Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 14
5438416

	BETWEEN	B Applicant
	A N D	PROFESSOR HARLENE HAYNE, Vice Chancellor of UNIVERSITY OF OTAGO Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney, Counsel for Applicant Barry Dorking, Counsel for Respondent
Investigation Meeting:	On the papers, with additional information provided on 30 January 2014
Submissions Received:	17 and 24 January 2014 from Respondent 24 January 2014 from Applicant
Date of Determination:	31 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, B, claims he was unjustifiably disadvantaged by being given a final written warning which relied on information unlawfully obtained contrary to an order of the District Court.

[2] The University disputes the claim and says it acted lawfully and fairly. The University also contends the claim cannot proceed as it requires the Authority to determine issues outside its jurisdiction.

[3] In a telephone conference held on 21 November 2013 the parties agreed the question of jurisdiction be determined as a separate preliminary issue. They also agreed the determination be based on written submissions and an investigation meeting was not required.

Background

[4] By way of background I paraphrase Mr Cranney's submission. He says the evidence will establish the District Court issued a suppression order in relation to certain information. One of the University's managers was present in Court and wrote the information down. He then asked the Court Registry whether he could disclose the information to the University. He was told to get legal advice, which he did. He was advised the suppressed information could be disclosed to the University and that occurred. The University then acted on the suppressed information and B received disciplinary sanctions.

[5] The University asserts the application should be struck out as the Authority has no jurisdiction to determine two questions which must be decided in order to ascertain whether or not the warning was justifiably issued. They are whether the employer's lawyer behaved improperly and whether the suppression order was breached.

The Submissions

[6] The following should be accepted for what it is – a summation of the parties submissions.

[7] For the University it is submitted the jurisdiction of the Authority emanates from s.161 of the Employment Relations Act 2000 (the Act) and, in particular, subsection (1)(r) which provides the Authority has exclusive jurisdiction to make determinations about employment relationship problems.

[8] That means it is necessary the essence of the claim, but not the entire claim, be related to or arising from an employment relationship as defined by s.5 of the Act.

[9] It is submitted that while the employer's actions impact on the employment relationship, the essence of the actual problem relates to or arises from the alleged breach of the suppression order and the alleged conflict of interest.

[10] It is then submitted the District Court's jurisdiction in respect to suppression arises from the Criminal Procedures Act 2011 and the Employment Court has held that Act *confers … no jurisdiction of any kind on the Employment Court* (*Gapuzan v. Pratt & Whitney Air NZ Services* [2013] NZEmpC 158 at para.[27]). It is further submitted a breach is a criminal offence for which remedies are provided under applicable legislation. If, therefore, B genuinely believes a suppression order has been breached, his remedy lies in the District Court and not the Authority. Not till the respondent, or the manager who took the notes, is convicted in the District Court will B have a proper basis to claim their actions were not those of a reasonable employer.

[11] With respect to the alleged conflict of interest, it is submitted that if there is a conflict it is a matter between the respondent, its manager and lawyer. B has no standing to complain and if he did it would be a matter to be determined by the Law Society under the Lawyers and Conveyancers Act 2000 and its attendant rules.

[12] With respect to the conflict B has chosen to amend the pleadings in an attempt to remove the grounds of objection.

[13] With respect to the suppression order, Mr Cranney says one issue is whether a fair and reasonable employer could obtain, or agree to receive, the suppressed information in the way that occurred here. Another is whether having obtained the information by the means described a fair and reasonable employer could rely on it to discipline its employee.

[14] Mr Cranney goes on to submit many breaches of employment rights can span both criminal and civil liability. A simple example is an assault by an employer on an employee at work. That clearly has both civil and criminal consequences and the Authority is quite entitled, indeed obliged, to make appropriate conclusions. As an example he cites *Northern Distribution Union v. Sherildee Holdings Ltd* [1991] 2 ERNZ 675 at 680. That was a case where a breach of the Machinery Act 1950 give rise to an unjustified action.

[15] Mr Cranney goes on to note the University implicitly accepts the Authority can determine issues relating to the breach of the suppression order if they have employment consequences (paragraph 20 (a) of the University submission) before it asserts the facts alleged here neither arise from, nor are related to, B's employment.

[16] Mr Cranney argues the last assertion is incorrect and, here, there were clear employment consequences.

[17] In respect to the argument concerning the Criminal Procedures Act it is argued

> *The answer to that is that the Authority in exercising its own jurisdiction is quite entitled if necessary to determine subsidiary or ancillary issues relating to other statutes - there is express jurisdiction at clause 1(1)(b) of schedule 2 of the Employment Relations Act for this.*

Determination

[18] With respect to the lawyer's behaviour B has chosen to amend the pleadings so as to remove the grounds of objection. In any event, I advise the parties I agree with Mr Dorking's argument in respect to standing and would not be of a view to take the matter further. Rightly or wrongly the advice was given and acted upon. If the claim proceeds, it is the actions of the University which must be judged (s.103A) and not the advice.

[19] Turning to the question of whether or not an inquiry into the alleged breach of a suppression order precludes the Authority from hearing the substantive claim. On this I prefer Mr Cranney's position and in doing so note the recent and detailed analysis of the Authority's jurisdiction by Judge Bell in *The Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24.

[20] The Authority's jurisdiction is conferred by s.161 of the Employment Relations Act 2000.

[21] As Judge Bell noted at paragraph 12 there are some *matters which are particular to employment law* and *In these cases the Authority is required to apply specific statutory provisions. ... Examples are s 161(1) ... (e) ...* and *no question usually arises of some other body (except the Employment Court) hearing these cases.*

[22] Judge Bell goes on to comment that there are also provisions in s.161(1) under which the Authority may decide general law. In such situations questions of competing jurisdiction should be determined with an inquiry as to *whether the case involves a determination about an employment relationship problem or whether it falls within one of the particular heads listed in s 161(1). If the case is outside both a Court may hear it.* Otherwise it is the Authority's.

[23] This is a personal grievance claim. A personal grievance claim is an employment relationship problem and expressly within the Authority's jurisdiction in accordance with s.161(1)(e).

[24] The fact its determination may involve issues of general law does not alter the situation as is stated by Judge Bell and illustrated by the example referred to by Mr Cranney.

[25] That such issues of general law may include the question of whether evidence was lawfully obtained has also been confirmed and in this regard I refer to *Ravnjak v. Wellington International Airport Ltd* [2011] NZEmpC 31. That case involved an employer reliance on evidence which, according to the provisions of s.52 of the Private Investigators and Security Guards Act 1974, was gathered unlawfully. The provisions of the Private Investigators and Security Guards Act, an Act over which neither the Authority nor Employment Court has jurisdiction, influenced the outcome of an employment case.

[26] For the above reasons I conclude the Authority has jurisdiction to consider B's claim.

Suppression

[27] The District Court prohibited publication of all details relating to B's identity and the offending. Suppression is granted where the circumstances of a case outweigh the principle of open justice. Such circumstances exist where there is a real risk the administration of justice would be frustrated or rendered impractical (*R v Patterson* [1992] 1 NZLR 45 (HC) at p50).

[28] To nullify the effect of the District Court's order by now naming B would appear to be both illegal and frustrate the administration of justice. It would therefore be prudent to apply the same restriction to this determination, at least until counsel have an ability to comment, and I choose to do so of my own volition.

[29] I therefore order B's identity be suppressed on an interim basis. The order will stand until it can be revisited at an investigation of the substantive claim.

Conclusion and Costs

[30] The Authority has jurisdiction to consider B's claim. The application it be struck out is declined.

[31] Costs are reserved though I express the view the parties should avoid additional effort and expense and deal with the issue as part of the costs consideration that will follow determination of the substantive claim.

M B Loftus
Member of the Employment Relations Authority