IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-092-001026
[2015] NZHC 2010

BETWEEN	MELISSA JEAN OPAI Plaintiff
AND	LAURIE CULPAN Defendant
	THE COMMISSIONER OF POLICE Second Defendant

Hearing: 20 August 2015

Appearances: N W Woods for the Plaintiff
S W B Foote for the First Defendant
M Hodge and H Dymond-Cate for the Second Defendant

Judgment: 24 August 2015

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 25 August 2015 at 2.30 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

Rice Craig, Auckland
Meredith Connell, Auckland
Thomas Dewar Sziranyi Letts, Wellington

S Foote, Auckland

[1] The Commissioner of Police, the second defendant, has applied to strike out a defamation action against him and Mr Culpan, who is a member of the New Zealand Police, as being one that falls within the exclusive jurisdiction of the Employment Relations Authority.[1]

[2] Ms Opai, the plaintiff, also a member of the New Zealand Police, opposes the application, maintaining that as the action is a claim founded on tort, it does not fall within the Authority's exclusive jurisdiction.

[3] The first defendant, Mr Culpan, abides the decision of the Court on the strike-out application.

[4] As pleaded the action relates to statements made by the first defendant in his capacity as a senior member of the NZ Police that are allegedly defamatory of the plaintiff as follows:

(a) Comments that were made in a performance appraisal authored by Laurie Culpan for the year 2012/2013, which was "published" around July 2013, and amended and "re-published" in August 2013. Between January-March 2014 the Commissioner edited and "republished" the appraisal. Such publication was allegedly by the report being sent or made available within the Police to HR staff and staff ranked senior sergeant or above in Counties Manukau, and some national-level staff.

(b) A briefing paper authored and published by Laurie Culpan in November 2013 which related to culture problems within the Police, but which the plaintiff says would have been understood by staff to have been targeted at her. This briefing was likewise made available to senior Police staff, the Police Association, and to certain other Police officers.

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[1] The Commissioner has also filed an appearance under protest on the same jurisdictional grounds, but the application before me proceeded exclusively on the strike-out application on the understanding that the protest would stand if the strike-out application succeeds.

(c) A "258 report form" authored and widely published by Laurie Culpan by his making it available to HR and senior staff, concerning and incorporating a complaint about the plaintiff, to the effect that she had breached the Police code of conduct by falsifying her timekeeping. The contents of the report are said to carry the meaning that the plaintiff is dishonest. The plaintiff says the complaint was upon investigation "not upheld", but no apology has been forthcoming.

(d) Reports and diary entries relating to the above, said to be widely published to senior Police and the wider Police community.

[5] The plaintiff says the above resulted from a malevolent campaign by Mr Culpan to vilify her because of her efforts to enforce standards within her division by reporting misconduct by other Police staff members. The Commissioner is vicariously liable for Mr Culpan's actions.

Issue

[6] The sole issue for determination is one of jurisdiction – whether Ms Opai's claim is within the exclusive jurisdiction of the Employment Relations Authority and the Employment Court. It is common ground that the claim should be struck out under High Court Rule 5.49 if the claim lies within the Authority's exclusive jurisdiction, as the Commissioner argues it does.

[7] That turns on whether Ms Opai's action comes within the terms of s 161(1)(r) – that is, whether the action is an action about "employment relationship problems … arising from or related to the employment relationship … (other than an action founded on tort)".

Discussion

[8] In *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 the High Court examined the jurisdiction of the Employment Relations Authority to determine claims in tort. The two member Court considered exhaustively the question whether, in relation to

claims in tort, the ERA continues to confer on the Authority only a limited jurisdiction targeted to cases in strikes, lock-outs, and picketing, or whether the Authority could possess wider jurisdiction in tort if such claims are to be regarded (on the facts) as being "about an employment relationship problem" (which is the threshold for the ERA's exclusive jurisdiction under s 161).

[9] The Court conducted an exhaustive analysis of the legislative history and statutory purpose of the ERA, and the range of remedies available under that Act, as factors that must influence the consideration of whether Parliament intended to confer jurisdiction over tort claims on the Authority. Pertinently it said at [66]:

> [66] These various points are in our view compelling indicators that Parliament did not intend to extend the Authority's existing jurisdiction so dramatically as is suggested by the first defendant. We express our essential agreement, at greater length, with the analysis of Panckhurst J that "relating to" in the definition of "employment relationship problem" must be read in a limited way to mean any cause of action, the essential character of which is to be found entirely within the employment relationship itself. **This would not encompass claims arising from tortious conduct even if arising between an employer and employee, since the relationship merely provides the factual setting for the cause of action; the duty arises independently**.
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> [Emphasis added].

[10] The court had already discussed defamation specifically at [55]:

> [55] Mr McIlraith on behalf of the plaintiff submitted that Parliament could not have intended to grant the Authority exclusive jurisdiction to determine claims in tort because:
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> a) As noted, the Authority did not have jurisdiction over tort claims under the ECA, except in relation to strikes and lockouts (*Conference of the Methodist Church of NZ v Gray*). This limited jurisdiction was retained in s 99 ERA and specifically extended to tort claims relating to picketing, reflecting a response to the Business Round Table's submission that the Employment Court's jurisdiction regarding torts should only come into play when a strike or lock-out was involved. Mr McIlraith suggests that if the intention was to confer a general jurisdiction on the Authority to deal with tort claims this specific extension (and indeed s 99 generally) would not have been needed.
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> b) Ousting the jurisdiction of the High Court would be inappropriate to deal with claims in a commercial context in that third parties would be drawn into disputes determined by the Authority. This is difficult to reconcile with the focus in s 3 on employment relationships (and, we would add, with the definition of "employment relationship" in s 4(2));.

c) The Authority is not bound by strict procedure or rules of evidence and is not a court of record. It is clear that the ERA is intended to reduce judicial intervention and resolve employment relationship problems without regard to technicalities. But Mr McIlraith submits that it would be reasonable to expect the imposition of rigorous procedures in dealing with tort claims rather than the reduction in procedures, especially if third parties are to be affected.

d) There is no requirement that Authority members be legally trained, which is what one might expect if they have the jurisdiction to deal with tort claims.

e) If the Authority did have jurisdiction to deal with claims in tort it would be doing so without access to the Contributory Negligence Act 1947 and the Law Reform Act 1936, both of which confer their respective powers only on "Courts". To this we would add the various powers conferred by the Defamation Act 1992 only on the District and High Courts.

[11] More recently, the Court of Appeal in *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 cited this approach taken by the High Court in *BDM Grange* with approval. It rejected the somewhat different approach taken by the High Court in *The Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24, which concerned the Society's claim against Ms Hagai to recover money stolen by her in the course of her employment. The High Court had held that the claim should have been advanced before the Authority, considering that Ms Hagai's theft of her employer's money while she was at work came within the general wording of "an employment relationship problem" and within several of the heads in s 161(1).

[12] The Court of Appeal described its own approach as consistent with that of the Court in *BDM Grange*, and with the statutory purpose in creating the Authority and Employment Court as "bodies having specialist expertise and understanding, equipping them to deal with employment-related problems" [99]. It said:

> [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.

[13] The Court of Appeal's reasoning is apposite to the present claim based on the tort of defamation. The duty that lies at the heart of Ms Opai's defamation claim arises independently of the employment relationship between her and the Commissioner.

[14] Counsel for the Commissioner submits that the Court should not be swayed by the dressing up of "the employment relationship problems" alleged by Ms Opai as defamation claims. Rather, he contends, I should look at the substance of the claims as personal grievance claims.

[15] A similar argument was relied upon in *BDM Grange.* The Court rejected it, saying:

> [70] We think that argument is circular. Both ss 157(1) and 160(3) operate only where there is an employment relationship problem. If tortious conduct is not in fact an employment relationship problem then the dispute will not fall to be determined under ss 157(1) and 160(3).
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> [71] The strength of Mr Keene's argument must be that the undesirability of having the same conduct give rise to rights in the Authority and in the High Court should support the wider construction of the phrase "relating to an employment relationship problem". However that concern does not outweigh the factors discussed earlier, which we find indicate a policy of leaving the jurisdiction for tort claims with the High Court. Insofar as a fact situation establishes that both the Authority and this Court have jurisdiction (as with a claim in this Court against a managing director qua director and in the Authority against him qua employee, or where assault or deceit is relied upon in each (para [68] above)) the remedy is either an order of this Court for stay or delay of proceedings in this Court or a like order by the Employment Court (s 194).

[16] The fact situation, as pleaded, contains the essential elements of defamation. There may well be a need for further particulars of publication, as counsel for the Commissioner suggested, but strike-out is not sought on that basis. It is sought on a jurisdictional basis. This Court's jurisdiction over defamation claims is not ousted by s 161.

[17] I do not think therefore that the argument assists the Commissioner. The fact is that Ms Opai's pleading is one of defamation. No doubt that pleading duplicates in part complaints that lie at the heart of her personal grievance claim which she has apparently brought before the ERA, but the Commissioner has a practical remedy.

As the High Court has observed, the remedy in such a case is to seek a stay of one proceeding pending the resolution of the other.

Result

[18] The application to strike-out the claim is dismissed. Such dismissal, made as it is on a strike out application on jurisdictional grounds, is not to be taken as being in any way indicative of the adequacy or otherwise of particulars of the claim relating to the issue of publication or some other aspect of the pleadings. Nor is it to be taken, of course, as indicative of the substantive merits of the claim. The former may well need to be considered during the interlocutory process and the latter is appropriately assessed at trial, when the evidence on the claim and on such defences as the defendants may advance (such as honest opinion and qualified privilege) will be fully before the Court.

[19] As costs follow the event under the statutory costs regime, the plaintiff is entitled to 2B costs plus disbursements as fixed by the Registrar.

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Associate Judge Sargisson