IN THE COURT OF APPEAL OF NEW ZEALAND

CA608/2010
[2010] NZCA 582

BETWEEN	DIANE KENNEDY Applicant
AND	ROLLING THUNDER MOTOR COMPANY LIMITED Respondent

Hearing: 30 November 2010

Court: Chambers, Randerson and Stevens JJ

Counsel: D J Clark for Applicant
D N Burton and S M Waring for Respondent

Judgment: 6 December 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay to the respondent costs of a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] The applicant has applied for leave to appeal on a question of law pursuant to s 214 of the Employment Relations Act 2000 (the ERA). At issue is the scope of the jurisdiction of the Employment Relations Authority (the Authority) and the extent to

which the disputes before it must arise from, or relate to, the employment relationship between the parties.

Background

[2] The applicant was employed by the respondent as its general manager. Staff, including the applicant, were permitted to use company BarterCards for personal purchases but were required to account to the respondent for such purchases. The respondent believed that the applicant, while employed, incurred in this way what was thought to be a debt of $71,230.39 and has failed to account for it. On further investigation, the respondent now alleges that the amount solely attributable to personal expenditure by the applicant is $100,871.64.

[3] The respondent brought a claim before the Authority for recovery of the debt. The Authority dismissed the claim for want of jurisdiction.[1] The respondent then filed a statement of claim in the Employment Court seeking a hearing *de novo*. The applicant applied to have them struck out for want of jurisdiction. Judge Couch declined the application.[2] As a result the applicant has sought leave to appeal to this Court.

The nature of the claim

[4] The respondent's claim as currently formulated is conveniently set out in the statement of claim as follows:

> 7 During the Defendant's employment with the Plaintiff she put forward a proposal to open an account with BarterCard. BarterCard operates on the basis of using "BarterCard Trade Dollars" to purchase or sell goods or services from other businesses in the BarterCard scheme. It operates in a similar way to company credit cards.
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> 8. The Plaintiff agreed to open the account with BarterCard.
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> 9 To make the BarterCard scheme more relevant to the Plaintiff the Defendant requested that some employees of the Plaintiff (including herself) have their own personal accounts on the Plaintiff's

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1 *Rolling Thunder Motor Company Ltd v Kennedy* ERA Christchurch CA45/10, 3 March 2010.
2 *Rolling Thunder Motor Company Ltd v Kennedy* [2010] NZEmpC 109.

BarterCard account. This would allow them to make personal purchases for themselves and the employees would then reimburse the Plaintiff. The Plaintiff agreed to this.

10 The Plaintiff's accountant set up an internal accounting system by opening personal debtor accounts for employees participating in the BarterCard scheme.

11 The Plaintiff received a statement from BarterCard each month itemising all transactions on its BarterCard account.

12 Each month the Plaintiff's accountant requested that the Defendant identify which of the expenses on the statement were her personal expenses. The expenses marked by the Defendant as personal were then charged by the Plaintiff to the Defendant's personal debtor account and the Defendant was issued with a corresponding monthly statement of that account.

13 Throughout the Defendant's employment she did not dispute any of the statements of her personal debtor account.

14 The Defendant was made fully aware of the size of her personal debtor account on an ongoing basis. In addition to receiving monthly statements the Defendant had constant access to the account details in her position as General Manager.

[5] In view of the strike out application, no statement of defence has been filed by the applicant. At the hearing, the applicant's counsel, Mr Clark, informed the Court that in essence the applicant's defence involved a contention that all such expenditure using the BarterCard was for company purposes. That raises the immediate question as to the scope of the applicant's authority and the true basis for particular items of expenditure during the course of the applicant's employment.

The decision of the Employment Court

[6] The Judge concluded that the Authority had jurisdiction under s 161(1)(r) of the ERA which provides:

Jurisdiction

(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—

…

> (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):
>
> ...

[7] The Judge noted that there was conflicting High Court and Employment Court authority on the proper interpretation of the phrase "arising from or related to" used in s 161(1)(r). In the High Court, Panckhurst J had held:[3]

> [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? In this regard it may be necessary to distinguish between situations where the opportunity to breach the right or interest at stake arose in the context of an employment relationship as opposed to those where some employment right or interest is truly at stake.
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> [23] ...Where the subject matter is property rights and the claim is tortious, equitable or statutory it may be unlikely that the case is one within the exclusive jurisdiction of the Authority. Put another way where the rights or interest claimed by the plaintiff do not derive from a contract of service the general jurisdiction of this Court is unlikely to be ousted.

[8] A full bench of the High Court comprising Baragwanath and Courtney JJ agreed with Panckhurst J in a later case:[4]

> 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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3 *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001.

4 *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 at [66].

[9] The Employment Court, however, adopted a "but for" approach to the phrase "arising from or related to".[5] Thus, the Authority would have jurisdiction if the dispute would not have arisen had the parties not been in an employment relationship. The Judge considered that the High Court decisions adopted an "unduly narrow" construction of s 161(1)(r). He considered that the "but for" test applied by the Employment Court better reflected the wording of the statute.

[10] Applying that test to the facts as pleaded in the statement of claim, the Judge concluded that there was "a direct connection between the employment relationship and the arrangement whereby the debt is alleged to have been incurred".[6]

Discussion

[11] Counsel for the applicant submits that there is a conflict between the High Court authorities identified by the Judge and the "but for" test adopted by the Judge. On this basis alone, leave to appeal to this Court ought to be granted to resolve the conflict.

[12] We are by no means satisfied that the "but for" test applied by the Judge is appropriate when considering the application of s 161(1)(r) of the ERA. That question may need to be decided by this Court on another occasion, particularly in view of the approach in the High Court cases mentioned earlier.

[13] However, we do not consider that leave should be granted to the applicant in the present circumstances. We are not satisfied that in the circumstances of this case the questions of law concerning the "but for" test, and the scope of the Authority's jurisdiction under s 161(1)(r) of the ERA are such that they ought to be submitted to this Court for a decision. It may be that such questions have general or public importance. But we decline leave for other reasons.

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5 Applying the earlier Employment Court decision *Waikato Rugby Union v New Zealand Rugby Football Union* [2002] 1 ERNZ 752.

6 At [23].

[14] First, we consider that it is premature for the applicant to seek leave to appeal, given that the pleadings are not yet complete and the facts have not been determined surrounding the relationship of the parties as well as the detailed circumstances of the manner in which the BarterCard purchases came to be made by the applicant. Second, based on what we were told by counsel about the defence to be advanced by the applicant, we consider that there may well be a proper factual foundation for jurisdiction under s 161(1)(r). As the applicant will likely contend that the BarterCard purchases were authorised by the respondent employer, the inevitable retort by the employer will be that the applicant was not authorised to make such purchases. This in turn will require consideration of the purpose(s) for which the purchases were made. All of these questions are likely to demonstrate (once the relevant facts are established) whether or not the action is one "arising from or related to the employment relationship" between the parties.

[15] In other words, it may well be that the respondent can establish that the cause of action meets the test articulated by the Full Court of the High Court in *BDM Grange Ltd v Parker*, namely, that its "essential nature ... is to be found entirely within the employment relationship itself".[7] At present, there is no proper basis available for determining that question.

[16] Finally, if, once the facts are known, the Employment Court were to assume jurisdiction in circumstances which the applicant considered it did not have, it would always be open to the applicant to seek leave to appeal to this Court at a later stage.

Conclusion

[17] The application for leave to appeal is dismissed.

Costs

[18] The applicant must pay to the respondent the costs of a standard application on a band A basis and usual disbursements.

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[7] At [66].

Solicitors:
Wisheart Macnab & Partners, Blenheim for Appellant
Cullen - The Employment Law Firm, Wellington for Respondent