

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2026] NZERA 327  
3259499

BETWEEN                      PETER SAUNDERS  
Applicant

AND                              SERVICE FOODS LIMITED  
Respondent

Member of Authority:        Jeremy Lynch

Representatives:              Applicant in person  
Kirsty McDonald and Bridget Craig, counsel for the  
Respondent

Investigation Meeting:        On the papers

Submissions and Other  
Material Received:            Nothing received from the Applicant  
2 and 17 March 2026 from the Respondent

Date of Determination:        27 May 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] By its preliminary determination of 31 March 2025,<sup>1</sup> the Authority found Peter Saunders had not raised any personal grievances within the statutory 90-day timeframe.

[2] Mr Saunders has not challenged this finding.

[3] This determination resolves the remaining claims brought by Mr Saunders.

**The Authority's investigation**

[4] For the Authority's preliminary investigation, Mr Saunders was represented by an advocate.

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<sup>1</sup> Peter Saunders v Service foods Limited [2025] NZERA 184.

[5] Following the release of the Authority's preliminary determination in March 2025, a case management conference (CMC) was held by telephone with the parties on 12 May 2025, the purpose of which was to make arrangements to progress the investigation of Mr Saunders' remaining claims.

[6] At this CMC, Mr Saunders' advocate advised that Mr Saunders wished to have settlement discussions with the respondent. The parties agreed that the best approach was for the Authority to allow a brief period for such discussions to occur, and to timetable a further CMC (to progress the matter to a substantive investigation) should the settlement discussions not resolve Mr Saunders' outstanding claims.

[7] Unfortunately, matters were not able to be resolved by the parties, and a further CMC was held on 30 May 2025. At this CMC, Mr Saunders' advocate advised that he had been unable to make contact with his client, and consequently had not been able to take instructions in relation to settlement. The Authority granted a period of a further two weeks for Mr Saunders to be located, and instructions given.

[8] On 12 June 2025 the advocate wrote to the Authority advising of the efforts he had undertaken to make contact with Mr Saunders. The Authority is satisfied that reasonable steps were taken to ascertain Mr Saunders' whereabouts, and to take instructions as to the outstanding matters before the Authority.

[9] On 30 June 2025, Mr Saunders' advocate advised that due to his inability to make contact with his client, he had withdrawn his representation. The advocate further advised that he was not aware of an email address for Mr Saunders, and was not sure of Mr Saunders' home address.

[10] On 14 July 2025 the Authority directed that a physical copy of all its directions, together with a physical copy of its 31 March 2025 preliminary determination be served on Mr Saunders at the Auckland address listed in his affidavit, sworn on 1 July 2024.

[11] In the directions issued on 14 July 2024, the Authority recorded that as there had been no recent engagement by Mr Saunders, and a definite lack of certainty as to his whereabouts, the Authority's substantive determination of his outstanding claims could not proceed, and the matter was therefore adjourned on a sine die basis.

[12] In September 2025, Mr Saunders telephoned the Authority, advising of his new contact phone number, and further advising that he wished for his former advocate to once again represent him in resolving his outstanding claims.

[13] On 29 September 2025, Mr Saunders' former advocate advised the Authority he was again acting in this matter.

[14] The Authority suggested the parties take a brief period to have settlement discussions, before convening a further CMC to arrange the substantive investigation of outstanding matters.

[15] However, on 21 October 2025 the advocate wrote to the Authority advising that due to ongoing difficulties in communicating with his client, he was again withdrawing his representation of Mr Saunders.

[16] The Authority was eventually able to make contact with Mr Saunders by telephone, who confirmed he was available to attend a further CMC.

[17] The Authority held a CMC with the parties on 28 November 2025. During this CMC, Mr Saunders advised he wished to file an out of time challenge to the Authority's preliminary determination. The Authority provided Mr Saunders with information as to how to progress his application for challenge, together with the contact details for Auckland Community Law centre.

[18] The Authority's directions record that serious jurisdictional issues arise in terms of Mr Saunders' remaining claims. The parties' attention was drawn to the judgment of the Supreme Court in *FMV v TZB* (in particular as it relates to torts),<sup>2</sup> as well as the Authority's lack of jurisdiction to make orders under the Crimes Act 1961 (Crimes Act), or the Health and Safety at Work Act 2015 (HSWA).

[19] The Authority set a timetable for a further on the papers investigation into whether it has jurisdiction to investigate Mr Saunders' outstanding claims. The parties were provided with the opportunity to lodge affidavit evidence and submissions. In addition, Mr Saunders was provided with the opportunity to lodge reply affidavit evidence and/or reply submissions.

[20] The directions specifically record that if a party fails to lodge affidavit evidence

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<sup>2</sup> *FMV v TZB* [2021] NZSC 102.

and/or submissions in accordance with the directed timetable (without seeking leave), the investigation process would continue regardless of any issues of nonparticipation.

[21] Service Foods Limited (Service Foods) lodged its submissions in accordance with the timetable directions.

[22] Mr Saunders did not lodge any affidavit evidence or submissions, and nor did he contact the Authority to advise of any reason for his nonparticipation, or to seek an extension to the timetable.

[23] The Authority served a copy of its timetable directions following the 28 November 2025 CMC to the updated physical address for service Mr Saunders had provided. The directions record that Mr Saunders was directed to notify the Authority of any change to his physical address for service.

[24] Mr Saunders has not contacted the Authority to advise of any change to his address for service. The Authority therefore assumes that the address held on file for Mr Saunders is his current address for service.

[25] The Authority is satisfied that Mr Saunders has been provided with a reasonable opportunity to participate in the investigation of his outstanding claims, but has failed to engage. As clearly signalled in the directions issued to the parties following the 28 November 2025 CMC, the Authority's investigation has proceeded despite Mr Saunders' lack of engagement.

[26] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[27] The Authority has carefully considered all the material provided.

### **The issues**

[28] The remaining issues for investigation and determination are whether the Authority has jurisdiction to investigate:

- (a) whether Mr Saunders was assaulted by a co-worker?
- (b) Whether Service Foods has engaged in *adverse conduct*, as that term is used under the HSWA?

- (c) Whether Service Foods has breached its duty to notify WorkSafe in breach of the provisions of the HSWA?
- (d) Whether Service Foods is liable in tort, for battery against Mr Saunders?
- (e) Whether Service Foods is liable in tort, for intentionally inflicting emotional harm on Mr Saunders?

[29] The Authority must also consider whether a party is entitled to an award of costs.

[30] Despite confirming to the Authority that he was still seeking an investigation into the above issues, Mr Saunders' did not appear to seek any remedies in respect of these claims. Mr Saunders was directed to clarify the remedies sought in respect of each of the above claims. No response was received from Mr Saunders.

## **Discussion**

### *Whether Mr Saunders was assaulted by a co-worker?*

[31] In February 2023, during an unrelated disciplinary meeting, Mr Saunders claimed (for the first time) that he had been assaulted by a colleague in December 2022. Affidavit evidence provided by Service Foods as part of the Authority's preliminary investigation sets out that its People and Culture Business Partner requested a written statement of the alleged assault from Mr Saunders so that this could be investigated, and asked for details of when the incident occurred so that CCTV footage could be reviewed.

[32] In March 2023 Service Foods again requested this information from Mr Saunders, and offered to assist him preparing a written statement, but he declined this assistance.

[33] The Authority has no criminal jurisdiction. As such, the Authority cannot make orders under the Crimes Act .

[34] However, the Authority can make a finding that an assault has occurred at a workplace, when investigating a personal grievance.<sup>3</sup>

[35] The Authority's preliminary investigation found that Mr Saunders had not

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<sup>3</sup> For example, *John Wright v Otira Stagecoach Hotel Limited* [2024] NZERA 29.

raised a personal grievance in relation into his alleged assault. As such, the Authority has no jurisdiction to investigate this claim on a substantive basis.

[36] For completeness, Mr Saunders did not participate in this investigation. The Authority has been unable to further consider this issue. This determination makes no finding in respect of Mr Saunders' alleged assault.

*Whether Service Foods has engaged in adverse conduct under the Health and Safety at Work Act 2015?*

[37] Section 88 of the HSWA defines 'adverse conduct' for the purposes of subpart 5 of that Act. Actions such as dismissing an employee, or subjecting them to detriment are captured by the definition.

[38] A difficulty for Mr Saunders is that s 88 of the HSWA is simply a definition provision. It sets the 'conduct' part of the definition. Section 89 of the HSWA sets the 'role' part of the definition. The person who is subject to the conduct also has to have some role exercising powers under that Act. Together s 88 and s 89 create the elements for liability on conviction for a fine under s 90 of the HSWA, for the person who engages in adverse conduct for a prohibited health and safety reason.

[39] The Employment Relations Authority has no jurisdiction to investigate and determine such a claim.

*Whether Service Foods has breached its duty to notify WorkSafe in breach of the provisions of the Health and Safety at Work Act 2015?*

[40] Section 56 of the HSWA provides that an entity such as a Service Foods must notify WorkSafe as soon as possible after becoming aware that a 'notifiable event' has occurred. Section 56(6) provides for a fine not exceeding \$50,000 (in the case of a company) for the contravention of the duty to notify.

[41] The Employment Relations Authority has no jurisdiction to investigate and determine such a claim.

*Whether Service Foods is liable in tort, for battery against Mr Saunders?*

[42] The directions issued to the parties following the 28 November 2025 CMC specifically referred the parties to the provisions of s 161(1)(r) of the Act, together with the judgment of the Supreme Court in *FMV*.

[43] Section 161(1) of the Act sets out the exclusive jurisdiction of the Authority. It is a lengthy section, with many examples of employment relationship problems listed.

[44] As the majority of the Supreme Court in *FMV* held:<sup>4</sup>

As can be seen, s 161(1) of the Act relevantly provides that the Authority has exclusive jurisdiction to make determinations about “employment relationship problems generally”. This phrase is defined in s 5 as follows:

**employment relationship problem** includes a personal grievance, disputes, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

As a result, S161 (one) effectively reads:

the Authority has exclusive jurisdiction to make determinations about any problems relating to or arising out of employment relationships, generally...

[45] In respect of tort claims, the Supreme Court held that s 161(1)(r) of the Act provides that the Authority has:<sup>5</sup>

...exclusive jurisdiction over “any other action... arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort)”.

[46] The majority of the Supreme Court in *FMV* considered the effect of s 161, and held that:<sup>6</sup>

In plain terms, the provision’s effect is that in addition to the facilitations, disputes, matters, grievances, actions, objections and other problems referred to in s 161, all “other actions” arising from or relating to employment relationships must be brought in the Authority, but tort actions must not, even if they also arise from or are related to an employment relationship.

[47] The majority further held that:<sup>7</sup>

...as a starting point, employment relationship problems that can be framed as any of the examples in s 161(1)(a)-(qd) *must* be framed that way and cannot be brought in any other jurisdiction. Only where an employment relationship problem cannot be framed in any way except as a tort claim does the exception in s 161(1)(r) apply.

[48] Service Foods submits that the impact of the majority’s judgment is to effectively abolish most employment-related tort actions, other than the industrial torts.

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<sup>4</sup> Above n 2, at [22].

<sup>5</sup> Above n 2, at [23].

<sup>6</sup> Above n 2, at [113].

<sup>7</sup> Above n 2, at [127].

I accept this submission.

[49] Mr Saunders' claim that Services Foods is liable in tort, for battery against him could be (and indeed was) brought as a personal grievance claim. Mr Saunders brought an unjustified disadvantage claim in relation to the alleged assault. However, as the Authority found in its preliminary investigation, this personal grievance had not been raised within the statutory 90-day timeframe. This finding has not been challenged.

[50] Service Foods submits that:

...[this] claim has already been heard and determined, and cannot now be pursued by other means. The tort exception in s 161(1)(r) does not allow for parties to attempt to circumvent s 114 and raise claims out of time.

[51] I accept this submission.

[52] The Authority does not have jurisdiction to investigate this claim.

*Whether Service Foods is liable in tort for intentionally inflicting emotional harm on Mr Saunders?*

[53] Mr Saunders' claim of intentional infliction of emotional harm arises out of the alleged assault.

[54] As noted above, this claim could have been (and indeed was) brought as a personal grievance claim for unjustified disadvantage. The Authority found in its preliminary investigation that this personal grievance had not been raised within the statutory 90-day timeframe.

[55] A claim capable of being brought as a personal grievance must be brought that way. The tort exception in s 161(1)(r) does not allow parties to circumvent the requirements of section 114, and raise claims out of time.

[56] The Authority does not have jurisdiction to investigate this claim.

### **Outcome**

[57] The Employment Relations Authority does not have jurisdiction to make orders under the Crimes Act, or the HSWA.

[58] Mr Saunders cannot frame an employment relationship problem as a tort claim, if the same a claim can be brought as a personal grievance.

[59] The Authority does not have jurisdiction to investigate Mr Saunders' tort claims, as these have already been investigated and determined as personal grievance claims.

[60] The Authority's preliminary determination found that Mr Saunders had not raised any personal grievances within the statutory 90-day timeframe. As a result there are no personal grievance claims before the Authority arising from or related to Mr Saunders' alleged assault.

[61] Given the above, the Authority does not have jurisdiction to investigate any claims arising from or related to Mr Saunders' alleged assault.

[62] A copy of this determination is to be delivered to Mr Saunders' address for service.

### **Costs**

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[64] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Service Foods may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Saunders will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[65] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>8</sup>

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>8</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)