

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CIV-2022-463-18
[2022] NZHC 1955**

BETWEEN

SIOBHAN FOSTER
Plaintiff

AND

ANDREW WILSON
(ROTORUA ECONOMIC
DEVELOPMENT)
First Defendant

GRAHAM BROWNRIGG
(ROTORUA ECONOMIC
DEVELOPMENT)
Second Defendant

Hearing: 13 July 2022

Appearances: Plaintiff is self-represented
Fraser Wood for the First and Second Defendants

Judgment: 10 August 2022

JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR

*This judgment was delivered by me on 10 August 2022 at 3:00pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors:

Tompkins Wake (Fraser Wood), Rotorua, for the First and Second Defendants

Introduction

[1] Ms Siobhán Foster was employed as a travel consultant by Rotorua Economic Development Ltd (**RED**), a Council-controlled organisation. She began full-time employment in this role on 30 March 2017. Her employment was terminated in January 2022 for non-compliance with RED's COVID-19 vaccination policy.

[2] Ms Foster claims against Mr Andrew Wilson and Mr Graham Brownrigg for alleged breaches of the New Zealand Bill of Rights Act 1990, breach of contract, discrimination, coercion, threats, trespass and general unlawfulness. Mr Wilson is the CEO of RED; Mr Brownrigg is the Executive Manager of Visitor Services and Experience. Mr Brownrigg is also Ms Foster's former team leader.

[3] The defendants say they have been erroneously joined as parties, and that the correct defendant should be RED. They also say their dealings with Ms Foster arise solely in the employment context. They have therefore filed a protest to jurisdiction challenging this Court's jurisdiction to hear and determine the proceeding, on the basis the issues fall within the Employment Relations Authority's (the **Authority**) exclusive jurisdiction.

Background

[4] In late 2021, as part of its obligations under the Health and Safety at Work Act 2015, and responding to the COVID-19 pandemic, RED formulated a COVID-19 response policy. After consultation and feedback, RED determined its employees would be safest at work if they were fully vaccinated. The RED board therefore approved a mandatory vaccination policy on 10 December 2021.

[5] Ms Foster objected to the policy. She refused to disclose her medical records and her vaccination status. RED therefore assumed Ms Foster had not been vaccinated. On 15 December 2021, Mr Wilson sent Ms Foster a letter advising she would be stood down on full pay until she received her first vaccination, or unless she received both vaccinations by Monday 17 January 2022.

[6] As Ms Foster had confirmed she did not intend to be vaccinated and was not going to comply with the policy, RED's leadership team convened on 17 January 2022 to consider whether alternative arrangements could accommodate her. The team determined there were none, given the nature of RED's work and Ms Foster's role within the organisation. Accordingly, Mr Wilson gave Ms Foster four weeks' notice of the termination of her employment.

[7] Ms Foster did not receive any vaccinations by 15 February 2022, and her employment thereby ended. She now claims against the defendants for various alleged infringements relating to the termination of her employment.

Ms Foster's claim

[8] Ms Foster's statement of claim is not clearly pleaded. It appears to seek damages for breach of contract, discrimination, coercion, threats, financial hardship, trespass and unlawfulness. It also refers to various provisions of the New Zealand Bill of Rights Act 1990, including ss 10 (the right not to be subjected to medical or scientific experimentation without that person's consent), 11 (the right to refuse to undergo any medical treatment), 13 (the right to freedom of thought, conscience, and religion) and 15 (the right to manifest religion and belief). It seeks compensation in the amount of \$2,311,255.04, comprising Ms Foster's yearly salary multiplied by the 16 years she has left until retirement (inflation adjusted) and various expenses in preparing her case.¹

Ms Foster's affidavits

[9] Ms Foster has made two affidavits in support of her claim. In the first, dated 5 April 2022, she says she feels discriminated against, coerced and bullied into getting vaccinated by Messrs Wilson and Brownrigg. She says was deprived of her income after she exercised her free choice to refuse an invasive medical procedure, and that her termination was discriminatory. She says her employment contract contained no information requiring her to undergo any medical procedure of any kind, or to be subject to any vaccination of any kind to continue her employment.²

¹ Statement of claim dated 1 April 2022.

² Affidavit of Siobhán Foster dated 5 April 2022.

[10] In her second affidavit, Ms Foster says she has an absolute right to choose not to be included in a medical experiment. She says the COVID-19 Pfizer vaccine's effectiveness is still unproven.³

Defendants' protest to jurisdiction

[11] The defendants protest the Court's jurisdiction to determine Ms Foster's claims:⁴

- (a) The first and second defendants, Andrew Wilson and Graham Brownrigg respectively, both employees of Rotorua Economic Development Ltd ("RED") appear under protest to object to the jurisdiction of the court to hear and determine this proceeding.
- (b) The first and second defendants' objection is based on the following grounds:
 - (i) At all material times the plaintiff was an employee of RED.
 - (ii) On 17 January 2022 the plaintiff was given written notice of termination of her employment for non-compliance with RED's Covid Vaccination Policy ("the Policy").
 - (iii) The subject matter of the proceeding, as currently pleaded, concerns the introduction and implementation of the Policy, and the subsequent termination of the plaintiff's employment. This is an employment relationship problem.
 - (iv) Section 161 of the Employment Relations Act 2000 gives the Employment Relations Authority exclusive jurisdiction to make determinations about employment relationship problems.
 - (v) The High Court has no jurisdiction over employment relationship problems and the correct forum is the Employment Relations Authority.

Mr Wilson's affidavit

[12] Mr Wilson has made an affidavit in support of the protest to jurisdiction. He deposes he believes Ms Foster has incorrectly issued proceedings against him in his personal capacity rather than naming RED as a party. He says all his dealings with Ms Foster have been in his capacity as CEO of RED, and in Ms Foster's capacity as an employee of RED. He says that because Ms Foster's complaint relates to the

³ Affidavit of Siobhán Foster dated 9 May 2022.

⁴ Appearance under protest to jurisdiction dated 10 May 2022.

process undertaken in implementing RED's COVID-19 vaccination policy, he believes this is an employment relationship problem within the Authority's exclusive jurisdiction. He says Ms Foster's claims of breach of contract, discrimination, coercion, threats, financial hardship, trespass and unlawfulness all concern the introduction and implementation of RED's vaccination policy. Those claims, along with Ms Foster's termination, all relate to her employment with RED.⁵

Mr Brownrigg's affidavit

[13] Mr Brownrigg has also made an affidavit in support of the protest to jurisdiction. He too says he believes he has been incorrectly joined as a party. He deposes all his dealings with Ms Foster have been as her team leader, and all claims she has made arise out of the employment relationship. He says he has had no dealings with the plaintiff in his personal capacity.⁶

Ms Foster's reply memorandum

[14] Ms Foster has filed a reply memorandum in response to the defendants' affidavits. She says she raised concerns with RED about the vaccine's safety and effectiveness as early as October 2021. She says in November 2021 she agreed to receive the vaccine, conditional on proof in writing of its safety and effectiveness. She says she re-stated her concerns over the following months but was not given information adequate to meet her conditions. She says RED's vaccine policy is not an agreement or an amendment to her employment contract and she therefore cannot have breached it. She says there is no legislation that states the policy could override her employment contract. And she says she believes RED has no power or authority over her to control what she chooses to put in her body.⁷

Defendants' submissions

[15] Mr Fraser Wood, for the defendants, says Ms Foster's pleadings and evidence show the claim arises entirely within the employment context. He says the substance

⁵ Affidavit of Andrew David Wilson dated 15 June 2022 at [1]–[5] and [29].

⁶ Affidavit of Graham Neil Brownrigg dated 15 June 2022 at [1]–[4].

⁷ Memorandum in response to affidavits of Andrew Wilson and Graham Brownrigg dated 20 June 2022.

of the claim concerns the introduction and implementation of RED's COVID-19 vaccination policy and the subsequent termination of Ms Foster's employment for non-compliance with that policy. He says the Court has no jurisdiction to hear and determine the claim, and, in any event, the defendants have erroneously been joined as parties. There is no legal basis upon which they could be liable in their individual capacities, and the claim is therefore an abuse of process.⁸

[16] Mr Wood submits Ms Foster's claim is in essence a personal grievance for unjustified dismissal, falling squarely within s 161(e) of the Employment Relations Act 2000 — and, by extension, the Authority's exclusive jurisdiction. Even were this not so, the claim unavoidably arises in the course of Ms Foster's employment relationship with RED, and in a work context. Mr Wood says it is clear that New Zealand Bill of Rights Act issues are not, in any event, outside the Authority's purview. The claim must be dismissed for want of jurisdiction.⁹

[17] Even if the Court did have jurisdiction to determine Ms Foster's claims, Mr Wood submits, that would not rehabilitate the fact the defendants have erroneously been joined as parties to the proceeding. He says the claims Ms Foster raises, as personal grievances, must be pursued against RED. There is therefore no prospect of recovery against the defendants. It is open to the Court to use the powers in the High Court Rules 2016 to strike out the defendants as parties to the proceedings and join RED as the sole defendant instead.¹⁰

Ms Foster's submissions

[18] Ms Foster submits that an argument based on the New Zealand Bill of Rights Act means the Authority has no jurisdiction. She says s 190 of the Employment Relations Act means the Court may exercise the powers conferred on the Authority under ss 162 and 164. She says such powers include identifying problems relating to individuals' employment agreements.¹¹

⁸ Synopsis of submissions on behalf of the first and second defendants dated 30 June 2022 at [5]–[8].

⁹ At [16]–[24].

¹⁰ At [25]–[34].

¹¹ Synopsis of submissions by the plaintiff dated 6 July 2022 at [24]–[27].

[19] Ms Foster also submits that the defendants have been correctly joined to the proceeding due to their roles of employment with RED. She points to s 142W(3)(e) of the Employment Relations Act, dealing with persons involving breaches of employment standards. She says the defendants are “officers” of RED within the meaning of that section.¹²

[20] Summarising, Ms Foster submits the burden rests with RED to prove the safety and efficacy of the Pfizer vaccine as part of its duty of care to her. She says she has and is exercising her absolute right under s 10 of the New Zealand Bill of Rights Act to decline to take part in a medical experiment. Pointing to s 92Y of the Health Act 1956, she submits force may not be used to secure compliance with a direction. She says RED has no power of attorney over her, nor any authority control over what she chooses to put into her body. And she says despite requesting information and evidential proof of the safety and efficacy of the vaccine on three separate occasions, RED never furnished this information.¹³

Legal principles

Appearance and objection to jurisdiction

[21] Rule 5.49 of the High Court Rules provides:

5.49 Appearance and objection to jurisdiction

...

- (3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.

...

- (6) The court hearing an application under subclause (3) or (5) must,—
- (a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; and
 - (b) if it does not dismiss the proceeding under paragraph (a), set aside the appearance.

¹² At [28].

¹³ At [29]–[38].

- (7) To the extent that an application under this rule relates to service of process effected outside New Zealand under rule 6.27 or 6.28, it must be determined under r 6.29.

...

Employment Relations Act

[22] Section 161 of the Employment Relations Act provides, relevantly:

161 Jurisdiction

- (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
- (a) disputes about the interpretation, application, or operation of an employment agreement:
 - (b) matters related to a breach of an employment agreement:
 - ...
 - (c) personal grievances:
 - ...
 - (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.

[23] An “employment relationship problem” is a question of fact. If the controversy arises in the course of the employment relationship and in a work context, it will be an employment relationship problem.¹⁴

[24] Section 103 of the Act defines “personal grievance” as including claims that the employee has been unjustifiably dismissed; that the employee’s employment was

¹⁴ *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [93]–[94].

affected to the employee's disadvantage by some unjustifiable action by the employer; and that the employee has been discriminated against in the employee's employment.

Improperly joined parties

[25] For completeness, I set out the relevant provision on improperly joined parties. Rule 4.56 of the High Court Rules provides, relevantly:

4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
 - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
 - (b) the name of a person be added as a plaintiff or defendant because—
 - (i) the person ought to have been joined; or
 - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.

...

Analysis

[26] Mr Wood submits that s 161 of the Act was most recently addressed by the Supreme Court in *FMV v TZB*.¹⁵ He submits the Supreme Court stated that what constitutes an "employment relationship problem" is a simple question of fact:

If the controversy arises during the course of the employment relationship *and* in a work context, then it will be an employment relationship problem...

To be clear, given the test is factual, it will not matter whether other causes of action may also arise from the controversy between the parties. That a controversy can also be pleaded without reliance on what is described (with unhelpful circularity) as an "employment right or interest" does not itself take it outside the scope of "employment relationship problem". All that matters is whether the controversy arose during the course of the employment relationship and in the work context. This necessarily means that if a controversy can be framed in terms of one or more of the examples in s 161(1)(a)-(d), it *must* be brought in the Authority as an employment

¹⁵ *FMV v TZB*, above n 14, at [93]–[94] (footnotes omitted).

relationship problem. If it does not fit within any of those examples, it will then be a question of whether the problem nevertheless relates to or arises out of an employment relationship in terms of the open-textured introductory language of s 161(1) and the catch-all in paragraph (r).

[27] Mr Wood submitted that regardless of Ms Foster's claim being based on alleged breaches of the Bill of Rights Act, her claim is in essence a personal grievance for unjustified dismissal — falling squarely within s 161(1)(e) and therefore within the exclusive jurisdiction of the Authority.

[28] Mr Wood further submitted that even if this were not the case, then Ms Foster's claim unavoidably arises during the course of her employment relationship with RED and in the context of Ms Foster's subsequent termination due to non-compliance with RED's policy. He therefore submitted that the "open textured introductory language of s 161(1) and the catch-all in paragraph (r)" captures Ms Foster's claim and places it within the exclusive jurisdiction of the Authority.

[29] Mr Wood concedes that the catch-all phrasing of s 161(1)(r) excludes actions "founded on tort". He submitted that Ms Foster's claim has not been articulated so as to raise a claim founded on tort. He further submitted that in any case because the claim may be framed as a personal grievance claim under s 161(1)(e) the exclusion related to actions based on tort and paragraph (r) does not apply.

[30] Mr Wood submitted that Ms Foster's claim for "damages" relates essentially to her loss of income as a result of termination of her employment, calculated by reference to her pre-termination salary. Therefore these considerations are again related to the employment context rather than an action based on tort.

[31] Mr Wood submitted that the issues concerning sufficiency or adequacy of the risk assessment undertaken by RED, the consultation undertaken concerning risk assessment, the formulation and implementation of its COVID-19 policy, are all matters arising out of the employment relationship. RED's reasonableness or otherwise in insisting on compliance with the COVID-19 vaccination policy and the subsequent termination of Ms Foster's employment for non-compliance with that policy, all arise in the employment context.

[32] Mr Wood also submitted that any rights asserted by Ms Foster based on the New Zealand Bill of Rights Act were also within the exclusive jurisdiction of the Authority. He referred to the case of *CSN v Royal District Nursing Service New Zealand Ltd*¹⁶ which concerned a government-mandated vaccination order. He submits that while the Authority rightly declined jurisdiction to determine the legality of the order, no protest was raised in relation to the New Zealand Bill of Rights Act-based arguments being led in the Authority questioning the scope of the order's application.¹⁷

[33] In conclusion, Mr Wood submits that it is clear from the *FMV* decision and the authorities in subsequent decisions that the New Zealand Bill of Rights Act issues arising from employment disputes are not outside the purview of the Authority and furthermore sit within its exclusive jurisdiction.

[34] Submissions by Mr Wood answer Ms Foster's submission that her rights arise under various sections of the New Zealand Bill of Rights Act, including s 10 (the right not to be subjected to medical or scientific experimentation without that person's consent), s 11 (the right to refuse to undergo any medical treatment), s 13 (the right to freedom of thought, conscience and religion) and s 15 (the right to manifest religion and belief). I accept Mr Wood's submission that these issues, to the extent they are ultimately relevant to Ms Foster's claim, do not take the claim out of the exclusive jurisdiction of the Authority.

[35] In relation to Ms Foster's submission in respect of s 190 of the Employment Relations Act, as Mr Wood pointed out this is based on a misconception of that statutory provision. The references to "court" in that section are clearly references to the Employment Court, not the High Court.

Conclusion

[36] I am of the view that the issues raised by Ms Foster in relation to the termination of her employment and the implementation and application of RED's

¹⁶ *CSN v Royal District Nursing Service New Zealand Ltd* [2022] NZERA 102.

¹⁷ At [58]–[61].

COVID-19 vaccination policy arise within the employment relationship and in the work context. As characterised by Mr Wood, Ms Foster’s claim is either a personal grievance under s 161(1)(e) of the Act, or otherwise falls within the catch-all paragraph of s 161(1)(r) and is not a claim based in tort for the purposes of the exclusion in that paragraph. Notwithstanding Ms Foster has relied on rights under the New Zealand Bill of Rights Act, the claim remains within the exclusive jurisdiction of the Authority.

Result

[37] Ms Foster’s application is dismissed pursuant to s 161(3) of the Employment Relations Act on the basis that the High Court does not have jurisdiction to hear the claim.

[38] As the Court has declined jurisdiction, it is not necessary for me to deal with the issue of Mr Wilson and Mr Brownrigg being parties to the proceedings as defendants rather than RED.

[39] Costs are awarded to Mr Wilson and Mr Brownrigg on a 2B basis.

.....
Associate Judge Taylor