

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** B&H Design Limited  
Applicant

**AND** Helen Whiting  
First Respondent

Savante Advertising (NZ) Ltd  
Second Respondent

**REPRESENTATIVES** Clayton Luke Counsel for Applicant  
Mark Lawlor Counsel for First Respondent  
Glenn Finnigan Counsel for Second Respondent

**MEMBER OF AUTHORITY** Dzintra King

**INVESTIGATION MEETING** On the Papers

**DATE OF DETERMINATION** 17 April 2007

DETERMINATION OF THE AUTHORITY

The parties agreed that the matter could be determined on the papers.

The applicant, B&H Design, has brought proceedings against Helen Whiting, an ex-employee, as first respondent, and her new employer, Savante Advertising (NZ) Ltd, as second respondent. The applicant seeks compliance orders and penalties against both respondents. The compliance order sought against Savante is an order directing it to cease employing the first respondent, Ms Whitehead.

The sole matter for decision in this determination is whether the Authority has jurisdiction to make the compliance order sought against Savante.

The applicant says that Savante has breached s 134 (2) Employment Relations Act 2000 by negotiating with and subsequently hiring Ms Whitehead; and that by doing so Savante is "a person who incites, instigates, aids or abets any breach of an employment agreement." A compliance order is sought to require Savante to cease acting in breach of s 134 (2) and the applicant says the Authority has jurisdiction to make such an order. The second respondent says the Authority does not have jurisdiction.

On 5 April 2007, after both parties made their written submissions, a Full Court of the Employment Court issued a judgment that clearly resolves the jurisdictional issue: *Credit Consultants Debt Services NZ Ltd v David Wilson and EC Credit Control Ltd*, unrep, Colgan CJ, Travis J, Shaw J, Wellington, WRC 9/07, 5 April 2007.

In that case, CCDS claimed that ECCC incited, instigated, aided and abetted breaches of Mr Wilson's employment agreement. The applicant sought interim, interlocutory and permanent injunctions against both respondents. In the instant case, it is a compliance order that is sought. At para 10 the Court stated:

*If the plaintiff were to seek a compliance order against the second defendant ...we would conclude that the Employment Relations Authority is not empowered to make such an order against a former employee's new employer or other legal entity requiring that person to comply with the employment agreement between the former employer and the former employee. Section 137... does not encompass this situation. A new employer or legal entity in the circumstances of ECCC in this case cannot be said, under subs (1), to have not observed or complied with any provision of Mr Wilson's employment agreement with CCDS.*

The Court went on to say that s 134 (2) permitted CCDSA to bring a penalty action against ECCC for inciting, instigating, aiding or abetting a breach of the employment t agreement. At para 16 the Court held that:

*The plaintiff cannot claim damages against the second respondent in the Employment Relations Authority or in the Employment Court because it does not have a cause of action in breach of an employment agreement against ECCC. It was not a party tot hat agreement or indeed in any contractual relationship with the plaintiff. Any claim for damages against ECCC would be in tort or in equity but would not be founded on the employment agreement. ...Any claim for damages by CCDS against ECCC would have to be brought in the courts of ordinary jurisdiction and pursuant to a cause of action that is not justiciable in either the Employment Relations Authority or this Court.*

I include the references to damages claims because B&H Design is seeking damages against Savante.

The Full Court also noted that CCDS could have no cause of action in contract against ECCC in contract because there was an absence of privity between the two companies. Further, the Court discussed s 134 as a cause of action that might be related to interlocutory relief and said:

*That section does not, however, constitute a statutory obligation to not breach employment agreements. Rather, it provides for a statutory penalty for what the common law considers to be breach of contract (employment agreement). Finally, even it could be said that there was a substantive cause of action open to the second defendant as claimed, its remedy could only be in tort for the civil wrong of breach of statutory duty. ... a civil proceeding for a breach of statutory duty (a tort) is not justiciable in the Employment Court and ... not in the Employment Relations Authority.*

*... it is clear that if CCDS seeks more than a penalty against ECCC, it will have to issue proceedings against that other company in the courts of ordinary jurisdiction.*

The applicant's claim in the instant case is for a compliance order to enforce a statutory obligation. The second respondent says that a breach of a statutory obligation is tortious and therefore the Employment Relations Authority has no jurisdiction.

It will be readily evident from the Full Court's decision that it in agreement with the position taken by the Second Respondent, Savante.

Any issue of costs arising from this matter will be dealt with once other issues between the parties have been heard and determined.

Dzintra King  
Member  
Employment Relations Authority