IN THE COURT OF APPEAL OF NEW ZEALAND

CA587/2013
[2015] NZCA 255

BETWEEN	JP MORGAN CHASE BANK NA Appellant
AND	ROBERT LEWIS Respondent

Hearing:	16 April 2015 (further submissions received 24 April 2015)
Court:	Stevens, French and Cooper JJ
Counsel:	R L Towner for Appellant M W O'Brien and B Nicholson for Respondent
Judgment:	18 June 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The questions of law are answered as follows:

Was the decision of the Employment Court wrong in law in holding that:

(a) The Employment Court had jurisdiction to hear a challenge to a determination of the Employment Relations Authority pursuant to ss 179(1) and 187(1) of the Employment Relations Act 2000 in circumstances where the determination related to a claim about an alleged breach of a settlement agreement whereas the claim before the Employment Court was based on an alleged variation to the employment agreement?

Answer: No.

(b) It was arguable that the Employment Court has jurisdiction to award damages for breach of a settlement agreement?

Answer: Yes (where the settlement agreement is not an employment agreement or a variation to it).

(c) The written agreement dated 4 March 2010 was capable of being characterised either wholly or in part as a variation to an employment agreement?

Answer: Yes.

C The appellant is entitled to costs calculated for a standard appeal in accordance with band A together with usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] This appeal raises an important question concerning the extent of the exclusive jurisdictions of the Employment Relations Authority (the Authority) and the Employment Court under the Employment Relations Act 2000 (the Act).

[2] The issue arises in the context of an agreement (the settlement agreement) entered into by the parties to settle a personal grievance. Under the settlement agreement the respondent, Mr Robert Lewis, agreed to resign in return for certain payments to be made by the appellant, his then employer, JP Morgan Chase Bank NA (JP Morgan, or the bank). Mr Lewis alleges that the settlement agreement was breached.

[3] He pursued that claim initially before the Authority, and subsequently before the Employment Court.[1] JP Morgan applied for an order striking out the claim as being outside the Court's jurisdiction. The Employment Court dismissed the strike-out application. The bank now appeals from that decision pursuant to leave granted by this Court under s 214 of the Act.[2]

Background

[4] JP Morgan is a financial services firm registered as a bank under s 69 of the Reserve Bank of New Zealand Act 1989. It employed Mr Lewis from 1 August 2008, initially as Treasury Services Sales Executive New Zealand and, between 15 September 2008 and 5 March 2010, as the Chief Executive Officer of its New Zealand branch.

[5] During 2009 a dispute arose between Mr Lewis and Mr Tony O'Neill, JP Morgan's head of Treasury Services in Australia and New Zealand. It seems that their relationship deteriorated. In November that year a restructuring proposal was floated which Mr Lewis believed was designed to terminate his employment as a

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1 *Lewis v JP Morgan Chase Bank NA* [2012] NZERA Auckland 355 [Employment Relations Authority decision] and *Lewis v JP Morgan Chase Bank NA* [2013] NZEmpC 148 [Employment Court decision].

2 *JP Morgan Chase Bank NA v Lewis* [2014] NZCA 81.

consequence of the dispute with Mr O'Neill. He raised a personal grievance alleging that he had been unjustifiably disadvantaged in his employment.

[6] On 4 March 2010 the parties entered into the settlement agreement for the purpose of resolving the personal grievance. The settlement agreement provided, amongst other things, that Mr Lewis would resign from the bank the following day.

Factual allegations

[7] Mr Lewis claimed that when he telephoned JP Morgan's human resources free phone on 18 March 2010 he was told by an operator that the bank's records did not show he had been the CEO. When he asked what needed to be done to correct the records he was told the bank's Head of Human Resources, Ms Simpson, would need to authorise the change. Mr Lewis says he emailed Ms Simpson later that day, emphasising that he was making approaches to potential employers and that his ability to secure further employment would be seriously damaged if the bank failed to confirm that he had been the CEO of the New Zealand branch.

[8] Mr Lewis alleged that on 29 March he was advised by Ms Simpson that an appropriate correction had been made when that was not in fact the case. When he subsequently applied for a position with another bank, he told the prospective employer that he had been JP Morgan's CEO in New Zealand. When enquiry was made by the prospective employer, JP Morgan denied it. As a result, he lost that prospective employment opportunity. Mr Lewis says that, despite a further request for the bank's records to be changed, that did not occur; it was six months before he found new employment and over that period he suffered distress.

Claim in the Employment Relations Authority

[9] Mr Lewis' claim was initially advanced in the Authority. Following an unsuccessful mediation, he sought an investigation to ascertain whether the settlement agreement had been breached, and if so, an award of damages. On 11 October 2012 the Authority issued a determination holding that it did not have

jurisdiction to grant its usual remedy of a compliance order since the settlement agreement:[3]

(a) was not within the ambit of s 151 of the Act; and

(b) could not be the subject of a compliance order under s 137(1)(a)(i) of the Act, because it was not an employment agreement.

[10] Further, the Authority was satisfied it had no jurisdiction to grant the damages sought by Mr Lewis, the Act containing no power to do so.[4]

Claim in the Employment Court

[11] On 2 November 2012 Mr Lewis filed a statement of claim in the Employment Court alleging a breach of the settlement agreement. He subsequently instructed solicitors who filed two amended statements of claim. The second amended statement of claim alleged amongst other things that the settlement agreement was effectively a variation of the employment agreement, and the claim was recast to allege the employment agreement, as varied, had been breached. JP Morgan sought to strike out the claim on the basis that since the claim alleging variation of the employment agreement had not been made in the Authority it could not be entertained by the Employment Court. JP Morgan also based its strike-out application on the ground that the Court could not award damages for breach of the settlement agreement, because it was not an employment agreement.

[12] The strike-out application was dismissed by Chief Judge Colgan in a judgment delivered on 5 September 2013.[5] The Judge held that the substance of the claim before the Authority, and what was now alleged in the Employment Court, was a complaint by Mr Lewis that JP Morgan had not abided by the settlement agreement. He said:[6]

> … That this agreement may have been described as a "settlement agreement" in the Authority, but is now described by the plaintiff as an

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3 Employment Relations Authority decision, above n 1, at [8]–[10].
4 At [11].
5 Employment Court decision, above n 1.
6 At [54].

> agreement varying their individual employment agreement, is a difference of description. The same agreement, and allegations of its breach, are still in issue. The plaintiff is entitled, particularly with the benefit of legal advice and representation that he now has, to advance alternative legal grounds in support of essentially the same proposition in reliance on the same transactions. The second amended statement of claim addresses the same "matter" as was before the Authority. No strike-out of the proceedings is warranted on this ground.

[13] The Judge further considered it was arguable that the settlement agreement constituted "at least in part" a variation to Mr Lewis's employment agreement, because it altered "the essential nature of its termination". He noted that the employment agreement continued in effect the following day, "in all respects" and arguably "in some respects" beyond the point when Mr Lewis ceased to work for the bank.[7] This meant he could allege a breach of that agreement.

[14] The substantive allegations Mr Lewis sought to pursue were allegations that, contrary to the express or implied terms of the original employment agreement JP Morgan had denied that he was its New Zealand CEO and had not maintained records stating that he was. Further, he alleged breaches of the employment agreement as varied by cls 8 and 9 of the settlement agreement, which respectively provided terms for the announcement of his departure from the bank and mutual obligations not to make disparaging comments.

[15] The relief sought in the Employment Court was:

(a) declarations that he was the bank's CEO in New Zealand from August 2008 until March 2010, and that the bank had breached his employment agreement as varied by the settlement agreement; and

(b) damages in the sums of $50,000 for injury, distress and reputational damage, and $120,000 for lost income arising from his failure to secure new employment, interest and costs.

In addition, Mr Lewis challenged the Authority's award of $15,000 costs against him, claiming that the parties should bear their own costs in that forum.

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[7] At [56].

Employment Court judgment

[16] In relation to the first of the declarations, the Employment Court noted that what Mr Lewis really sought was a finding that he had been JP Morgan's CEO over the relevant period; however, the bank admitted that fact without reservation. The Court held it was arguable that if, as Mr Lewis claimed, the defendant failed to confirm on enquiry that he had been the New Zealand CEO or asserted that its records did not so confirm, there might have been a breach of the settlement agreement.[8]

[17] Having referred to various previous decisions of the Employment Court,[9] the Judge identified four reasons for not striking out the claim. First, a number of the cases discussed had arisen under the Employment Contracts Act 1991 (the 1991 Act), and the tests under that Act were significantly different from those that applied under the current statute. Secondly, there was some Employment Court authority for treating agreements such as the settlement agreement as one that varied the parties' employment agreement, both before and after the employee's resignation.[10] Thirdly, the Court referred to the breadth of the Authority's exclusive jurisdiction to make determinations about employment relations generally, citing the following from s 161(1)(r) of the Act:[11]

> … any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship … (other than an action founded on tort).

The third factor was informed by this Court's decision in *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*, which discussed when the Authority will be the appropriate forum in which to bring proceedings.[12] Citing [21] and [24] of that decision, the Employment Court considered this Court's finding

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8 At [79]–[80].

9 *Kerr v Associated Aviation (Wellington) Ltd* [2005] ERNZ 632 (EmpC); *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack* [2000] 1 ERNZ 518 (EmpC); *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236; *Wade v Hume Pack-N-Cool Ltd* [2012] NZEmpC 64, [2012] ERNZ 606 and *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 (EmpC).

10 At [75].

11 At [76]. Section 161 is the provision setting out the Employment Relations Authority's jurisdiction. See below at [41].

12 *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc* [2013] NZCA 272, (2013) 10 NZELR 781.

militated against a strike-out in the present case.[13] Finally, and relating to the previous point, the damages claim was "very arguably" an action arising from or related to the employment relationship.[14]

[18] It appears from his reasoning that the Judge considered the fact the issues Mr Lewis sought to pursue were arguably within the Authority's (and therefore the Employment Court's) jurisdiction was sufficient to defeat the strike-out application.

The questions before this Court

[19] This Court granted leave to appeal on the following questions of law:[15]

> Was the decision of the Employment Court wrong in law in holding that:
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> (a) the Employment Court had jurisdiction to hear a challenge to a determination of the Employment Relations Authority pursuant to ss 179(1) and 187(1) of the Employment Relations Act 2000 in circumstances where the determination related to a claim about an alleged breach of a settlement agreement whereas the claim before the Employment Court was based on an alleged variation to the employment agreement;
>
> (b) it was arguable that the Employment Court has jurisdiction to award damages for breach of a settlement agreement; and
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> (c) the written agreement dated [4] March 2010 was capable of being characterised either wholly or in part as a variation to an employment agreement?[16]

[20] Having considered the submissions made on the substantive appeal, we are of the view that these questions are best answered in reverse order, that is, starting with question (c). Questions (b) and (c) are linked and address the issue of whether the Employment Court was correct in declining to strike out the claim on the basis that it was arguably within the jurisdiction of the Authority and the Court. The determination of that issue requires a consideration of the extent of the exclusive jurisdiction conferred on the Authority by the Act. In a case such as this it is the Authority's jurisdiction that determines whether the matter is also within the jurisdiction of the Employment Court. Consequently, the jurisdictional question

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13 At [76].
14 At [77].
15 *JP Morgan Chase Bank NA v Lewis*, above n 2.
16 This Court's leave judgment referred to a written agreement dated 10 March 2010. The reference should have been to the settlement agreement dated 4 March 2010.

turns on whether the claims now made by Mr Lewis can be brought within the terms of s 161(1) of the Act.

[21] Question (a) raises a different and narrower issue concerning the way the case has been pleaded in the Employment Court, compared with the claim advanced before the Authority. JP Morgan argues it has become a different case from that which the Authority considered, and the Employment Court does not have jurisdiction to deal with the claim as a "matter previously determined" by the Authority.[17]

[22] Before turning to the relevant statutory provisions we will describe the employment agreement and the settlement agreement.

The employment agreement

[23] The employment agreement was formed when Mr Lewis, on 29 July 2008, added his signature to a letter that had been sent to him by Ms Simpson dated 9 July. The letter began by confirming Mr Lewis' employment with the bank and continued:

> We have set out your personal employment terms and conditions in Appendix A and the general employment terms and conditions in Appendix B. These terms and conditions supersede any verbal discussions with you regarding your employment arrangements.

[24] Appendix A provided that Mr Lewis would have the corporate title of Vice President of Treasury Services although it noted that the position might change as a result of promotion or the operational requirements of JP Morgan's business. It was common ground that Mr Lewis' title was subsequently changed to that of CEO of the bank's New Zealand branch.

[25] The contract had an anticipated commencement date of 1 August 2008. Another provision dealt with leave, including sick leave, bereavement and parental leave. Clause 6 of Appendix A said that employment would be subject to a three-month probationary period and cl 8 provided as follows:

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[17] The Employment Court's jurisdiction under s 187(1)(a) of the Employment Relations Act 2000 is to hear and determine matters previously determined by the Authority.

> **8. Notice Period For Termination (paragraph 4 in Appendix B)**
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> 8.1 During your probationary period, either party may terminate your employment by giving one week's notice.
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> 8.2 After the probationary period, either party can terminate the employment by giving the other party 3 months' written notice or by the Company making a payment in lieu of notice.

[26] Appendix B set out a number of "General Employment Terms and Conditions". The heading of cl 4 of the appendix was "Termination", and it contained a cross-reference to para 8 in Appendix A. Clause 4.1 provided for termination by either party on prior written notice of at least the period specified in para 8 of Appendix A, and by the bank at any time without notice or compensation in the case of a number of events. These included fraud, failure to follow instructions, neglect of duty or other material breach of the terms of employment.

[27] Clause 6 dealt with confidentiality, and obliged Mr Lewis to keep secret and not use for his own advantage trade secrets, business methods and other information confidential to the bank. That obligation applied whether during or after the period of employment. Clause 8 set out a number of "Post Employment Restrictions". Two of these restrictions applied for a period of six months commencing on the day the employment terminated. They were obligations not to entice clients and business away from the bank.

[28] Clause 7 provided for Mr Lewis to return company property on the termination of his employment, including all documents or other materials concerning the bank and its clients prepared or coming into Mr Lewis' possession during the course of employment. This extended to client lists, correspondence, electronic equipment, computer software and hardware.

[29] Clause 8.3 was in the nature of a restraint of trade, and prevented Mr Lewis, for a period of three months commencing at the date of termination, from engaging directly or indirectly in any business in New Zealand which would be in competition with any business carried out by JP Morgan. Clause 8.5(a) provided that during the period of this three-month restriction, Mr Lewis would receive a monthly payment

equivalent to the amount of his monthly monetary remuneration calculated in accordance with Appendix A.

The settlement agreement

[30] The settlement agreement began with recitals recording that Mr Lewis had raised a personal grievance with the bank relating to his employment, which the parties had agreed to resolve on the terms set out in the agreement.

[31] Clause 1 provided:

> Mr Lewis resigns from his employment with the Bank effective Friday, 5 March 2010 which will be his last working day ("Termination Date").

[32] Clause 2 then obliged JP Morgan to pay Mr Lewis within seven business days of the Termination Date various sums as a payment in lieu of notice, as a termination payment, and as an annual incentive payment, in each case less any applicable tax. The bank further agreed to pay Mr Lewis compensation pursuant to s 123(1)(c)(i) of the Act.[18]

[33] Other payments that JP Morgan agreed to make were a contribution towards Mr Lewis' legal costs (to be inclusive of an amount that his solicitors had already billed the bank), Mr Lewis' entitlements including salary up to and including the Termination Date and a further sum, less any applicable tax, in lieu of entitlements to any "JP Morgan Chase Awards" (these were incentive payments which could take the form of cash, restricted shares or units of common stock or options, under the terms of Appendix B of the employment agreement).

[34] Finally, the bank agreed to pay any outstanding holiday pay, less tax.

[35] Under cl 3 of the settlement agreement, the bank offered "outplacement support" through its provider up to the value of $5,000 plus GST. Clauses 4 to 6 provided as follows:

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[18] Section 123(1)(c)(i) provides that if the Authority or the Employment Court determines that an employee has a personal grievance, it may require the payment to the employee of compensation by the employer for "humiliation, loss of dignity, and injury to the feelings of the employee". At the request of the parties to maintain confidentiality we have not referred to the amounts of these payments, and those referred to in the following paragraph.

4. The Bank waives the restraint of trade provisions in clause 8 of Appendix B of Mr Lewis' employment agreement with the Bank.

5. Mr Lewis will comply with clause 7 of Appendix B of his employment agreement relating to the return of the Bank's property.

6. Mr Lewis will continue to be bound by clause 6 of Appendix B of his employment agreement and the JP Morgan Code of Conduct relating to confidentiality.

[36] Under cl 7, the bank expressed its regret for any distress which Mr Lewis might have experienced as a result of its "restructuring proposal". Clauses 8 and 9 then dealt with announcement and non-disparagement, issues clearly relevant to any future employment. They were in the following terms:

8. The Bank will position Mr Lewis' departure from its employment, both internally and externally, as the result of restructuring its operational footprint in New Zealand following the acquisition of ANZ's sub-custody operations based in Wellington. The Bank will make the following internal announcement within seven days of the Termination Date:

> "JPM announced today that Mr Rob Lewis would leave the Bank to seek other external opportunities following the Bank's decision to move its principal New Zealand office from Auckland to Wellington as a result of the recent acquisition ANZ's sub-custody operations. The Bank wishes to thank Mr Lewis for serving as its CEO in New Zealand since August 2008 and wishes him well in his future endeavours."

9. Neither party will make any disparaging comment about the other to any third party. The Bank will inform the members of the Australia and New Zealand Executive and Operating Committees of this obligation.

[37] Clause 10 then provided:

10. This settlement is in full and final settlement of any claims (whether or not yet contemplated) of any nature whatsoever the Bank (which includes in this clause any and all related or affiliated entities of the Bank, whether in New Zealand or internationally) or Mr Lewis has or may have against the other relating to Mr Lewis' employment with the Bank or with the termination of that employment, and the Bank and Mr Lewis (subject to the indemnification of Mr Lewis pursuant to clause 11) release each other from any further liability to the other whatsoever (save for a breach of this Agreement).

[38] Clause 11 provided for the continuation of insurance cover in respect of Mr Lewis' actions as an employee. Clause 12 stipulated that the terms of settlement would remain confidential to the parties and their advisers. Clause 16 was in the following terms:

> 16. The parties agree that this agreement may be pleaded by all or any of them as a bar to any actions, suits, claims, demands or legal proceedings instituted by any other in respect of any matter arising out of or in connection with the subject matter of this agreement.

[39] The final clause we mention is cl 18, which provided:

> 18. This agreement constitutes the entire agreement of the parties relating to this agreement, which supersedes all and any prior understandings, negotiations, agreements written or oral express or implied.

Relevant provisions of the Act

[40] Before dealing with the issues we refer briefly to the relevant provisions of the Act.

Section 161

[41] Section 161 of the Act is headed "Jurisdiction". This section relevantly provides:

> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
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> (a) disputes about the interpretation, application, or operation of an employment agreement:
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> (b) matters related to a breach of an employment agreement:
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> …
>
> (n) compliance orders under section 137:
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> …
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> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):
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> …

[42] Section 161(3) states that except as provided in the Act, no court has jurisdiction in relation to any matter that is within the exclusive jurisdiction of the Authority pursuant to subs (1). It follows that if the claims now advanced by Mr Lewis are claims that fall within s 161(1), there was jurisdiction for the claim to be determined by the Authority. If not, the Employment Court would not have jurisdiction.

Section 137

[43] 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 a failure to observe any provision of an employment agreement (s 137(1)(a)(i)) or where there has been non-compliance with:[19]

> any terms of settlement or decision that section 151 provides may be enforced by compliance order.

Section 151 and related provisions

[44] Section 151(1) provides:

> **151 Enforcement of terms of settlement agreed or authorised**
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> (1) This section applies to—
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> (a) any agreed terms of settlement that are enforceable by the parties under section 149(3):
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> (b) any recommendation that is enforceable by the parties under section 149A(5):
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> (c) any decision that is enforceable by the parties under section 150(3).

[45] Under s 151(2) a matter referred to in s 151(1) may be enforced by a compliance order under s 137.

[46] Section 149(1) provides for the formal signature of agreed terms of settlement by persons engaged or authorised by the chief executive of the

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[19] Section 137(1)(a)(iii).

department. This process was not followed in the present case, but the provision is relevant to the arguments addressed under question (b).

[47] Section 149A enables the parties to a problem to agree in writing that a person employed or engaged by the chief executive to provide mediation services should make a written recommendation in relation to the matters in issue. The recommendation becomes final and binding unless a party gives written notice that the party does not accept it. No such recommendation was made in this case.

[48] Similarly, s 150 enables the parties to appoint a mediator, who can make a binding decision on the matters in issue. Again, no such reference was made in the present case.

Section 179

[49] Section 179 provides that a party to a matter before the Authority who is dissatisfied with the determination of it may elect to have the matter determined by the Employment Court. The appellant relied on this provision to file a statement of claim in the Employment Court when the Authority held it did not have jurisdiction to entertain the claim. The section does not confer any original jurisdiction on the Employment Court.

Section 187

[50] As noted the issue raised by question (a) concerns whether the alteration to the pleaded basis of the claim in the Employment Court compared to that pursued in the Authority meant that the matter had not been "previously determined" by the Authority. That is an issue separate from the issue of whether the claim from the outset involved a matter within the ambit of s 161(1).

[51] Section 187(1) provides that the Employment Court has exclusive jurisdiction:

> (a) to hear and determine elections under section 179 for a hearing of a matter previously determined by the Authority, whether under this Act or any other Act conferring jurisdiction on the Authority.
>
> …

[52] The issue raised is whether the altered basis of the claim in the Employment Court took the dispute outside the Employment Court's derivative jurisdiction under s 187(1)(a).

Question (c)

[53] Mr Towner for JP Morgan submitted that the settlement agreement was not a variation of the employment agreement. He argued that it did not deal with terms and conditions of employment, but rather contained terms settling the respondent's personal grievance and describing the basis on which the respondent's employment would terminate. In advancing this argument, Mr Towner discussed the decisions of the Employment Court in *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack*, *Majestic Horse Floats Ltd v Goninon*, *Musa v Whanganui District Health Board*, and *Wade v Hume Pack-N-Cool Ltd.*[20] He relied also on a passage appearing in Burrows, Finn and Todd's *Law of Contract in New Zealand* in which it was stated:[21]

> … what has been created by agreement may be extinguished by agreement. An agreement by the parties to an existing contract to extinguish the rights and obligations that have been created is itself a binding contract.

[54] Mr Towner referred in addition to the definition of "employment agreement" in s 5 of the Act. That provides that "employment agreement":

> (a) means a contract of service; and
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> (b) includes a contract for services between an employer and a homeworker; and
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> (c) includes an employee's terms and conditions of employment in—
>
> (i) a collective agreement; or

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[20] *Counties Manukau Health Ltd*, above n 9; *Majestic Horse Floats Ltd v Goninon* [1993] 1 ERNZ 323 (EmpC); *Musa v Whanganui District Health Board*, above n 9; *Wade v Hume Pack-N-Cool Ltd*, above n 9.

[21] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [19.2.1].

(ii) a collective agreement together with any additional terms and conditions of employment; or

(iii) an individual employment agreement.

He submitted that the settlement agreement could not be brought within the definition.

[55] Mr O'Brien for Mr Lewis argued that a settlement agreement can be considered to be a variation to an employment agreement where the employment agreement is extant at the time the settlement agreement is entered into, the employee continues to be employed beyond the date of the settlement agreement, and the settlement agreement has future application. He relied on another statement in the same paragraph of Burrows, Finn and Todd describing a bilateral discharge of an agreement as one that occurs "when the contract to be extinguished is either wholly or partly executory, in that both parties have obligations which have not yet been fully performed."

[56] Mr O'Brien submitted that the essence of bilateral discharge is that the agreement extinguishes rights and obligations. In order for that to occur, nothing must be left of the obligation. There could not be a bilateral discharge of some of the rights and obligations under an agreement. Rather, where only parts of the rights and obligations are discharged, the effect is to vary the original agreement because that otherwise remains in force. Mr O'Brien derived this approach from the judgment of Viscount Haldane in *Morris v Baron & Co* who said:[22]

> What is, of course, essential is that there should have been made manifest the intention … of a complete extinction of the first and formal contract and not merely the desire of an alteration, however sweeping, in terms which still leave [the first contract] subsisting.

[57] Mr O'Brien submitted that where the parties to an agreement agree to amend the termination provisions to provide for a different method of termination, that constitutes a variation of the original agreement and not a bilateral discharge or "extinguishment" of the original agreement. In the present case, the employment agreement continued to define the rights and obligations of the parties after the

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[22] *Morris v Baron & Co* [1918] AC 1 (HL) at 19.

settlement agreement was executed (albeit only for one day) as the settlement agreement only varied the termination provisions and provided that the employment agreement would terminate at a specified future date. He submitted that in effect, the settlement agreement changed the employment agreement from one involving employment for an indefinite duration to one involving employment for a fixed term. Other provisions, such as those in Appendix B referred to at cls 5 and 6 of the settlement agreement, were continued in effect beyond the cessation of Mr Lewis' employment.

[58] Mr O'Brien referred to the cases discussed by Mr Towner as well as other decisions of the Employment Court to support his argument. In addition he relied on the decision of this Court in *Shaffer v Gisborne Boys' High School Board of Trustees* placing particular reliance on the following passage:[23]

> An agreed settlement of differences between the parties to an employment contract may be seen as an addition to the terms of that contract. Henceforth the original contract and the settlement terms will have to be read together to ascertain the full provisions of the contractual relationship. The tribunal has power under s 55(1)(a) to make a compliance order where any person has not observed or complied with "any provision of any employment contract" and there is no reason why an agreed settlement term should not come within the words just quoted. This seems clearly so when reinstatement has been agreed. It is less clearly so when, as in the *Majestic Horse Floats* case, the employment has ended.[24] …

Evaluation

[59] We accept, as Mr O'Brien submitted, that the starting point should be to ask whether the settlement agreement had the effect of discharging by agreement obligations previously arising under the employment agreement, a "bilateral discharge". As noted in Burrows, Finn and Todd, where the contract to be discharged is still executory (as with the employment agreement in this case) the consideration for the discharge is a mutual agreement to release each party from further performance.[25]

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23 *Shaffer v Gisborne Boys' High School Board of Trustees* [1995] 2 NZLR 288 (CA) at 294 (decided under the Employment Contracts Act 1991).

24 *Majestic Horse Floats*, above n 20.

25 Burrows, Finn and Todd, above n 21, at [19.2.1]. See also H G Beale (ed) *Chitty on Contracts* (31st ed, Sweet & Maxwell, London, 2012) vol 1 at [22–025].

[60] One of the cases relied on for these propositions is *Morris v Baron*, to which reference has already been made.[26] The same case is relied on in *Chitty on Contracts* for the statement that rescission of a contract will be implied where the parties have effected such an alteration of its terms as to substitute a new contract in its place.[27] The authors go on to state that the question of whether a rescission has been effected is frequently one of considerable difficulty, because of the need to distinguish a rescission of the contract from a variation which merely qualifies existing rights and obligations. If a rescission is effected, the contract is extinguished, but if there has only been a variation, the contract will continue to exist in an altered form.[28]

[61] Reference can also helpfully be made to the decision of the House of Lords in *British and Beningtons Ltd v North Western Cachar Tea Co Ltd*, where Lord Atkinson said:[29]

> … A written contract may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it …

[62] Although this language is addressing circumstances in which a written contract may be discharged by an oral one, the underlying principles are the same where both contracts are in writing. This indeed follows from the various statements in the five separate judgments delivered in *Morris v Baron*.

[63] In his judgment in that case, Lord Dunedin observed:[30]

> … The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not

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26 *Morris v Baron*, above n 22.

27 Beale, above n 25, at [22–028]. Nothing turns on the use of the word "rescission" in this context, which for present purposes may be treated as synonymous with discharge. The latter word may be more accurate where a contract has been partly performed: Lord Dunedin, in *Morris v Baron*, above n 22, at 28, preferred the word "abrogate".

28 At [22–028].

29 *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 (HL) at 62.

30 At 25–26.

> exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

[64] The various judgments in *Morris v Baron* were effectively summarised by Lord Sumner in *British and Beningtons Ltd* as follows:[31]

> … The question is whether the common intention of the parties … was to "abrogate," "rescind," "supersede" or "extinguish" the old contracts by a "substitution" of a "completely new" and "self-contained" or "self-subsisting" agreement … .

[65] Applying these statements of the law in the present case we think it is clear that the settlement agreement was a new agreement, intended by the parties to replace the employment agreement and operate as a stand-alone statement of their obligations to each other after Mr Lewis ceased to be employed by the bank. We say that for a number of reasons.

[66] First, the settlement agreement set out the terms on which the relationship of employer and employee was to terminate. While it is true that this altered the termination provisions of the employment agreement, it did so for the very purpose of bringing Mr Lewis' employment to an end. We think it would be artificial to describe the settlement agreement as a variation of the employment agreement in these circumstances.

[67] Secondly, the settlement agreement contained provisions that were plainly intended not to operate as terms of employment, but as terms that were to apply once the employment relationship was ended. For example, the bank's payment obligations under cl 2 arose within a period calculated from the Termination Date; and other obligations on both sides would have effect after the cessation of employment. While cl 5 of the settlement agreement adopted cl 7 of Appendix B of the employment agreement dealing with return of the bank's property, the obligation was clearly one intended to apply on the termination of employment; the mere adoption cannot be relied on to demonstrate that there was a variation of the original employment agreement. The same may be said of the restraint of trade and

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[31] *British and Beningtons Ltd*, above n 29, at 67.

confidentiality provisions (cls 4 and 6), while the provision of "outplacement support" (cl 3) was again an obligation that would arise after termination.

[68] In fact the provisions of the employment agreement that were specifically referred to in the settlement agreement are readily able to be categorised as simply incorporated by reference: they are in the category referred to in the last sentence of the passage quoted above from Lord Dunedin's judgment in *Morris v Baron*. Once Mr Lewis left the bank's employ, their contractual force would rest on the settlement agreement, not the employment agreement.

[69] These provisions may be contrasted with cl 2(f) of the settlement agreement requiring the bank to pay Mr Lewis' "entitlements including salary up to and including the Termination Date". What those entitlements were was left to be calculated under the employment agreement, and use of the word "entitlements" is consistent with the original provisions under the employment agreement continuing to apply up to termination. In other words, it would be the employment agreement that gave rise to and defined the entitlements, and the settlement agreement made it plain those entitlements would continue to apply.

[70] Thirdly, there is no doubt that the settlement agreement can be "sued upon" alone. In fact, the substance of the claim that Mr Lewis now seeks to advance is of a breach of the settlement agreement and the obligation it contained that there would be no disparagement of Mr Lewis by JP Morgan. While reference is also made to implied terms of the employment agreement to keep accurate records and not to deny he was the bank's CEO, it is not the breach of those obligations which gives substance to Mr Lewis' claim; rather, it is the fact that the bank did not advise third parties of Mr Lewis' role as the chief executive of its New Zealand branch, thereby putting itself in breach of cl 9 of the settlement agreement (the non-disparagement clause). Any loss arose from that failure.

[71] In any event, the attempt to rely on implied terms in the employment agreement would face the insuperable difficulty that cl 18 of the settlement agreement provided that it constituted the entire agreement between the parties and that it superseded all and any prior agreements.

[72] Finally, once the settlement agreement was executed, it could not be said that it was possible for both agreements to be performed. This follows from the fact that the employment agreement envisaged Mr Lewis' ongoing employment; the settlement agreement put that prospect to an end. Plainly, he was no longer obliged to continue in JP Morgan's employment and it had been agreed that he would not do so. It would be entirely artificial to describe the situation as one involving the ongoing performance of both contracts.

[73] Clearly, Mr O'Brien was correct to submit that the employment agreement would continue in effect until the point at which, on the day after the settlement agreement was executed, the parties had agreed Mr Lewis' employment would cease. However, the whole point of the settlement agreement was to bring his employment to an end and the provisions of the settlement agreement were only to take effect at and from that point.

[74] Consequently, considered in terms of the relevant contractual principles, we are in no doubt that the settlement agreement should be regarded as replacing the employment agreement and as governing, on its own, the relationship between the parties after the cessation of Mr Lewis' employment. Since the settlement agreement cannot be regarded as an "employment agreement" for the purposes of the definition in s 5 of the Act, the Authority did not have jurisdiction to deal with the dispute under s 161(1)(a) or (b) of the Act.

[75] Further, the Authority did not have jurisdiction under s 161(1)(n) of the Act: it could not have issued a compliance order under s 137(2), since this was not a case where there was non-compliance with a provision of an "employment agreement" (s 137(1)(a)(i)), and no other provision in s 137 authorised a compliance order under that section.

[76] There is nothing in this Court's decisions in *Shaffer v Gisborne Boys High School Board of Trustees*, and *Department of Survey & Land Information v NZ Public Service Assn* (another case on which Mr O'Brien relied) which would suggest a different conclusion.[32]

[77] In *Shaffer*, the Post-Primary Teachers' Association initiated a personal grievance on behalf of the appellant, a teacher, when she was redeployed as a result of a falling school roll. A mediated settlement was reached, the parties having agreed during the mediation that the mediator should make a binding decision and sign the terms of settlement under s 88(2) of the 1991 Act. The signed decision ordered that the appellant be reinstated, and appended a statement to be read out by the Chair at a meeting of the board of trustees. Subsequently the school board commenced an application for judicial review under s 105 of that Act. The Employment Court held that the mediator's decision had been made without jurisdiction, and the question before this Court was whether that conclusion was correct. The appeal was allowed, the Court stating that the mediator's decision on the terms of settlement amounted to a determination under s 55(1)(b) of the 1991 Act, and could be the subject of a compliance order.[33]

[78] As a consequence the appellant was reinstated to her position, and the employer-employee relationship was to continue. In such circumstances it may very well be necessary to consider the terms of both the original agreement and any new or altered terms to ascertain the provisions applicable to the ongoing relationship. The present case is very different. For the reasons already addressed the parties' ongoing obligations are, and can only be, those set out or referred to in the settlement agreement and the employment agreement has no continuing relevance for the claim sought to be advanced.

[79] In *Department of Survey & Land Information v NZ Public Service Assn*, two employees held senior positions in the Department of Lands.[34] Their individual contracts of employment could be terminated on three months' notice, or the

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32 *Shaffer v Gisborne Boys' High School Board of Trustees,* above n 23 and *Department of Survey & Land Information v NZ Public Service Assn* [1992] 1 ERNZ 851 (CA).

33 At 294.

34 *Department of Survey & Land Information,* above n 32.

payment of three months' wages in lieu. On 15 January 1990, the Acting Director-General of Lands offered them the option of terminating their contracts on 31 January 1990 with "an appropriate sum in lieu", or remaining in employment in the hope of securing suitable positions in the new Department of Survey and Land Information to be formed on 1 February. On 17 January they accepted the former option on the footing that they would receive three months' salary in lieu of notice. Later that month a new Acting Director-General purported to countermand that arrangement, giving them three months' notice of termination effective from 31 January, and requiring that they work over that period.

[80] The Labour Court determined that the two employees had valid personal grievances and awarded each three months' pay in lieu of notice based on the arrangement agreed with the first Acting Director-General, as well as compensation for humiliation and injury to feelings.

[81] The matter came before this Court on a case stated appeal. One of the questions was whether the Labour Court had erred in deciding there was sufficient consideration from the employees to support the variation of the employees' respective contracts of employment. This Court endorsed the view taken in the Labour Court that there was such consideration arising from the exchange of correspondence on 15 and 17 January 1990. There was a significant change in the terms of employment pursuant to which their employment came to a consensual end in 12 days' time, whereas previously the employment had been terminable on three months' notice. They had given away the prospect of continued employment in the new Department.

[82] We do not consider the description of what occurred in that case as a variation of the employment contracts means that the same outcome should apply in this case. Here there is a comprehensive settlement agreement which we have concluded amounted to the substitution of a new agreement, an issue not discussed in *Department of Survey & Land Information*.

[83] We do not consider it necessary to discuss all of the Employment Court decisions referred to by counsel. Each is a decision on its particular facts, and none

would imply that the settlement agreement in this case should be regarded as an employment agreement, with the possible exception of *Kerr v Associated Aviation (Wellington) Ltd.*[35] To the extent that case implies that enactment of s 161(1)(r) meant it was no longer necessary to differentiate between an employment agreement and a settlement agreement that terminates the former we consider it is wrongly decided.[36]

[84] We note further in *Musa v Whanganui District Health Board* the parties had entered into an agreement on 26 March 2008 to settle a personal grievance, pursuant to which the plaintiff agreed to resign on 31 July 2008, and the defendant agreed to make certain payments. The Employment Court, while expressing the view that the provision of the agreement terminating the employment at the end of July may have amounted to a variation of the employment agreement, continued:[37]

> … But the settlement agreement was a separate contract, an accord and satisfaction as the law sometimes terms it. Not only was it not an employment agreement but in some respects it was the antithesis of an employment agreement. It is an agreement that provided for the end of employment on terms. … The terms said to have been breached … were not terms that were limited to the balance of the employment period. What became known at the hearing as the non-disparagement clause applied not only to the remaining four months of Mr Musa's employment but, potentially, indefinitely.

[85] We have applied similar reasoning in this case. In our view, the settlement agreement is to be regarded as a stand-alone agreement and not properly categorised whether in whole or in part as an employment agreement. That means the Authority was correct when it held that it did not have jurisdiction to determine Mr Lewis' claim. Because the Act had not conferred jurisdiction on the Authority, the Employment Court did not have jurisdiction to determine the matter under s 187(1)(a).

[86] For the reasons discussed we have concluded that question (c) should be answered "yes": The Employment Court was wrong in law in holding that the written agreement dated 4 March was capable of being characterised either wholly or in part as a variation to an employment agreement.

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35 *Kerr v Associated Aviation (Wellington) Ltd*, above n 9.
36 At [31].
37 *Musa v Whanganui District Health Board*, above n 9, at [79].

Question (b)

[87] This question asks whether the Employment Court erred in law in holding it was arguable that it can award damages for breach of a settlement agreement. We address it on the basis that the settlement agreement is not an employment agreement, and that the Court's jurisdiction is derived from that of the Authority.

[88] The word "arguable" reflects language used by the Employment Court in the decision under appeal. However, as the issue goes to jurisdiction it would have been preferable to omit the reference to the matter being arguable. The appellant had applied for an order striking out the respondent's claim on the basis that the claim was outside the Authority's jurisdiction. That required that the jurisdictional issue be determined.

[89] The focus of the question is on the broad conferral of jurisdiction in s 161(1)(r), relating to "any other action … arising from or related to the employment relationship …".[38]

[90] Mr O'Brien argued that this provision conferred jurisdiction on the Authority and therefore the Employment Court, because the settlement agreement arose from, or is related to, the employment relationship. He then relied on s 162 of the Act which confers power on the Authority to make any order the High Court or a District Court may make under a range of statutes (including the Contractual Remedies Act 1979), submitting that the Employment Court could therefore award damages for breach of the settlement agreement. He also emphasised the breadth of the definition of "employment relationship problem" in s 5 as an expression extending to a personal grievance, dispute or any other problem relating to or arising out of an employment relationship.

[91] Mr O'Brien relied on this Court's decision in *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*, the decisions of the High Court in *The Hibernian Catholic Benefit Society v Hagai* and the Employment Court in

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[38] It seems that "action" here is used in the sense in which it is synonymous with "proceedings" notwithstanding that "proceedings" is also used elsewhere in the subsection.

Kerr v Associated Aviation (Wellington) Ltd.[39] Counsel submitted that the provisions of the Act constituted a conscious and deliberate widening of the Authority's jurisdiction compared with that conferred on the Employment Tribunal under the 1991 Act. The Tribunal's exclusive jurisdiction under that statute was confined to "proceedings founded on an employment contract" which was to be contrasted with the Authority's wider power under the current statute to resolve relationship problems generally.[40]

[92] It will be apparent from the discussion of question (c) that we do not consider the matter before the Authority was one that either arose from or was related to the employment relationship. In essence it was a claim under the settlement agreement, and concerned the alleged breach of post-employment obligations. Of course the claim would not have arisen but for the fact that Mr Lewis was once the bank's employee, but the claim is founded on the settlement agreement. That is necessarily so, not only because the settlement agreement now constitutes the entire agreement between the parties, but also because other claims, "arising out of or in connection with the subject matter" were specifically barred by cl 16 of the settlement agreement.

[93] In *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc* the issue this Court had to determine was whether the Secretary for Education was properly named as the sole respondent when the Authority investigates claims of the New Zealand Educational Institute Te Riu Roa for declaratory and compliance orders for alleged breaches by the Secretary of the Primary Teachers' Collective Agreement. The appellant argued that the agreement was not binding on the Secretary, and that the scheme of the Act is such that employment relationship problems are assumed to arise only between parties to an "employment relationship", as specified in s 4(2). This Court rejected that argument, in part because of the breadth of the definition of "employment relationship problem".[41]

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39 *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*, above n 12; *The Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24, (2014) 11 NZELR 534; *Kerr v Associated Aviation (Wellington) Ltd*, above n 9.

40 Employment Contracts Act, s 3(1).

41 *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc*, above n 12, at [21].

However, the facts of that case and the issues determined by the judgment do not assist with the very different issues that arise here.

[94] In *The Hibernian Catholic Benefit Society v Hagai* the plaintiff sued to recover money stolen by an employee in the course of her employment, claiming 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.[42] Associate Judge Bell held that the claim should have been advanced before the Authority, considering that the defendant's theft of the plaintiff's money while she was at work not only fell "within the general wording of an employment relationship problem", but also came within three of the "heads" in s 161(1): paras (b) (breach of employment agreement), (f) (breach of good faith obligations) and (r).[43] The Judge thought para (r) would, relevantly, embrace claims based on breach of fiduciary duty and for money had and received.[44] Since the Authority had jurisdiction, the High Court did not. In a passage relied on by Mr O'Brien, the Judge said:[45]

> … a claim that one party to an employment relationship should pay a sum to another party to the relationship on account of a liability incurred in the context of that relationship comes comfortably within the meaning of employment relationship problem under s 5 and is therefore within the jurisdiction of the authority under s 161.

[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 an "employee 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.

[96] At [19], Associate Judge Bell quoted and purported to apply what was said by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*: [46]

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42 *The Hibernian*, above n 39.

43 At [20].

44 The actual causes of action were apparently not specified in the statement of claim: see the judgment at [18].

45 At [11].

46 *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP 72/01, 14 August 2001.

> [22] To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in a particular claim an employment relationship one, or is the subject-matter of the claim some right or interest which is not directly employment related at all? …

[97] We accept that statement of the law as sufficient for present purposes, but consider its application to the facts in *The Hibernian Society* should have led to a different conclusion. While Ms Hagai was clearly in breach of her employment contract, the essence of the Society's claim was her dishonest theft of the money. This was not an employment-related problem, although it would undoubtedly have justified her dismissal. While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai's conduct was such as would have made her liable to the plaintiff *without* any such relationship. In other words, the existence of the employment relationship was not a necessary component of many of the causes of action that could have been asserted against her. That indicates that the essence of the claim was not employment related, and should not have been regarded as within the Authority's jurisdiction.

[98] This approach is consistent with that taken by the Full Court of the High Court in *BDM Grange Ltd v Parker*, a case which considered the jurisdiction of the Authority to determine claims in tort, and in which there was an extensive discussion of the words "relating to" as used in the definition of "employment relationship problem" in s 5 of the Act. The Court observed:[47]

> … We express our essential agreement, at greater length, with the analysis of Panckhurst J [in *Pain Management Systems*] 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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[47] *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC) at [66].

[99] Our approach is also consonant with the statutory purpose in creating the Authority and the Employment Court as bodies having specialist expertise and understanding, equipping them to deal with employment related problems. Their constitution and jurisdiction is dealt with in pt 10 of the Act, which commences with a statement of the object of that part, in s 143. Relevantly, that section refers to the establishment of procedures and institutions that, amongst other things:

> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements

[100] Consistently with this the Authority is described in s 157 as an "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."

[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".[48] 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.[49]

[102] As to *Kerr v Associated Aviation (Wellington) Ltd*, we have already noted our disagreement with the reasoning in that case, which rejected as artificial the distinction between settlement agreements and employment agreements. We have explained why the distinction can be important and why it is on the facts of this case.

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[48] Employment Relations Act, 143(f).

[49] We note that in *The Hibernian*, above n 39, at [43], Associate Judge Bell followed his own earlier decision in *Aztec Packaging Ltd v Malevris* [2012] NZHC 243, (2012) 10 NZELC 79,003, rejecting criticism by Duffy J in *RPD Produce Holdings Ltd v Miller* [2013] NZHC 705, (2013) NZELR 521 at [39]–[40] that *Aztec* took too expansive a view of what constituted an employment relationship problem and was wrongly decided. See also *PropertyIQ NZ Ltd v Vicelich* [2012] NZHC 2016, (2012) NZELR 614 at [20].

[103] Mr O'Brien noted, in a subsidiary argument, that ss 149 and 151 of the Act are an important part of the context in which the present question must be addressed. These provisions have already been referred to above. Their significance is that s 151 applies to agreed terms of settlement enforceable under s 149(3), enforceable recommendations under 149A(5) and decisions enforceable under s 150(3). It is these three categories of resolution of employment relationship problems that may be enforced by compliance order under s 137, or, in the case of a monetary settlement, by using the procedure available under s 141.[50]

[104] The settlement agreement in this case was not signed under s 149, and was not otherwise within the ambit of s 151. Mr Towner submitted that these procedures are not available in the case of a settlement agreement that was not signed by the relevant mediator under s 149(1). We agree with those submissions.

[105] Mr O'Brien submitted that because s 149(4) of the Act empowers the Authority to impose a "penalty" for breach of an agreed term of an agreement formally signed under the section, arguably a similar power must be available in the case of an agreement not so signed. However the Authority is a creature of statute and can only exercise the powers that have been given to it and those that it has by necessary implication. We do not consider that statutory provisions that provide for a remedy in carefully restricted circumstances can properly found an inference that the power will be more widely available. Nor do we regard the power to impose a penalty as equivalent to a power to award damages in any event.

[106] Mr O'Brien also endeavoured to argue that because s 149(3) provides that in the case of an agreement formally signed under the section the terms cannot be brought before the Authority or the Employment Court, there is an inference that the terms of an agreement that has not been formally signed could be brought before the Authority and the Court (but not the ordinary courts). We do not accept that submission, which rests entirely on inference and does not seem to be supported by any of the statutory language.

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[50] The latter involves filing the relevant document in the District Court, and then enforcing it as if it were a judgment of that Court.

[107] In any event, greater difficulties remain. Since the settlement agreement was not an employment agreement and a claim based on it is not able to be brought within the ambit of s 161(1)(r), Mr Lewis' claim was not within the Authority's jurisdiction at all. That is the position regardless of any obstacles arising under ss 149 and 151.

[108] We add for completeness that s 162 of the Act, which enables the Authority to make any orders that the High or District Court may make under seven specified statutes, cannot operate as an independent source of power. The powers may clearly only be exercised in respect of matters within the Authority's jurisdiction. Further, as the High Court noted in *BDM Grange Ltd v Parker*, the powers are limited in their application to any matter related to an employment agreement, and do not extend to the more widely defined "employment relationship problem".[51]

[109] For these reasons we have concluded that in this case neither the Authority nor the Employment Court have jurisdiction to award damages for breach of the settlement agreement. Such a power would not exist in the case of any breach of a settlement agreement (not being an employment agreement or a variation to it). We answer question (b) accordingly.

Question (a)

[110] This question concerns the extent to which the Employment Court's jurisdiction depends on the precise terms of the issues raised before the Authority. As is apparent from the terms of the question, the issue raised is whether the Court could properly entertain Mr Lewis's amended claim that there had been a breach of an alleged variation to the employment agreement, when the claim advanced before the Authority was for a breach of the settlement agreement.

[111] The answers given to the previous questions mean that, strictly, this question does not require an answer. Since the Employment Court did not have jurisdiction to determine the claim because it was outside the Authority's jurisdiction, the pleading

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[51] *BDM Grange Ltd v Parker*, above n 47, at [59].

point does not need to be determined. However we deal with it briefly because the issue may be of significance in other cases.

[112] Mr Towner noted that s 179(1) of the Act allows a party to a matter before the authority dissatisfied with a decision to elect to have "the matter" heard by the Court. Similarly, under s 187(1)(a) the Employment Court's jurisdiction is, relevantly, to hear "a matter previously determined by the Authority". He referred to the Full Court of the Employment Court's decision in *Abernethy v Dynea New Zealand Ltd*, in which the Court emphasised that the issue raised before the Court must be one that had been the subject of the investigation by the Authority into the relevant employment relationship problem.[52]

[113] Mr Towner submitted that the word "matter" must be construed so as to refer to the question or allegation that was before the Authority. The matter before it was an allegation that there had been a disparagement of Mr Lewis by the bank in breach of cl 9 of the settlement agreement. It had not been asked to determine an alleged variation of an employment agreement, and its investigation had been limited to whether the settlement agreement was breached. By contrast, the amended pleadings had significantly broadened the matter. This was contrary to the statutory purpose which was to confine proceedings in the Employment Court to those issues that had been dealt with by the Authority, not to confer what amounts to an original jurisdiction on the Court.

[114] Mr O'Brien submitted that JP Morgan's approach was unduly technical. He emphasised the relevant procedural rules did not require Mr Lewis to state the particular causes of action he relied on: Form 1 of the Employment Authority Regulations 2000 simply provides that the applicant must state the "problem or matter" to be resolved. A non-technical approach is appropriate having regard to the Authority's role under s 157(1) to which we have earlier referred. He submitted that the substance of Mr Lewis's claim was and remained that the appellant was deliberately failing to confirm to third parties that he had been its CEO in New Zealand, and that he had suffered damage as a result.

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[52] *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [33].

[115] We accept Mr O'Brien's submissions. We see the approach advocated by the appellant as overly technical. While Mr Lewis originally complained to the Authority about a breach of the settlement agreement, the substance of the complaint was the issue of disparagement arising from the bank's failure to give accurate information in response to inquiries about his status when employed by it. The Employment Court held that the second amended statement of claim addressed the same matter that was before the Authority, and it was not significant that it expressed the claim on the basis a breach of the employment agreement as allegedly varied.

[116] Its essential reasoning is encapsulated in the passage we set out at [12] above. We consider it was right. We answer question (a) accordingly.

Result

[117] The appeal is allowed.

[118] For ease of reference we set out the questions for which leave was granted together with our answers:

> Was the decision of the Employment Court wrong in law in holding that:
>
> (a) The Employment Court had jurisdiction to hear a challenge to a determination of the Employment Relations Authority pursuant to ss 179(1) and 187(1) of the Employment Relations Act 2000 in circumstances where the determination related to a claim about an alleged breach of a settlement agreement whereas the claim before the Employment Court was based on an alleged variation to the employment agreement?
>
> Answer: No.
>
> (b) It was arguable that the Employment Court has jurisdiction to award damages for breach of a settlement agreement?
>
> Answer: Yes (where the settlement agreement is not an employment agreement or a variation to it).

(c) The written agreement dated 4 March 2010 was capable of being characterised either wholly or in part as a variation to an employment agreement?

Answer: Yes.

[119] The consequence of these answers is that if Mr Lewis wishes to pursue his claim he will need to do so in the District Court, or, if the amount claimed exceeds the District Court's jurisdiction, in the High Court.

[120] The appellant is entitled to costs calculated for a standard appeal in accordance with band A together with usual disbursements.

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