

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 229
3008911

BETWEEN POSSUM BOURNE
 MOTORSPORT 2015 LIMITED
 Applicant

A N D PAUL HAYTON
 First Respondent

A N D BRYAN HAYTON
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Dench, Counsel for Applicant
 Melanie Swarbrick, Counsel for First Respondent
 Grant Litchfield, Counsel for Second Respondent

Investigation Meeting: On the papers

Submissions Received: 25 May, 21 and 29 June 2017 from Applicant
 13 and 30 June 2017 from First Respondent
 15 and 29 June 2017 from Second Respondent

Date of Determination: 01 August 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Possum Bourne Motorsport 2015 Limited (PBM) employed Mr Paul Hayton and his brother Bryan Hayton, who are the respondents in this matter.

[2] The Haytons say that the Authority does not have jurisdiction to investigate or determine PBM's claims against them because the claims PBM has made originate from a Sale Agreement entered into by PBM and the second respondent, Mr Bryan

Hayton. They say this is a commercial matter that needs to be dealt with by the ordinary courts.

[3] In its Statement of Problem filed on 28 April 2017, PBM makes the same claims against each respondent, namely that each respondent breached their respective employment agreements and that each respondent also breached their statutory duty of good faith to their employer, PBM.

[4] PBM seeks damages from each respondent arising from their respective alleged breaches of the applicable employment agreements. PBM also claims that penalties be imposed on each respondent for each of their respective breaches of the applicable employment agreements and for the alleged breaches of the respondents' statutory duty of good faith.

[5] PBM carries on business in Pukekohe providing services for performance motor vehicles. The second respondent, Mr Bryan Hayton, is a director and shareholder of Supreme Motorsport Limited (SML) which employed him (Bryan) and his brother, Paul. SML was placed in liquidation on 15 December 2015.

[6] SML was previously called "*Possum Bourne Motorsport Limited*" and until 09 November 2015 carried on business as "*Possum Bourne Motorsport*".

[7] As a result of the financial difficulties SML was facing, on 09 November 2015 PBM purchased the assets of Possum Bourne Motorsport from SML in accordance with the terms of a Sale Agreement. The purchase included all of the assets, inventory and trading name of the Possum Bourne Motorsport business.

[8] As part of the purchase, SML agreed to change its name to allow PBM to use the name "*Possum Bourne Motorsport Limited*" and SML agreed to transfer a licence from Peggy Bourne (Possum Bourne's widow) to PBM so it was legally entitled to use the Possum Bourne name.

[9] In return, as part of the sale transaction, PBM agreed to re-employ selected SML employees, which included both of the Hayton brothers. PBM also took over the leases on the two buildings from which SML had operated its business in Pukekohe.

[10] In accordance with the sale agreement, PBM took over the Possum Bourne Motorsport business with effect from 09 November 2016. Possum Bourne Motorsport continued to operate from the same business premises it had always done in Pukekohe doing the same work for the same customers while employing some of the same employees.

[11] After the purchase PBM changed its name to Possum Bourne Motorsport 2015 Limited and SML changed its name to Supreme Motorsport Limited.

[12] Suffice to say difficulties subsequently arose in the employment relationship between Mr Bryan Hayton and his employer, PBM.

[13] On 18 May 2016, Mr David Thexton and Ms Amanda Morgan (who are the directors and shareholders of PBM) met with Mr Bryan Hayton in Pukekohe to discuss his employment issues. Bryan's brother Paul Hayton was also present at the meeting.

[14] During the meeting Mr Bryan Hayton expressed that he no longer wanted to continue working for PBM and he indicated a desire to buy the business back from PBM. Mr Bryan Hayton asked Mr Thexton and Ms Morgan to provide him with some options to enable him to buy his former business back off PBM.

[15] PBM put a buy back proposal letter to Mr Bryan Hayton on 23 May 2016. On 27 May 2016, Mr Bryan Hayton rejected the proposals put forward by PBM for buying the business back and advised that he would be resigning with effect from 30 May 2016. Mr Bryan Hayton also made a counterproposal regarding PBM's business.

[16] On 28 May 2016, Mr Thexton and Mr Bryan Hayton met at PBM's business premises during which time Mr Bryan Hayton pointed out items which he identified as his personal property and which he told Mr Thexton he (Mr Bryan Hayton) wanted to uplift over the weekend. Mr Thexton claims that Mr Bryan Hayton told him that he did not wish to do anything to harm PBM's business which he (Mr Thexton) accepted.

[17] Under the terms of the Sale Agreement Mr Hayton's personal property was not part of the sale and purchase transaction. Mr Thexton and Ms Morgan had been wanting Mr Bryan Hayton to remove his personal property from PBM's business

premises and had been strongly encouraging him to do that for a number of weeks. Mr Bryan Hayton had personal property still on PBM's business premises because he had been living on the premises while operating SML.

[18] Over the weekend of 28 and 29 May 2016, Mr Bryan Hayton and others assisting him attended PBM's business premises and removed most of the equipment, tools and inventory that PBM needed to run its business. The removal of items included various vehicles, memorabilia, personal property of PBM directors and a compressor left by a previous tenant.

[19] PBM claims that Mr Bryan Hayton (or others assisting him) also rendered inoperable or damaged the remaining PBM's property so that PBM could not continue its business.

[20] PBM further claims that on 28 May 2016, Mr Bryan Hayton changed the ownership and number plates of two of its vehicles into his personal name and that during the weekend of 09 and 10 July 2016, Mr Bryan Hayton had two containers removed from an open area outside PBM's business premises and a third container removed during the weekend of 23 and 24 July 2016. PBM claims it owned at least some if not all of the contents of the containers the Hayton brothers had removed.

[21] PBM claims that its customers were contacted by the Haytons who told them (PBM's customers) to collect their property from PBM's premises because PBM was no longer operating its business.

[22] PBM says that the Hayton brothers used PBM's property to set up their (the Haytons') own performance motorsport business which competed with PBM by using property taken from PBM, by servicing PBM's key customers, and by employing employees they enticed away from PBM.

[23] On 11 October 2016, Bryan and Paul Hayton incorporated a company to run the new business called Speed Hub Motorsport Limited but PBM claims that they were already set up and operating their business prior to that date.

[24] PBM's breach of employment agreement claims rely on an alleged breach of the express obligation contained in clause 1 of the Haytons' employment agreements which stated:

You will, during your employment:

Diligently and faithfully serve PBM and promote and protect its interests at all times; and ...

[25] PBM also relies on the breach of an implied obligation of fidelity under the employment agreement.

[26] PBM claims that Mr Bryan Hayton took steps to remove PBM's property and failed to return it and acted with the intention of disabling PBM from carrying out business as a performance motorsport business. PBM says that breached his employment agreement and duty of good faith.

[27] PBM claims that Mr Paul Hayton assisted his brother to take property over the weekend of 28 and 29 May 2016 by preparing items to be uplifted, by failing to warn PBM of what his brother Bryan had planned, by contacting PBM customers to advise that PBM was no longer in business and asking the customers to collect their property, setting up with his brother and encouraging PBM's existing customers to move their business to his brother's new business, and encouraging PBM's existing employees to transfer to the Haytons' new business which was set up to compete with PBM.

[28] PBM also claims that Mr Paul Hayton acted together with his brother with the intention of helping Mr Bryan Hayton to take PBM's property and business without payment and with an intention of disabling PBM from carrying out its operations as a performance motorsport business. PBM says these actions breached Mr Paul Hayton's employment agreement and his duty of good faith.

[29] Mr Bryan Hayton says that the Authority does not have jurisdiction because the allegations made by PBM are founded on an allegation of conversion or theft of property. Mr Bryan Hayton claims that he personally owned the items he took from PBM's premises.

[30] Mr Bryan Hayton says that ownership of the assets in issue will need to be determined by the referring to the terms of the Sales Agreement he entered into with PBM. Mr Bryan Hayton says that has nothing whatever to do with the employment relationship between the parties.

[31] Mr Litchfield on behalf of Mr Bryan Hayton submits that the employment relationship in this case merely provides part of the context in which the opportunity

arose for Mr Bryan Hayton to remove assets from PBM's premises so the claims that PBM is raising do not directly arise out of the employment relationship itself.

[32] Mr Litchfield asks that PBM's Statement of Problem be struck-out or alternatively that the investigation of PBM's claims against Mr Bryan Hayton be stayed until "*a Court of competent jurisdiction has determined what, if any, assets belonging to PBM have been unlawfully removed or converted by Mr Bryan Hayton*".

[33] Mr Paul Hayton supports his brother Bryan's claim that the Authority does not have jurisdiction to investigate any of the claims raised by PBM in its Statement of Problem. Ms Swarbrick on behalf of Mr Paul Hayton submits that the critical question for the Authority in determining jurisdiction is an assessment of whether PBM's claim is an employment relationship issue or is instead the subject matter of some right or interest which is not directly employment-related. Ms Swarbrick submits it is the latter.

[34] Ms Swarbrick relies on the Court of Appeal decision in *JP Morgan Chase Bank NZ v Lewis*¹ and the High Court decision in *Payne Management Systems (NZ) Ltd v McCallum*² in support of her submission that the claims which PBM wants the Authority to investigate arise out of the Sale Agreement only and have nothing to do with the parties' employment relationship.

[35] Mr Dench submits on behalf of PBM that its claims are clearly founded in and based on the employment relationship and that the parties were still in an employment relationship at the time the various causes of action arose.

[36] Mr Dench relies on the Statement of Problem which identifies a breach of express and implied terms of the Haytons' employment agreements, breaches of good faith and penalty claims.

[37] Mr Dench submits that the Authority has exclusive jurisdiction to make determinations regarding a breach of an employment agreement and it follows that it has exclusive jurisdiction to impose a penalty for a breach of good faith obligations under the Employment Relations Act 2000 (the Act) and/or an employment agreement.

¹ [2015] NZCA 255.

² HC, Christchurch, CP72/01, 14 August 2001.

[38] Mr Dench further submits that the Authority (and Employment Court) is able to award damages for loss (one of the remedies claimed by PBM in the Statement of Problem) caused by breach of an employment agreement, even though the loss that may have occurred after the employment ended.

[39] Mr Dench relies on the Employment Court decision in *Rooney Earthmoving Ltd v McTeague*³ and the damages decision of the Employment Court in this matter at [2012] ERNZ 273 to support that proposition.

[40] Mr Dench says that even though a single set of events which give rise to claims over which the employment institutions have jurisdiction may also be sufficient to simultaneously give rise to other (non-employment related) causes of action over which other institutions (such as the High Court) have jurisdiction, that possibility does not void the Authority's jurisdiction over the matters which the Employment Relations Act (the Act) expressly states are to be within the Authority's exclusive jurisdiction.

[41] Mr Dench submits that there is no artificial limit on the Authority's jurisdiction that would preclude it from determining ownership of the property which PBM claims it owned and which it alleges the Haytons dealt with in breach of the obligations in their employment agreements and the statutory duty of good faith in the Act.

[42] Mr Dench submits that the need for the Authority to determine incidental matters when determining an employment relationship claim is a routine occurrence and that the proof of ownership of the property which PBM claims it owned is just one element of the Authority's investigation in terms of its investigatory process for determining the breach of employment agreements and breach of good faith claims.

[43] Mr Dench says that PBM's claims that Mr Paul Hayton's activities involved him actively taking steps to harm his employer's (PBM's) business while he was still employed are in breach of the express and implied duties under his employment agreement and in breach of his statutory duty of good faith. These are claims which fall within the Authority's exclusive jurisdiction.

³ [2009] ERNZ 240.

[44] Mr Dench distinguishes the *Payne Management* decision on the basis that the employer in that case did not claim a breach of an employment agreement but rather relied on claims for tort of conversion, breach of copyright, breach of confidence, breach of the Fair Trading Act 1986 and a restraint against the registration of a patent.

[45] The issue for the High Court in *Pain Management* was whether any of the causes of action before it fell within the Authority's exclusive jurisdiction in s.161(1)(r) of the Act. This is a generally worded provision which confers jurisdiction on the Authority for "*any other action, ... arising from or relating to the employment relationship ...*".

[46] The *Payne Management* decision was applied by the High Court in *BDM Grange Ltd v Parker*⁴ which held that an employment relationship problem means "*any cause of action, the essential character of which is found entirely within the employment relationship itself*".

[47] The High Court in *BDM Grange* recognised that some factual circumstances may give rise to concurrent causes of action in both the High Court and employment institutions. Mr Dench says that is the case here.

[48] However, PBM does not rely on s.161(1)(r) to give rise to the Authority's jurisdiction to investigate its current claims. PBM instead relies on a breach by the Haytons of their respective employment agreements, in particular a breach of an express term of faithfulness contained in clause 1 of the employment agreements and of their implied duty of fidelity.

[49] PBM therefore relies on s.161(1)(b) of the Act to confer jurisdiction to The Authority to determine its breaches of an employment agreement claims. On that basis Mr Dench submits that neither the *Payne Management* nor the *JP Morgan* Court of Appeal decisions apply.

[50] In *Hibernian Catholic Benefit Society v Hagai*⁵ the High Court held that an alleged breach of a fiduciary duty claim involved an employment relationship problem over which the employment institutions had exclusive jurisdiction. However the Court of Appeal in *JP Morgan* subsequently disagreed with the High Court's analysis in *Hibernian*.

[51] The Court of Appeal in *JP Morgan* said that in applying the *Payne Management* test, it was of the view that the essence of the employer's claim in *Hibernian* involved the dishonest theft of an employer's money and that an employment relationship was not a necessary component of the many causes of action that could have been asserted against the employee.

[52] In *JP Morgan* the Court of Appeal's view was that the employment relationship merely created the opportunity for the situation involving the alleged dishonest theft of an employer's money, so the Court of Appeal's view was that the employer could have maintained its cause of action in the High Court for a breach of fiduciary duty.

[53] Mr Dench submits that it does not follow that the Court of Appeal would have disallowed a concurrent claim in the Authority for breach of an employment agreement because it did not have that specific issue before it so it could not have considered, or purported to overrule, the situation where concurrent proceedings are brought in the employment jurisdiction and the ordinary Courts, arising from the same set of circumstances but which involve different sets of pleadings, depending on each forum relating to the respective jurisdiction in which proceedings have been filed.

[54] Mr Dench submits that there is no rule that prevents a cause of action being pleaded in the Authority when a different cause of action might be able to be pleaded in the ordinary Courts arising from the same set of circumstances as those which have been set out in a Statement of Problem filed with the Authority.

[55] Mr Dench says that the fact that Mr Paul Hayton has filed Authority proceedings against PBM (which include personal grievance claims) means that the Authority will already be reviewing the circumstances which are in issue in terms of PBM's claims against the Hayton's, as part of investigating and determining Mr Paul Hayton's personal grievances.

[56] It would be artificial for the Authority to be able to investigate the very events that PBM relies on for its claims but only in the context of Mr Paul Hayton's personal grievance claims. The removal of property by Mr Bryan Hayton affected the way in

⁴ [2006] 1 NZLR 353.

⁵ [2014] NZHC 24.

which PBM responded to Mr Paul Hayton when he reported to work the day after that had occurred and PBM's subsequent actions.

[57] Mr Dench relies on the Employment Court decision in *Edminstin v Sanford Ltd*⁶ as an example where the employment institutions, once seized of jurisdiction, had the ability to investigate and determine all issues that required determination without being restricted to conventional employment issues.

[58] The *Edminstin* case involved a compliance order application by Mr Edminstin against his former employee to enforce part of a s.149 Record of Settlement agreement under the Act. The dispute arose from Mr Edminstin's claim that he had the right to "collect" his "marks", which are a navigational record of or leading to oyster beds and other relevant seabed features which could be used for the harvesting of oysters.

[59] Mr Edminstin claimed that Sanford was not legally entitled to use this information for itself so he sought Sanford's deletion of the "marks" information from its on-board computer system. Mr Edminstin succeeded with his claims.

[60] In the course of determining the substantive matter, the Employment Court in *Edminstin* had to address intellectual property issues and investigate historical custom and practice in the Bluff oyster industry to determine the existence or otherwise of an alleged implied term that Mr Edminstin would exclusively own his own marks, as an aid to the Employment Court interpreting the meaning of the terms contained in the s.149 Record of Settlement.

[61] Ms Swarbrick seeks to distinguish *Edminstin* on the basis it involved ownership issues which were traced back to an express term in Mr Edminstin's individual employment agreement.

[62] Ms Swarbrick says that the fact that the parties were in an employment relationship and that an employment relationship problem developed out of the commercial relationship which also existed between PBM and Mr Bryan Hayton does not convert PBM's claims, which Ms Swarbrick categorises as purely a commercial issue, into an employment issue.

⁶ [2017] NZEmpC 70.

[63] I consider that PBM's claims directly and essentially concern the employment relationship that it had with the Hayton brothers. PBM is claiming breaches of express and implied terms in the employment agreement together with a breach of the good faith provisions in the Act.

[64] The parties were in an employment relationship at the time the cause of action arose. The alleged actions occurred on PBM's business premises which the Haytons only had access to as a result of the employment relationship.

[65] The Authority's investigation into whether or not the Haytons were involved in the unlawful removal of PBM's property from PBM's business premises while they were still in an employment relationship with PBM will involve a factual investigation, one aspect of which will be whether or not PBM has established on the balance of probabilities ownership of the specific items of property it alleged were unlawfully removed from its premises.

[66] I do not accept that the need for the Authority to potentially determine ownership of assets sold pursuant to a commercial Sale Agreement does not mean that the claims PBM against the Hayton's regarding breaches of their employment agreements and duties of good faith do not directly arise from the employment relationship or no longer fall within the Authority's exclusive jurisdiction.

[67] The claims made by PBM require the Authority to investigate and determine the Haytons' legal obligations (both contractual under their employment agreements and statutory under the Act) which are matters that I am satisfied arise directly and essentially from their employment relationship with PBM.

Outcome

[68] PBM has discharged its burden of establishing on the balance of probabilities that the Authority has jurisdiction to investigate PBM's claims against the Hayton brothers as set out in PBM's Statement of Problem.

[69] Accordingly, Mr Bryan Hayton's claim to have these proceeding struck-out does not succeed. I am also not prepared to issue a stay of these proceedings as Mr Bryan Hayton requested. The ownership of the property Mr Bryan Hayton admits removing from PBM's premises will one of the matters to be investigated and

determined as part of the Authority's overall investigation into PBM's substantive claims.

Costs

[70] PBM as the successful party is entitled to a contribution towards its actual costs. However, I consider that costs should be adjourned *sine die* pending the outcome of the substantive proceeding.

Rachel Larmer
Member of the Employment Relations Authority