IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 461
3055653

	BETWEEN	LYNSEY FRY First Applicant
		CORRECTIONS ASSOCIATION OF NEW ZEALAND INC Second Applicant
	AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Vicki Campbell
Representatives:	Sam Houliston for Applicant Renee Butler for Respondent
Investigation Meeting:	On the papers
Submissions Received:	17 May and 14 June 2019 from Applicant 7 June 2019 from Respondent
Determination:	6 August 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem lodged in the Authority on 7 March 2019 Ms Fry and the Corrections Association of New Zealand Inc. (CANZ) make various claims against the Chief Executive of the Department of Corrections (DOC) in relation to events during and following a riot which occurred on 1 June 2013.

[2] The statement of problem sets out a number of wide ranging claims both actual and in the alternative as follows:

(i) On or about 1 June 2013, and as a result of a prisoner riot which occurred at the Spring Hill Correctional Facility (SHCF), the respondent breached clause 6.2.1 of the Department of Corrections Frontline Staff (Non-Management) and the Corrections Association of New Zealand (CANZ) collective employment agreement for frontline staff, which was in force between 15 May 2012 and 30 June 2013 (the CEA); and/or

(ii) The respondent failed or neglected to provide and/or maintain a safe place of work at SHCF for the applicant, both prior to and during the riot and in doing so breached the obligations it owed to the applicant under the Health and Safety in Employment Act 1992 (HSEA) which was in force at the time of the 1 June 2013 riot; and/or

(iii) The respondent neglected or failed to provide and/or maintain a safe place of work when the applicant returned to work following the riot, land in doing so breached obligations it owed to the applicant under both the HSEA and, from 4 April 2016, the Health and Safety at Work Act 2015 (HSWA); and/or

(iv) In the alternative, the respondent breached its implied common law duty to provide a safe place of work, and take all practicable steps to ensure the safety of employees while at work; and/or

(v) The respondent beached its 2011 Code of Conduct ("the code") as it did not:

(1) Act as a good employer and work with employees in good faith;

(2) Model the standards of behaviour described in the Code;

(3) Treated the applicant fairly and provided a safe work environment;

(4) Address any behaviour that is inconsistent with this Code and managed it objectively; and

(5) Display accountability for its failures.

[3] In resolution of these claims Ms Fry and CANZ seek general damages as compensation for humiliation, loss of dignity, and injury to feelings which Ms Fry says has resulted in her being diagnosed with post-traumatic stress disorder (PTSD) and depression, and have caused an inability for her to pursue her career within DOC.

[4] During a case management call with the parties on 16 April 2019 I raised the Authority's ability to investigate and determine claims under the HSEA and HSWA and to award general damages for breaches of those Acts.

[5] Ms Fry raised a personal grievance in 2016 which DOC told her was not raised within the statutory time period. Ms Fry does not claim she has a personal grievance in this current proceeding.

[6] It was agreed I would deal with the issues I raised during the case management call as a preliminary matter on the papers before the Authority under s 174D of the Employment Relations Act 2000 (the Act).

Issues

[7] In order the resolve the preliminary issues I must determine the following:

a) Does the Authority have jurisdiction to investigate and determine claims under the HSEA and HSWA?

b) If the answer to a) is yes, does the Authority have jurisdiction to award damages?

[8] As permitted by s 174E of 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 as a result. It has not recorded all submissions received.

Jurisdiction

[9] The Authority has exclusive jurisdiction over employment relationship problems.[1] An employment relationship problem is defined as including a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship.[2]

[10] Ms Fry and CANZ's claims include claims of breaches of the terms of the collective agreement. The duty to provide a healthy and safe workplace arises as an implied term of the employment agreement.[3] The jurisdiction of the Authority to investigate and determine claims arising from breaches of the employment agreement is confirmed at s 161(1)(b) of the Act.

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[1] Employment Relations Act 2000, s 161.
[2] Section 5.
[3] Attorney-General v Gilbert [2002] 1 ERNZ 31; Shaw v Schering-Plough Animal Health Limited [2013] NZEmpC 22 at [65].

[11] The issues I raised during the case management call related to the applicant's claims under paragraph (1)(a)(ii) and (1)(a)(iii) of the statement of problem and whether the Authority has jurisdiction to make awards of damages for breaches of the Health and Safety in Employment Act 1992 (HSEA) or its predecessor the Health and Safety at Work Act 2015 (HSWA).

[12] In their submissions Ms Fry and CANZ have referred me to a number of decisions where a failure by an employer to provide a healthy and safe workplace has been found to be a breach of the parties contractual obligations. In each of those cases the applicants established personal grievances based on the breach to provide a healthy and safe workplace. That is not the case with Ms Fry or CANZ.

[13] What Ms Fry and CANZ claim is for damages as a result of breaches of HSEA and HSWA. The applicants submit the Authority has jurisdiction under s 161(1)(r) of the Act which provides for the Authority to make determinations about employment relationship problems including actions (not set out in s 161(1) (a) to (qc)) arising from or related to the employment relationship.

[14] In *JP Morgan Chase Bank NA v Lewis* the Court of Appeal held that the exclusive jurisdiction of the Authority can only be invoked under s 161(1) of the Act where the problem is one that "directly and essentially concerns the employment relationship".[4]

[15] Both the HSEA and HSWA set out duties owed by employers to employees. Accordingly any breaches are arguably directly and essentially concerning the employment relationship. However, neither Act contemplates or provides for the Authority to have jurisdiction directly to make orders and/or provide civil remedies in the event that breaches of either Act are found.

[16] Both statutes are criminal statutes with a criminal enforcement regime including infringement and prohibition notices, and ultimately prosecution. Both statutes contain rules that apply to broader workplace issues, including matters relating to contractors, volunteers and other people in the workplace.

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[4] *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 225, [2015] 3 NZLR 618 at [95].

[17] The Authority has jurisdiction to investigate and determine applications for breaches of the express and/or implied terms of the employment agreement and/or personal grievances based on a failure to provide a healthy and safe workplace but not claims for breaches under the HSEA or the HSWA directly.

[18] The claims in the statement of problem at paragraphs (1)(a)(ii) and (1)(a)(iii) allege direct breaches of the HSEA and/or HSWA. The claims in these two paragraphs are not pleaded as being a breach of the employment agreement (unlike the claim in paragraph (1)(a)(i)).

[19] The Authority does not have jurisdiction to investigation and determine the claims set out in paragraphs (1)(a)(ii) and (1)(a)(iii) of the statement of problem. However any breaches of either or both statutes will inform and provide content to the contractual obligations relating to the claims set out in the statement of problem.

[20] In its submissions DOC has raised further questions of jurisdiction relating to Ms Fry's claim for damages and the claim for breach of DOC's code of conduct. These issues would benefit from an investigation before any further conclusions can be reached.

[21] In its submissions DOC sought the dismissal of all claims against it. It is not appropriate to dismiss all of the claims set out in the statement of problem without further investigation.

[22] I am of the view that all of the remaining claims should be investigated and determined. For that reason the Authority will convene a case management call to discuss progression of this matter to an investigation meeting.

Costs

[23] Costs relating to this preliminary determination are reserved and will be dealt with when dealing with costs associated with the substantive matter.

[24] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority