[34] The Employment Relations Act replaced the ECA, and brought with it an expanded jurisdiction to resolve employment relationship issues between employers, unions and employees. It is notable that the language in s 161(1) is broader than the "founded on" formulation under the ECA. Section 161(1) confirms that the Authority has exclusive jurisdiction to "make determinations about employment relationship problems generally," including in relation to the specific examples set out in that section. An employment relationship problem includes "a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship" (s 5). This language is repeated in s 161(1)(r), which provides jurisdiction for "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)".

[35] It is apparent, from the inclusive rather than exclusory introductory wording of s 161(1), that employment relationship problems are not limited to matters relating to or arising out of an employment relationship. This is reflected in the non-exhaustive definition of the term contained within s 5. It follows that employment relationship problems are not limited, under the Act, to contractual causes of action.[21]

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[20] At 53.

[21] *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90, [2010] ERNZ 290, at [34]. *Clark v NCR (NZ) Corporation* [2006] ERNZ 401, a judgment relied on by the defendant, which suggests that a separate cause of action in estoppel is not within the jurisdiction of the Court, was decided under the more restrictive wording of the ECA.

[36] Counsel for the defendant submitted that s 189 creates a limited equitable jurisdiction, and that the Court's equitable jurisdiction flows from that provision.[22] It is submitted that while s 189 confers a limited equitable jurisdiction, it does not allow the Court to make orders inconsistent with an individual employment agreement. Mr O'Brien also pointed to concerns relating to the enforcement of pre-contractual promises made without consideration.[23] He submitted that it was implicit in the plaintiff's estoppel cause of action that a variation was being sought to his terms and conditions, which the Court is prevented from doing.

[37] However, as Mr Neutze observed, the focus of the plaintiff's claim is on promises made during a restructuring process by the plaintiff's employer, that it would allegedly be unconscionable for the defendant to resile from, and in respect of which the Court (in the exercise of its equity and good conscience jurisdiction) should grant a remedy. Mr Neutze emphasised that the plaintiff did not seek payment for the period before employment based upon the subsequent employment agreement. He submitted it would not be a variation of the employment agreement to prevent a party from resiling from a promise made as an integral part of the defendant's restructuring process. I accept that it is arguable that if the plaintiff can make out his equitable claim in the restructuring context then monetary (or other) relief may flow and this need not involve an impermissible variation to his employment agreement.

[38] Ordinary civil courts have an equitable jurisdiction. Such jurisdiction is statutorily reflected in ss 16 and 17 of the Judicature Act 1908, and s 34 of the District Courts Act 1947. There is no equivalent provision in the Employment Relations Act.

[39] Section 189(1) of the Act provides that:

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[22] Referring to *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd* (1987) ERNZ Sel Cas 172 (CA) at 175; *Maritime Union of New Zealand v C3 Ltd* [2010] NZEmpC 60 at [11]-[15]; the dissenting judgment of Thomas J in *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 581-582 and *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116 (CA) at 123-124.
[23] Forrie Miller "Equitable Estoppel" (paper presented to New Zealand Law Society The Law of Obligations – "Contract in Context" Intensive Conference, July 2007) 51 at 57.

> In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act...as in equity and good conscience it thinks fit.

[40] Section 189 reflects a Parliamentary intent that the Court is to adopt a distinctive approach in deciding cases relating to employment relationships coming before it, to support the underlying purposes of the Act. The reference to jurisdiction contained within s 189 is linked to the way in which cases coming before the Court are determined.

[41] The jurisdiction of the Authority/Court has been examined in the High Court and this Court. Conflicting views have been expressed in both jurisdictions. The High Court has held that the employment institutions do not have jurisdiction in equity or in tort.[24] Counsel for the defendant referred to *Caughey Preston Trust Board v Houlding*,[25] where the Chief Judge of the Employment Court stated that an "estoppel is not a cause of action, certainly in employment law. Rather, it may at best be a defence …". However, this was in the context of an oral interlocutory judgment and consideration, on an *ex parte* basis, of a statement of claim pleading a single cause of action in promissory estoppel. In other cases, it has been held that the Court does have jurisdiction in equity but not in tort.[26]

[42] A separate but related point of difference has also emerged, regarding whether the Court has jurisdiction only when the essence of the claim is related to or arising from the employment relationship as the High Court has found[27] or simply when the claim would not have arisen if the employment relationship did not exist.[28]

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[24] *B D M Grange Ltd v Parker* [2005] ERNZ 343 at [74]. See also *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP 72/01, 14 August 2001 at [23].
[25] AC 32/06, 2 June 2006 at [11].
[26] See, for example, *Warner* at [37]; *Tu'itupou v Guardian Healthcare Operations Ltd* (2007) 4 NZELR 1 where Judge Perkins referred to the *Gaunt* decision at [57] as setting out the modern approach on estoppel; *Clark v NCR* at [11], where Judge Perkins stated that a cause of action based on estoppel was not within the jurisdiction of the Court if separately and discretely pleaded but that, when combined with the relief sought for breach of contract, jurisdiction is preserved even under the ECA.
[27] *Pain Management* at [22]. The Court in *B D M Grange* appears to adopt a more restrictive approach, requiring that the "essential character" of the claim be "found entirely within the employment relationship itself" at [66].
[28] *Rolling Thunder Motor Company Ltd v Kennedy* [2010] NZEmpC 109 at [18]; *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 at [52].

[43] In *B D M Grange* a full Court of the High Court concluded that Parliament did not intend to confer jurisdiction on the Court for claims in tort or equity, holding that:[29]

> We have reasoned that Parliament's purpose cannot be to shift to the Authority and the Employment Court the responsibility to deal with claims in tort (outside those covered by s 99) or claims in equity (outside those covered by s 100) when it has refrained from providing tools equivalent to those furnished by s 162 for contract cases.

[44] The primary focus of the Court's analysis in *B D M Grange* was whether the Employment Court has jurisdiction in relation to tort claims. With respect to equitable claims, the Court emphasised "the sharp antithesis between s 162 (conferring extensive contract jurisdiction) and s 100 (which by conferring only narrow injunction power suggests the exclusion of significant equity jurisdiction)."[30] The specification of the Court's power in relation to injunctions to prevent a strike or lockout was thus said to indicate that Parliament did not intend to confer equitable jurisdiction in respect of employment relationship problems generally but only in this narrow sense. However, it is apparent that the underlying purpose of s 100 is to ensure that the Court, rather than the Authority, has jurisdiction in relation to strike and lockout injunctions. Otherwise jurisdiction might be thought to have been conferred on the Authority under s 161(1)(l),[31] which confers jurisdiction concerning strikes and lockouts on the Authority. Viewed in this light, s 100 is not necessarily inconsistent with the Authority having equitable jurisdiction in relation to employment relationship problems.

[45] It is apparent that the analysis in *B D M Grange* focuses on the way in which a claim is categorised, namely in contract, tort or equity. The Court rejected a submission advanced on behalf of the defendant employee that the Court should go beyond the pleading and consider the substance of the conduct at issue. The Court held that if the allegedly tortious conduct did not fall within the Authority's exclusive

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[29] At [74].
[30] At [88].
[31] Section 161(1)(l) gives jurisdiction to the Authority in relation to: "any proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction)" corresponding with ss 99 and 100.

jurisdiction then it did not matter whether the defendant's claim was based on the employment relationship or not.[32]

[46] Section 161 confers exclusive jurisdiction on the Authority/Court to make determinations about employment relationship problems generally. This provides the platform for considering where the jurisdictional boundary line lies. Tort actions are expressly excluded: s 161(1)(r). There is no express exclusion of actions in equity.

[47] The way in which a claim is formulated or the label given to it cannot, as a matter of principle and in light of the statutory scheme, be the determining factor in considering whether a particular complaint can or cannot be pursued within this jurisdiction. Support for this proposition can be found in *Bowport Ltd v Alloy Yachts International Ltd*,[33] a judgment not referred to in *B D M Grange* and which post-dated the High Court's judgment in *Pain Management*.

[48] In *Bowport* Elias CJ considered a claim for breach of a confidentiality agreement which was part of an employment agreement. The Court found that such a claim was within the jurisdiction of the Employment Tribunal. The plaintiff had, however, lodged its claim in the High Court. Plaintiff's counsel submitted that the breach of confidence claim could be re-pleaded in equity to make clear that the basis of the claim was not the employment agreement.[34] The Court rejected that approach finding:[35]

> The language of ss 3 and 104(g) of the Employment Contracts Act and s 161 of the Employment Relations Act indicates that the form of action is not decisive. *The question is not whether the cause of action is classified as being brought in contract or equity, but whether the claim is "founded" on [now related to or arising out of] the employment contract. That turns on the essential elements of the claim.*

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[32] *B D M Grange* at [62].
[33] [2004] 1 NZLR 361 (HC). This judgment is discussed in *Waikato Rugby Union* at [38], cited by counsel for the defendant.
[34] At [93].
[35] At [94] (emphasis added).

[49] The Court held that the claim, however formulated, was one founded on the employment contract. As such, the proper jurisdiction for the claim was the employment institutions.

[50] Similarly in *Aztec Packaging Ltd v Malevris*[36] Associate Judge Bell considered claims for breach of fiduciary duty and repayment of money allegedly stolen by an employee. The alleged conduct occurred during the employee's employment. The Court rejected an argument that the plaintiff could plead its way around s 161 by not claiming on the employment agreement. The Court held:[37]

> The facts giving rise to an employment relationship problem may give rise to a variety of causes of action, which may fall under different heads of the law of obligations. For example, the misuse of confidential information received from an employer in the course of employment might: be in breach of an express or implied term of the employment agreement, might be in breach of the statutory duty of good faith in s 4(1) of the Employment Relations Act, might be in breach of an independent duty of confidence in equity, and might also be considered to be a form of tort. … *Where there are concurrent causes of action available for one employment relationship problem, it cannot be the case that the Employment Relations Authority has jurisdiction only for some causes of action, but not for others. If a given matter is within the exclusive jurisdiction of the Employment Relations Authority, the Authority has the jurisdiction to hear the matter, no matter how the cause of action is formulated. To allow otherwise would defeat the Authority's exclusive jurisdiction.*

[51] Such an approach is also consistent with the statutory focus on the substance of a claim rather than its form: ss 189 and 219, and the underlying purpose of s 161, which is designed to allow resolution of the employment relationship problem generally. As the High Court in *B D M Grange* acknowledged: "[w]ithin their respective jurisdictions the Authority and the Employment Court must have the tools required to perform their important tasks."[38] The point is reflected in the second reading of the Employment Relations Bill, where the Minister of Labour said:[39]

> The provisions in this part, for those who look at them, have been carefully thought through and have been designed to achieve the overall objectives set

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[36] [2012] NZHC 243, (2012) 10 NZELC 79,003.
[37] At [12] (emphasis added). While expressed to be following *B D M Grange* (at [22]), it is doubtful whether the Court's approach is consistent with that judgment's emphasis on separate causes of action and separate legal categories which can essentially plead around s 161 in the way the Court in *Aztec Packaging* held was impermissible.
[38] At [64].
[39] (9 August 2000) 586 NZPD 4480 (emphasis added).

> out in clause 156. I am sure those who come to use these provisions in the legislation will understand that this is one of the radical changes to try to provide a new method to be able to resolve problems that arise in the workplace that are consistent with the overall objectives of good faith, mutual trust, and confidence. *The marrying, if one likes, of the new dispute resolution's ways with the old ways of the common law through the adversarial system does provide a comprehensive set of arrangements that will enable the resolution, in everyone's best interests, of the infinite variety of matters that come before the parties.*

[52] The limit on the jurisdiction of the Authority and Court comes not from the restriction of claims by their legal category (except with regard to tort) but from the fact that they must arise from or relate to an employment relationship. Different approaches have emerged in relation to this issue. In *Rolling Thunder,* Judge Couch held:[40]

> … 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.

[53] However, in *Pain Management*, the High Court held:[41]

> 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 an employment relationship problem. 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 the employment relationship as opposed to those where some employment right or interest is truly at stake.

[54] On an unsuccessful application for leave to appeal to the Court of Appeal, the Court of Appeal cast doubt on the "but for" test expressed in *Rolling Thunder*, stating that:[42]

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[40] At [17], adopting *Waikato Rugby Union*.
[41] At [22]. See too *B D M Grange* at [66] which postdates the judgment in *Waikato Rugby Union.*
[42] *Kennedy v Rolling Thunder Motor Company Ltd* [2010] NZCA 582, (2010) 8 NZELR 232 at [12].

> We are by no means satisfied that the "but for" test applied by the Judge is appropriate when considering the application of s 161(1)(r) of the ERA … particularly in view of the approach in High Court cases …

[55] I respectfully adopt the approach set out by Panckhurst J in *Pain Management*, requiring that the essence of the claim (not the entire claim) be one related to or arising from an employment relationship. However, I accept Mr Neutze's submission that in the circumstances of this case it would not make a material difference whether the "essence" or the "but for" test applied.

[56] On the facts as pleaded, the promises relied on were made while the plaintiff was employed by the defendant and formed part of the defendant's process of "consultation" prior to and on terminating the plaintiff's employment. He was offered a number of alternative roles during the course of this process, and was told (in the context of these discussions) that he would be recompensed for the work he had performed prior to 15 December 2009 on a pro rata basis based on a $180,000 salary irrespective of whether he decided to accept an offer of alterative employment. It is said that the plaintiff relied on, and that the defendant intended him to rely on, the promise when considering whether to accept the alternative position. In the event, he was dismissed for redundancy on 26 February 2010 before he had provided a response to the redeployment offer.

[57] Counsel for the defendant submitted that the essence of the plaintiff's claim is payment for six months when he was not an employee. However, there is strength in Mr Neutze's submission that the essence of the claim as pleaded relates to promises made to the plaintiff by his employer during, and related to, the restructuring/redundancy process, and on which the plaintiff is said to have relied, to his detriment.

[58] For the purposes of the application currently before the Court, I conclude that the essence of the claim, on the facts as pleaded, relates to or arises out of an employment relationship problem.[43] It follows that the defendant's alternative argument as to abuse of process must also fail.

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[43] Per s 161, and as defined in s 5.

Result

[59] I find that this Court has jurisdiction to consider claims in equity provided the claim arises from or relates to an employment relationship so engaging the exclusive jurisdiction under s 161 to make determinations about employment relationship problems. In this case, the plaintiff's estoppel cause of action is properly before the Court in terms of ss 179 and 187 and, on the facts pleaded, is based on an employment relationship problem.

[60] The defendant's strike out application is dismissed.

[61] The defendant sought orders requiring further particularisation of the plaintiff's claim in the event that the cause of action complained about remained extant. I accept that further particularisation is required to put the defendant squarely on notice as to the claim it has to meet. The plaintiff must, within 14 days of the date of this judgment, file and serve an amended statement of claim pleading the material facts on which he relies, including reliance on the promise/s said to have been made, how the plaintiff is said to have resiled from such a promise/s, and the detriment said to have been suffered by the plaintiff as a result of his alleged reliance.

[62] Costs are reserved.

Christina Inglis
Judge

Judgment signed at 2pm on 7 September 2012