IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2020-044-1026
[2021] NZDC 16199

BETWEEN	UNITED FLOWER GROWERS LIMITED Plaintiff
AND	SHIRALEE ANNE HANSEN Defendant

Hearing: 2 August 2021

Appearances: C Murphy for the Plaintiff
E Callister-Baker for the Defendant

Judgment: 12 August 2021

RESERVED JUDGMENT OF JUDGE AA SINCLAIR
[On application by plaintiff to set aside notice of appearance under protest to jurisdiction]

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[1] The defendant, Ms Hansen, filed a notice of appearance under protest to jurisdiction dated 2 December 2020. The plaintiff, United Flower Growers Limited ("United") has filed an application to set aside this notice. The issue for determination is whether United can continue its claim for summary judgment in the District Court or whether the claim falls within the jurisdiction of the Employment Relations Authority ("the Authority") by virtue of s 161 of the Employment Relations Act 2000 ("the Act") as contended by Ms Hansen.

Factual Background

[2] Ms Hansen incorporated a company in January 2009 as "Hansens – the Flower People Limited" ("FPL") and traded as a flower wholesaler. On 3 November 2014,

FPL entered into a credit account agreement ("the Credit Facility") with United. In consideration of United entering into this arrangement, Ms Hansen agreed to "personally guarantee the payment to United on demand of all sums of money owed by FPL to United pursuant to the Credit Facility together with liquidated damages and expenses and legal costs incurred by FPL in relation to the Credit Facility".

[3] FPL continued to carry on business in the following years and eventually ceased trading in or about October 2019.

Employment Agreement

[4] Ms Hansen entered into an employment agreement with United on 25 September 2019 ("the Agreement"). Relevantly, the Agreement provided:

> 7.3 Deductions
>
> During your employment or on termination of your employment, the Employer shall be entitled to make a pro rata deduction from your wages/salary (including holiday pay) for:
>
> For company property that is not returned upon termination of employment; or
>
> For any other liabilities (including any types of leave that was taken in advance of entitlement) owned by the Employee to the Employer; or
>
> For incorrect overpayment of any sum which may be owing from the Employee to the Employer.

[5] The Agreement further provided:

> 14.1 Variation of the Agreement
>
> The parties may vary this agreement provided that no such variation shall be effective or binding on either party unless it is in writing and signed by both parties.
>
> 14.2. Entire Agreement
>
> Each party acknowledges that the agreement contains the whole and entire agreement between the parties as to the subject matter of this agreement.

[6] In addition, the Agreement provided for termination of Ms Hansen's employment under cls 11 (restructuring and redundancy) and 12 (termination of employment).

Incentive Invitation

[7] At the same time, United and Ms Hansen also entered into an incentive scheme described as an "Incentive Invitation." The commencement date was the first date of Ms Hansen's employment. The end date is stated as being when "Hansen's Limited [FPL] total trading debt with UFG [United] reaches zero."

[8] After setting out the incentive terms and possible payment scenarios, the Incentive Invitation stated:

> The basic premise of this incentive scheme is therefore that for every $1.00 of gross margin achieved on above budgeted income actual results for any trading period, an incentive of 25 cents (25%) will be deducted from the Hannes Ltd (sic) outstanding debt.

Subsequent Events

[9] Ms Hansen commenced work on or about 4 November 2019 and was employed until 1 July 2020 when United terminated Ms Hansen's employment on the grounds of redundancy.

[10] No payment was made to Ms Hansen pursuant to the Incentive Invitation.

[11] Ms Hansen subsequently commenced proceedings against United in the Authority alleging unjustified dismissal.

[12] The Statement of Problem filed in the Authority does not include any cause of action relating to the Incentive Invitation. However, relief is claimed by way of a declaration that Ms Hansen's debt to United:

> "be forgiven (in whole or in part) on the basis that the unjustified termination of employment has removed her ability to reduce the debt (ie the loss of a benefit)".

[13] Demand was made by United under Ms Hansen's personal guarantee on 27 July 2020 for payment of the sum of $129,484.28.

[14] No payment was received, and on 1 September 2020 United commenced summary judgment proceedings in the District Court against Ms Hansen for payment of this debt together with interest and costs.

Protest to Jurisdiction

[15] In summary, Ms Hansen asserts that the terms and circumstances of the debt and guarantee (including arrangements for repayment of the debt) are inextricably linked and related to her employment relationship with United. Accordingly, United's claim for recovery of the debt should be determined in the Authority.

[16] Ms Hansen submits that the concept of an employee's employment is much wider than an "employment agreement" and includes all of the rights, benefits and obligations arising out of the employment relationship.[1] On this basis, Ms Hansen contends that the Incentive Invitation is a term or condition of Ms Hansen's employment.

[17] It is contended that the ability to reduce FPL's debt created by the Incentive Invitation was a benefit to United. At the same time, it was an obligation imposed on Ms Hansen arising out of the employment relationship.

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[1] In *Tranz Rail Limited v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 the Court of Appeal sought to determine whether a bonus payment under Tranz Rail's incentive plan fell within the definition of discrimination under s 28(1)(a) of the Employment Contracts Act 1991. This required a consideration of the terms "fringe benefits" and "terms of employment." The Court of Appeal concluded that under s 28(1) of the Act "the terms of employment" are all the rights, benefits and obligations arising out of the employment relationship", and "necessarily wider than the terms of any employment contract".
In *ANZ National Bank v Dodge* [2005] 1 ERNZ 518 the Employment Court adopted the Court of Appeal's approach in *Tranz Rail* and concluded that the phrase "employee's employment" in s 103(1)(b) of the Act bears the same broad meaning as the Court of Appeal found it to have under s 28(1)(a) of the previous legislation.
Recently, the Employment Court in *Spotless Facility Services NZ Ltd v Anne Mackay* [2017] NZEMPC16 at [49]and [50] considered s 103 (1)(b) of the Act and referring to the above cases, the Court held that the meaning of "conditions" of employment is well established. "It includes all the rights, benefits and obligations arising out of the employment relationship: the concept is necessarily wider than the terms of an employment agreement".

[18] Ms Hansen says that the Incentive Invitation was explicitly linked to her employment performance. She asserts that the Incentive Invitation expressly (on its terms) or impliedly (on the basis that it is inconsistent with the existence of any personal guarantee) released or discharged Ms Hansen's obligation under the personal guarantee. Further, and in the alternative, the Incentive Invitation means that United is estopped from relying on the terms of the personal guarantee.

[19] Ms Hansen further contends that the Incentive Invitation cannot operate concurrently with any personal guarantee that may have existed for example, it is not possible to agree an arrangement for repaying the debt with Ms Hansen and continue to hold her to the guarantee. It was not open to United to "pick and choose" which contractual arrangement it wished to rely upon once it had entered into the Incentive Invitation. At that point, the Incentive Invitation became the agreed mechanism and the guarantee ceased to exist.

[20] Moreover, the Incentive Invitation did not require repayment of the debt on termination of employment. If United had wanted such a term it should have included it.

[21] Ms Henson says that the Incentive Invitation forms part of the Agreement as:

(a) pursuant to cl 14.2, the Agreement has the effect of overriding the guarantee which was entered into some years before and represents the entire agreement between the parties, subject to cl 14.1;[2]

(b) the Incentive Invitation was entered into concurrently and/or is a variation of the Agreement; and

(c) the Incentive Invitation is in writing and is signed by both parties. The language replicates that used in the Agreement referring to Ms Hansen as "the employee" and the effective date as "commensurate from first day of employment".

[2] Clauses 14.1 and 14.2 of the Agreement set out at para 5 above.

[22] Ms Hansen asserts that should United wish to bring a claim about the interpretation, application or operation of the Incentive Invitation which forms part of the Agreement, then only the Authority has jurisdiction to hear that claim.

Plaintiff's position

[23] United says the present claim is unrelated to the subsequent employment relationship between United and Ms Hansen and the summary judgment application should be permitted to proceed in the District Court.

[24] United contends that the exclusive jurisdiction established by s 161 of the Act does not apply as:

(a) there is no "employment relationship problem" because the debt arose prior to and not out of the employment relationship;

(b) there is no "interpretation, application or operational issue" because the terms of the Agreement do not include the debt;[3] and

(c) there is no capacity in the employment jurisdiction to order recovery of the debt (s 123 of the Act).

[25] Significantly, while United had the right to deduct any liability owed to it by Ms Hansen from her wages on a pro rata basis,[4] the incentive scheme was concerned with reducing the FPL debt. Sections 4 and 5 of the Wages Protection Act 1983 specifically provide that an employer is required to pay any wages to an employee without deduction unless with the written consent of the employee. Accordingly, there was no step that United could take to insist on the application of any incentive payment being used to reduce the FPL liability. United only had the ability to use any amounts due to Ms Hansen under the scheme if Ms Hansen chose to agree.

[3] Employment Relations Act 2000, s 161(1)(a).
[4] Set out at para 4 above.

Discussion

[26] Section 161(1) of the Act provides that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally including those matters specifically set out in s 161(1)(a)-(s).

[27] An "employment relationship problem" is defined in s 5 of the Act to include "… a dispute, and any other problem relating to or arising out of an employment relationship…". The definition is wide enough to cover a range of claims that may be made between the parties to an employment relationship and is not tied to particular causes of action.[5]

[28] In *JP Morgan Chase Bank NA v Lewis*[6] the Court of Appeal found that an employment relationship problem "must be one that directly and essentially concerns the employment relationship." In *CPL v Chief Executive of Oranga Tamariki*[7] the Authority usefully discussed the approach to be followed in determining whether a problem fell within its jurisdiction:

> In considering whether a problem lies within its jurisdiction to resolve, the Authority has to assess the essence or reality of the claims made. The assessment considers not merely the form of the claims but their substance.[8] The problem must be one that directly and essentially concerns the employment relationship[9]. Where the issue between the parties arises independently of that relationship, the essence of the claim does not arise from it, even if the factual setting for the claim occurs in a workplace or an employment relationship.[10]

[29] The present case arises out of a commercial agreement (the Credit Facility) entered into between United and FPL in 2014 setting out the terms of trade between these entities. Ms Hansen as director and shareholder of FPL provided a personal guarantee to United in respect of FPL's obligations under the agreement.

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[5] *Global Kiwi NZ Ltd v Fannin* [2014] NZ HC 656 at [9] (b).
[6] *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 256.
[7] *CPL v Chief Executive of Oranga Tamariki* [2019] NZERA 526; BC 201962575.
[8] *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152 at [85].
[9] Above n 6.
[10] *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC) at [66].

[30] Self-evidently, the Credit Facility was entered into well before Ms Hansen commenced working for United in November 2019. It did not directly relate to the employment relationship between United and Ms Hansen. Ms Hansen contends that United made it part of that relationship by virtue of the Incentive Invitation which she says formed part of the Agreement and overrode the operation of the personal guarantee under cls 14.1 and 14.2.

[31] On close analysis, the Incentive Invitation did not refer to the guarantee or otherwise address Ms Hansen's personal liability under the guarantee. Rather, the Incentive Invitation provided a mechanism for repayment of FPL's debt by Ms Hansen in the event that a bonus was paid to Ms Hansen under the Incentive Invitation. Notably, there was no ability for United to enforce payment in the event that Ms Hansen chose not to comply with the terms of this arrangement.

[32] Importantly, Ms Hansen's contention appears to also overlook the terms of the personal guarantee whereby Ms Hansen acknowledged that "no indulgence, granting of time, waiver or forbearance to sue or any other concession" would relieve her from liability under the guarantee.

[33] No demand for payment was made under the guarantee until after United terminated Ms Hansen's employment.

[34] United seeks judgment against Ms Hansen for the amount owing under the guarantee together with interest and costs. In essence, it is a claim for recovery of a debt. Unsurprisingly, the Act does not provide any procedure to pursue such a claim in the Authority.

[35] For the above reasons, I am satisfied this claim arises independently of the employment relationship between United and Ms Hansen and should properly be determined in the District Court.

Result

[36] United's application to set aside Ms Hansen's notice of protest to jurisdiction is granted and the notice is set aside accordingly.

Subsequent Timetable Orders.

[37] The following timetable orders are now made:

(a) Ms Hansen is to file and serve her notice of opposition to the summary judgment application within 7 working days from the date of this judgment;

(b) United is to file and serve a memorandum seeking a half day fixture within 2 working days from receipt of the notice of opposition;

(c) United is to file and serve its reply, if any, within 10 working days from receipt of the opposition;

(d) United is to file and serve its synopsis of submissions 5 working days before the date of hearing; and

(e) Ms Hansen is to file and serve her synopsis of submissions 3 working days before the date of hearing.

Costs

[38] Costs were claimed in the application on a 2B scale. At the end of the hearing, United stated that it wished to claim costs on an actual basis pursuant to the terms of the Credit Facility. If that claim is to be pursued, then I direct that costs be reserved on this application to be included for argument at the hearing of the summary judgment application.

[39] Alternatively, if United wishes to continue its original claim for costs on a 2B scale, I consider such an award would be appropriate. If costs cannot be agreed, United is to file and serve its memorandum of costs within 7 working days and Ms Hansen is to file and serve any memorandum in opposition within a further 5 working days. The submissions are not to be more than four pages in length.

A A Sinclair
District Court Judge