IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 175
3023695

	BETWEEN	SEFAR FILTER SPECIALISTS LIMITED Applicant
	AND	PAUL BENNETT Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Rachael Chandra, Counsel for the Applicant Respondent in person
Investigation Meeting:	30 May 2018
Additional documents received:	30 May 2018 from Applicant None from Respondent
Determination:	31 May 2018

DETERMINATION OF THE AUTHORITY

A. The Authority does not have jurisdiction to enforce the Record of Settlement between Sefar Filter Specialists Limited and Paul Bennett.

B. Sefar Filter Specialists Limited's claim is dismissed.

C. There is no award of costs.

Employment Relationship Problem

[1] Paul Bennett was employed by Sefar Filter Specialists Limited (Sefar) on 8 February 2017 as a Customer Service Officer. On 26 June 2017 Mr Bennett's employment was terminated following an investigation by Sefar into theft.

[2] Mr Bennett and Sefar entered into a Record of Settlement (ROS) on 4 July 2017. Sefar contends that Mr Bennett has breached Clause 2.2 of the ROS relating to the repayment of the monies he allegedly stole. It seeks a compliance order, contractual interest and legal costs.

[3] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination were:

a) Is the Record of Settlement enforceable?

b) If so, should a compliance order be made?

c) Should either party contribute to the costs of representation of the other party?

Background

[5] On 12 June 2017, whilst Mr Bennett was away from work, Sefar discovered that Mr Bennett had changed a number of its invoices. Particularly, he had changed Sefar's bank account to his personal bank account. This resulted in him receiving an amount of $10,764.92 from Sefar's clients.

[6] On 15 June 2017, Sefar met with Mr Bennett to raise the allegations and to advise him that it was undertaking an investigation. He was suspended at this time. The following day Sefar made a complaint of theft to the Police.

[7] On 22 June 2017, Sefar met with Mr Bennett to hear his explanation. At this meeting Mr Bennett said he was told that Sefar would not pursue its complaint with the Police if he signed an agreement to repay the money they said he had stolen. Mona Albina, Sefar's Human Resource Manager, denied saying this. She said Mr Bennett was told that Sefar could pursue civil action if he did not sign an agreement to repay the money. Ms Albina's evidence is supported by the contemporaneous notes taken at the time of the meeting. However, it is noteworthy that Sefar did not pursue its police complaint following the execution of the ROS.

[8] On 23 June 2017, Mr Bennett was sent a letter that detailed Sefar's investigation findings. The letter asked him to attend another meeting on 26 June 2017 to respond to these matters.

[9] On 26 June 2017 the parties met. At that meeting Mr Bennett's employment was terminated. The parties agreed to enter into a ROS in relation to the monies alleged to have been stolen by Mr Bennett.

[10] On Friday 30 June 2017 Sefar emailed Mr Bennett the ROS. The email required him to sign the ROS and return it to Sefar no later than 5 July 2017. There was no recommendation to seek legal advice and Mr Bennett said he did not obtain any advice before signing the agreement.

[11] The record of settlement was dated 4 July 2017. The material terms were:

> 1. Arrangements prior to and on termination
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> 1.1 Paul's employment terminated on 26 June 2017 (Termination Date). Paul acknowledges and agrees that the amount of $10,764.92 is due and payable to the Company by him as a debt (Debt).
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> 1.2 The Company will pay Paul his salary up to and including the Termination Date in the normal manner.
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> 1.3 Following the Termination Date, Paul would otherwise have been entitled to receive a payment in respect of outstanding, accrued (but untaken) holiday entitlement for the period up to and including the Termination Date. Pursuant to clause 6.5 of Paul's Contract, $500 of this accrued amount (Deduction) shall not be paid to Paul on termination of his employment and shall instead be deducted from what would otherwise have been his final pay and shall be applied to satisfy, in part, the Debt. The remainder of the Debt shall be paid by Paul to the Company in accordance with the terms of this agreement.
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> 2. Payment
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> 2.1 Subject to the terms of this agreement, the Company agrees, subject to applicable law and/or any decision of any law enforcement agency to prosecute Paul, not to pursue Paul for recovery of the of the Debt (other than as specified under this agreement and/or to enforce the terms of this agreement) in consideration of him making repayment(s) to the Company to satisfy in full the Debt owed to the Company. In that regard the Deduction is deemed to have been paid by Paul to reduce the Debt owed and the remaining balance of $10,264.92 (exclusive of interest) shall be paid by Paul to the Company in accordance with the repayment plan at clauses Error! Reference source not found. or 2.3 below (as applicable). (Sic)
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> 2.2 Unless clause 2.3 applies, Paul shall, within 3 working days of the settlement date for the sale of his house at 1/34 Cambridge Terrace, Papatoetoe (House), pay the Company the sum of $10,264.92 from the sale proceeds in order to repay in full the Debt.
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> 2.3 Should an unconditional agreement for the sale of the House not be agreed by 31 August 2017 (and in respect of which the settlement

date is no later than 29 September 2017), Paul shall instead pay the sum of $10,264.92 as follows:

2.3.1 by 102 of equal weekly instalments of $100, in respect of which each instalment shall be received by the Company from Paul by no later than 4.00pm of each Thursday of each relevant week with the first payment commencing on or before 7 September 2017 (or 7 November 2017 if Paul has not commenced new employment on or before 7 September 2017); and

2.3.2 by a final payment of $64.92 on, or by no later than, 22 August 2019 (or 22 October 2019 if Paul did not find new employment on or before 7 September 2017).

3. Security Interest

3.1 Paul, as security for the payment of the outstanding Debt and the performance of his obligations under this agreement:

3.1.1 grants to the Company a specific Security Interest as that term is defined under the Personal Property Securities Act 1999 (PPSA); and

3.1.2 grants to the Company a Security Interest in all of Paul's present and after-acquired property, and all of Paul's present and future rights in relation to any personal property.

[12] After execution of the ROS by the parties, Sefar forwarded the ROS to Mediation Services for sign-off by a Mediator under s 149 of the Act. The ROS records the Mediator explained the effect of sections 148A, 149(1) and (3) to the parties and that he was satisfied that they understood the effect of these sections.

[13] On 29 September 2017 the sale of Mr Bennett's house settled. Mr Bennett did not repay the sum of $10,264.92 to Sefar.

Issue One: Is the Record of Settlement enforceable?

[14] The Authority's power to make compliance orders is contained within s 137 of the Act. Section 137(2) empowers the Authority to require a party to comply with certain provisions, orders, determinations, directions or requirements. The power may be exercised where, among other cases, there has been non-compliance with any terms of settlement.

[15] The ability of the Authority to order compliance with the agreed terms of settlement is subject to there being compliance with s 149 (3).[1]

[16] Section 149 provides:

> (1) **Where a problem is resolved**, whether through the provision of mediation services or otherwise, any person—
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> (a) who is employed or engaged by the chief executive to provide the services; and
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> (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—
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> may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.
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> (2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—
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> (a) explain to the parties the effect of subsection (3); and
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> (b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.
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> (3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—
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> (a) those terms are final and binding on, and enforceable by, the parties; and
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> (ab)the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and
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> (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.
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> (3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.
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> (Emphasis added)

[17] While Section 149(3) provides that mediator signed-off agreements are final, binding and enforceable by the parties, this does not prevent the Authority from inquiring into the enforceability of the terms of an agreement.[2]

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[1] Employment Relations Act, s 151.

[2] *8I Corporation v 8I Limited & Anor* [2017] NZEmpC 69 at [48].

[18] For the reasons that shall follow I am satisfied that the Record of Settlement is not enforceable by the Authority under s 149 (3).

No Employment Relationship Problem

[19] Pursuant to s 149 (1) a person who fulfills the criteria listed may, at the request of the parties to the problem, sign agreed terms of settlement. The word "problem" is not defined. However, I am satisfied that, in the context of s 149, it means an employment relationship problem as defined by s 5 of the Act. This meaning is consistent with:

a. The principal object of the Act, namely to build productive employment relationships.

b. The role of the Authority to act as a specialist investigative body with "the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities".[3]

c. The Authority's jurisdiction under s 161 to make determinations about "employment relationship problems", including compliance orders under section 137.[4]

d. The common law. The Court of Appeal in *JP Morgan Chase Bank NZ v Lewis* confirmed that the Authority and the Employment Court do not have exclusive jurisdiction to determine all claims or problems that arise out of the employment relationship, only those that "directly and essentially [concern] the employment relationship".[5] The Court considered that where the employment relationship was not a necessary component of the available cause of action, this indicated that the essence of the claim was not employment related and should not be regarded as falling within the Authority's exclusive jurisdiction.[6]

[20] In *The Hibernian Catholic Benefits Society v Hagai*, a case similar to that currently before the Authority, the Plaintiff sued to recover money stolen by an

[3] Employment Relations Act, s 157.
[4] Employment Relations Act, s 161(1)(n).
[5] At [95].
[6] At [97].

employee in the course of her employment.[7] It was alleged that the employee had used her knowledge and control of the plaintiff's accounting systems to divert funds into bank accounts controlled by her husband and herself. When considering that decision the Court of Appeal in *JP Morgan* indicated that it disagreed with Associate Judge Bell's finding that the Authority had jurisdiction to hear the claim:

> [95] We do not agree with this reasoning. It effectively treats all issues that arise between employer and employee as exclusively within the Authority's jurisdiction because of the existence of that relationship. We do not think that can have been Parliament's intention when it passed the Act. In accordance with the definition in s 5 and "employment relationship problem", must relate to or arise out of an employment relationship. We consider this means that the problem must be one that directly and essentially concerns the employment relationship.
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> …
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> [101] A claim such as that brought against Ms Hagai would gain nothing from being advanced in the Authority: no employment relations expertise is required to deal with a claim seeking the recovery of stolen money, and there is no prospect that, to the extent that the facts disclose an employment relationship problem, it could be resolved. Further, the result of the judgment was to deny the plaintiff access to the special procedure provided for summary judgments in the High Court, in respect of a substantial sum plainly owing, a claim very appropriately the subject of "strict procedural requirements". There is nothing in the Act that justifies ousting the jurisdiction of the ordinary courts in such a case. In the result we consider the case was wrongly decided. It cannot assist the respondent's argument here.

[21] *JP Morgan* and *The Hibernian* were recently considered by the Employment Court in *Performance Cleaners All Property Services Wellington Ltd v Chinan*.[8] That case was also similar to the present case in that the Applicant employer alleged, inter alia, that the Respondent employee had misappropriated the Applicant's funds by withdrawing funds from its bank accounts to which she was not entitled. The Court was required to consider whether the essence of the case was that the Respondent breached the terms and conditions of her employment agreement or whether the cause of action was more properly that of conversion, misappropriation or another relevant cause of action in equity and/or tort.[9] The Court concluded that the substance of the claim was that the Respondent had engaged in deliberate wrongful conduct on multiple occasions, which included dishonesty. The essence of the claim was not

[7] The Hibernian Catholic Benefit Society v Hagai [2014] NZHC 24.
[8] [2017] NZEmpC 152.
[9] At [86].

employment-related. The employment relationship merely provided the factual setting for the causes of action.[10]

[22] Having carefully considered the foregoing cases, and the facts relevant to the present case, I am satisfied that s149 (3) has not been complied with in that the nature of the problem that was resolved by the parties in the ROS was not an employment relationship problem. The "problem" that Sefar resolved through the ROS, and which it now asks the Authority to enforce, arose from alleged fraudulent activity by Mr Bennett. Namely, the diversion of funds from Sefar to Mr Bennett's bank account. Whilst the breach arose in the context of an employment relationship, it did not directly and essentially concern the employment relationship.

[23] On the foregoing basis, as s149 (3) has not been complied with in that there was no employment relationship problem, the Authority does not have jurisdiction to order compliance with the agreed terms of settlement. This finding confirms the oral indication that I provided to the parties at the investigation meeting.

Additional Comment

[24] For completeness, even if I had found I had jurisdiction to enforce the Record of Settlement, I would not have found that Mr Bennett had breached Clause 2.2 of that agreement as claimed by Sefar.

[25] Clause 2.2 required Mr Bennett to pay the sum of $10,264.92 to Sefar from the sale proceeds of his house *unless clause 2.3 applies*. Clause 2.3 applied in circumstances where an unconditional agreement for the sale of the house was not agreed by 31 August 2017 and in respect of which the settlement date was no later than 29 September 2017.

[26] By minutes dated 8 February 2018 and 20 February 2018, Mr Bennett was directed to provide a copy of the sale and purchase agreement, or any other documentation, showing the date his property went unconditional. He did not comply with this direction.

[27] During the investigation meeting Mr Bennett said he did not know when the agreement went unconditional. However, he confirmed he did have a copy of the sale

[10] At [90]-[92].

and purchase agreement that was readily available. He agreed to provide this to the Authority by 5 pm 30 May 2018. Mr Bennett failed to provide the agreement.

[28] In the absence of the sale and purchase agreement, I viewed emails exchanged between Mr Bennett and Ms Albina. Unfortunately these do not assist with fixing a date when the agreement went unconditional. However, an email dated 15 September 2017 from Mr Bennett to Ms Albina states "*going forward we have a offer on the house that is getting some of the legal details sorted now*." It is more likely than not that the agreement went unconditional on or after this date.

[29] On the foregoing basis, as an unconditional agreement was not agreed by 31 August 2017 then Mr Bennett did not have to repay the sum of $10,264.92 in a lump sum. Rather, he was required to make weekly instalments of $100 in the manner set out in Clause 2.3 of the Agreement. There was no allegation made in the Statement of Problem that Mr Bennett has breached this clause. This will be a matter that the parties can address in a different forum.

Costs

[30] Sefar was unsuccessful in its claim. Mr Bennett was self-represented and incurred no legal costs. In those circumstances I make no award of costs.

Jenni-Maree Trotman
Member of the Employment Relations Authority