NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING PARTICULARS OF THE PARTIES EXCEPT IN ACCORDANCE WITH THE INTITULING OF THIS JUDGMENT REMAINS IN EFFECT.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA320/2018
[2019] NZCA 282

BETWEEN	FMV Appellant
AND	TZB Respondent

Hearing:	13 February 2019
Court:	Miller, Simon France and Peters JJ
Counsel:	A D Sharp for Appellant T L Clarke and H J Musgrave for Respondent
Judgment:	4 July 2019 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Ms FMV must pay TZB's costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Peters J)

Introduction

[1] The appellant, Ms FMV, was employed by the respondent, TZB, between February 2009 and January 2010, when she resigned.

[2] Until recently, Ms FMV had two sets of proceedings against TZB on foot, one in the High Court (CIV 3267) and the other in the Employment Relations Authority (Authority).[1] In May 2018, and on TZB's application, Brewer J struck out CIV 3267 and made the findings and/or orders giving rise to this appeal by Ms FMV. The agreed issues on appeal are:[2]

(a) whether the Judge was correct to determine that the High Court did not have jurisdiction to determine CIV 3267;

(b) whether the Judge was correct to hold the High Court would not have jurisdiction even if Ms FMV were to amend her statement of claim in CIV 3267 to allege that TZB was liable in tort for breaching its statutory duties to her under the Health and Safety in Employment Act 1992 (HSEA);

(c) whether the Judge erred in finding that, if he were wrong as to (a) or (b), CIV 3267 constituted an abuse of process; and

(d) whether the Judge acted on a wrong principle in granting permanent name suppression.

Background

[3] Ms FMV filed her notice of proceeding and statement of claim in CIV 3267 on 22 December 2016. Ms FMV alleges that TZB, as her employer, owed her duties of care as regards the work she was required to perform and her working environment; to operate a safe system at work, and to ensure her health and safety at work; and to

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1 *FMV v TZB* [2018] NZHC 1131 [*High Court Decision*]; and *FMV v TZB* [2017] NZERA Auckland 112 [*Authority Determination*].

2 Court of Appeal (Civil) Rules 2005, r 42A(1).

communicate with her in a full and frank manner. She alleges that TZB breached these duties, causing loss for which she seeks damages.

[4] The next day, on 23 December 2016, Ms FMV commenced proceedings against TZB in the Authority. The Authority stayed this proceeding on 12 April 2017, for reasons to do with Ms FMV's health.[3] The Authority also suppressed publication of the parties' names.

[5] On 20 December 2017, so almost a year later and just inside the one-year period for service provided for in r 5.72(2) of the High Court Rules 2016, Ms FMV served TZB with the notice of proceeding and statement of claim in CIV 3267.

[6] On 21 February 2018, TZB applied to the High Court to strike out CIV 3267 on the ground that the issues in the proceeding were in the Authority's exclusive jurisdiction. If it were wrong in that, TZB applied to strike out on the ground that CIV 3267 was an abuse of process. TZB also sought permanent name suppression. Brewer J granted these applications, hence the appeal.

Standard on appeal

[7] Subject to the issue as to suppression, this appeal is by way of rehearing.[4] Ms FMV is entitled to this Court's view of questions of fact, law, and degree.[5]

[8] The decision to grant permanent name suppression involved the exercise of discretion.[6] Accordingly, Ms FMV is required to:[7]

> ... demonstrate that the Court below acted on a wrong principle, took into account some irrelevant matter or failed to take into account some relevant matter, or made a decision that was plainly wrong.

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3 *Authority Determination* at [33], citing Employment Relations Act 2000, s 160(1)(f) and 173(1).
4 Court of Appeal (Civil) Rules, r 47.
5 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
6 *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 at [24], citing *May v May* (1982) NZFLR 165 (CA) at 170. See also *Opthamlogical Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at 13; and *Blackstone v Blackstone* [2008] NZCA 312 at [8].
7 *Rochford v Attorney-General* [2008] NZAR 404 at [17].

Jurisdiction

[9] The Authority has exclusive jurisdiction in respect of the matters reserved to it by s 161 of the Employment Relations Act 2000 (ERA). Those parts of s 161 relevant to this appeal are as follows:

> **161 Jurisdiction**
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> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
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> …
>
> (b) matters related to a breach of an employment agreement:
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> …
>
> (e) personal grievances:
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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):
>
> ...
>
> (3) Except as provided in this Act, no court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the Authority.

[10] "Employment relationship problem" is defined in s 5:

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

[11] "Employment agreement" is also defined in s 5 and "employment relationship" includes the relationship between an employer and his, her or its employee.[8] There is no dispute that there was an employment agreement between Ms FMV and TZB and that they were in an employment relationship.

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[8] Employment Relations Act 2000, s 4(2)(a).

Jurisdiction

Submissions

[12] Mr Sharp, counsel for Ms FMV, submitted to the Judge, and to us, that the claim in CIV 3267 is not within the Authority's (exclusive) jurisdiction because it is an "action founded on tort" and therefore excluded by the final words in s 161(1)(r).

[13] The gist of Mr Sharp's submission is that the Authority does not have, and indeed never has had, jurisdiction to determine a cause of action in tort. Moreover, to the extent that an employee might sue their employer for breach of a term of the employment contract or in tort, as in this case, the employee may elect to proceed in the Authority on the contract or in the High Court on the tortious cause of action. In support of this submission, Mr Sharp referred us to *Caldwell v Croft Timber Co Ltd*, in which Paterson J declined to strike out Mr Caldwell's claim in the High Court against his employer for exemplary damages and other relief, saying:[9]

> An employer's duty of care to an employee and, in particular, his duty to provide a safe workplace for employees, gives rise to an obligation, a breach of which may support an action in tort or for breach of an implied term of the contract of employment. It is frequently pleaded under both alternatives without exception being taken. … Normally it makes no difference whether the plaintiff brings his action in tort or breach of contract. However, in this particular case it does.
>
> If Mr Caldwell brings his action in contract based on a breach of an implied term, it is clearly within the exclusive jurisdiction of the Employment Court. If, as he has done in this case, he frames it in tort, it is not within the exclusive jurisdiction of that Court.
>
> The second cause of action is breach of statutory duty. Such a claim is a tortious claim. It is therefore not within the exclusive jurisdiction of the Employment Court.

[14] In reliance on these passages, Mr Sharp submits that the relevant issue is whether the cause of action is in tort "[e]ven if the underlying basis of the arrangement between the parties is one of an employment contract".[10]

[15] Additionally, before Brewer J and before us, Mr Sharp raised the possibility that Ms FMV might amend her claim to plead another case in tort, to the effect that

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9 *Caldwell v Croft Timber Co Ltd* [1997] ERNZ 136 at 143.
10 At 143.

TZB had breached statutory duties owed to her under the HSEA. Mr Sharp submitted that such a claim would clearly be outside the Authority's exclusive jurisdiction because s 161(1) does not make any provision for the Authority to determine such a claim.

[16] Mr Clarke, for TZB, submitted that the Authority has exclusive jurisdiction to determine an "employment relationship problem". He submitted that Ms FMV's claim is such a problem and in fact falls within the specific categories in ss 161(1)(b), (e), and the opening words of (r). Mr Clarke submitted that the critical issue is whether the claim does concern an employment relationship problem, and not the cause of action pleaded. Brewer J accepted Mr Clarke's submission.

Discussion

[17] The opening words of s 161(1) give the Authority exclusive jurisdiction to determine "employment relationship problems generally". Such problems include the types of dispute listed in s 161(1).

[18] Mr Sharp is correct that traditionally the Authority did not have jurisdiction to determine claims that were framed in tort. This is because predecessor legislation to the ERA limited its jurisdiction to claims founded on an employment contract. For instance, *Caldwell* to which we have referred was decided under the Employment Contracts Act 1991, s 3(1) of which provided:

> This Act shall apply to all employment contracts and the Tribunal and [Employment] Court shall, subject to the provisions of this Act, have exclusive jurisdiction to hear and determine any proceedings founded on an employment contract.

[19] The position changed under the ERA, with the foundation of jurisdiction becoming whether the matter to be determined is an employment relationship problem. In *JP Morgan Chase Bank NA v Lewis*, this Court held that an employment relationship problem is one that "directly and essentially concerns the employment relationship" and that the essence of the claim must be employment related.[11] On the other hand, the claim should not be regarded as within the Authority's

[11] *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 225, [2015] 3 NZLR 618 at [95] and [96].

jurisdiction if the employment relationship is not a necessary component of the claim.[12]

[20] Brewer J was satisfied that Ms FMV's claim in CIV 3267 was wholly dependent on her former employment relationship with TZB, and that it therefore fell within the Authority's exclusive jurisdiction and outside the exception for tort in s 161(1)(r).

[21] We agree. In CIV 3267 Ms FMV seeks relief for what she alleges was TZB's failure to meet its obligations as employer to her as its employee. Also, as the Judge said, much of what is pleaded in CIV 3267 replicates word for word the equivalent "statement of problem" in the Authority. In the words of *JP Morgan*, CIV 3267 "directly and essentially concerns the employment relationship" and the essence of the claim is employment related. Moreover, the employment relationship is a necessary component of the claim.

[22] Given these matters, Brewer J was correct to strike out CIV 3267 for want of jurisdiction.

Abuse of process

[23] Strictly speaking this conclusion makes it unnecessary for us to consider the issue of whether Ms FMV's proceeding in the High Court was/is an abuse of process. That said, Brewer J was correct on this matter also. The Judge was satisfied that both proceedings traversed identical issues. The statement of claim in CIV 3267 did not introduce any substantive issue not otherwise addressed in the statement of problem.

[24] Ms FMV submitted that, if the Judge found the proceedings were a duplication, he should not strike out those in the High Court, as that was filed before the proceeding before the Authority. The Judge was not persuaded by that submission. He considered that Ms FMV had chosen to progress her proceeding in the Authority beyond that in CIV 3267, notwithstanding the latter was filed first. That being Ms FMV's choice, the Judge thought she should not be allowed to resile from it. Nor was the Judge

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12 At [97].

persuaded that Ms FMV would be disadvantaged by a strike out of the High Court proceeding. Again, we agree.

[25] Mr Sharp referred us to *Beattie v Premier Events Group Ltd*.[13] In that case, the employer, Premier Events, commenced separate proceedings in the Authority and in the High Court against former employees and/or directors of Premier Events.

[26] The defendants in the High Court applied to strike out the High Court proceeding on the ground that it was an abuse of process for Premier Events to have proceedings on foot in both jurisdictions, and that they were being "vexed" twice in respect of the same subject matter.

[27] In the High Court, Ellis J declined to strike out the claim.[14] This was because the issues in the two proceedings were different. The defendants to each proceeding were sued in different capacities, and in respect of different (alleged) wrongs in respect of which the Authority did not have jurisdiction.[15] This Court upheld Ellis J's decision.[16]

[28] This case is different from *Premier Events* because the parties sue and are sued in the same capacity, and in respect of the same issues. This difference explains the different decisions.

Suppression

[29] The Authority made an order for suppression on 12 April 2017.[17]

[30] Davison J made an interim order for suppression in CIV 3267 on 19 March 2018.[18] On TZB's application, Brewer J made that order permanent, on the grounds that it would be wrong in principle to undo the Authority's order in a High Court proceeding that ought not to have been brought.[19]

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13 *Beattie v Premier Events Group Ltd* [2014] NZCA 184, [2015] NZAR 1413.
14 *Premier Events Group Ltd v Beattie* [2013] NZHC 2755 at [24].
15 At [18]
16 *Beattie v Premier Events Group Ltd*, above n 13, at [48].
17 Authority Determination, above n 1, at [1]−[6].
18 *FMV v TZB* HC Auckland CIV-2016-404-3267, 19 March 2018 at [7].
19 *High Court Decision*, above n 1, at [67].

[31] Mr Sharp submitted we ought to set aside Brewer J's order, having regard to the presumption of open justice, the fact that the Authority's suppression order was attributable in part to the fact that at the time the parties had not attended mediation, and the fact that Ms FMV did not object to publication of her details.

[32] There appears to be some confusion about whether or not the parties have attended mediation. Mr Clarke advised us they had not. That being so, a principal reason for the Authority's order apparently remains. It considered that publicity would inhibit prospects for a successful mediation.

[33] Regardless, we decline to interfere with the Judge's decision. We are not persuaded that Brewer J erred. As he recognised, the open justice principle applies and it is not displaced merely because a party, in this case TZB, may find publicity unwelcome or embarrassing.[20] But it is appropriate to defer to the Authority in circumstances where we have agreed with the Judge that the High Court lacked jurisdiction. If Ms FMV wishes the issue of suppression to be reconsidered, it is open for her to apply to the Authority to rescind its order.

Result

[34] The appeal is dismissed.

[35] The High Court order prohibiting publication of the names of the parties except in accordance with the intituling of this judgment remains in effect.

[36] Costs follow the event. Ms FMV must pay TZB's costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
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Bell Gully, Auckland for Respondent

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20 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].