



How the Supreme Court 'tort' the Court of Appeal a lesson

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

A recent decision of the Supreme Court called **FMV v TZB** has changed the law in relation to what sorts of claims the Employment Relations Authority can issue determinations on. This is an important decision because it is very cheap and easy to bring a claim to the Authority, and the Supreme Court – the highest court in the land – has widened the scope of the sorts of claims that the Authority can investigate.

Section 161 of the Employment Relations Act 2000 lists at least 36 specific types of claim that the Authority can hear, but they must ultimately always be about an “*employment relationship problem*”, which is defined as “*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*”.

Back in 2015 the Court of Appeal issued a judgement in the case of **JP Morgan NA v Lewis** which set limits on what an “*employment relationship problem*” includes, saying that it must “*directly and essentially concern the employment relationship*”. The case involved the New Zealand branch of JP Morgan Chase Bank and its former Chief Executive Officer (CEO), Mr Lewis. Mr Lewis resigned pursuant to a settlement agreement intended to settle a personal grievance he had raised with JP Morgan for unjustified disadvantage.

When Mr Lewis sought employment elsewhere, however, the Bank denied that Mr Lewis had ever been its CEO. Mr Lewis sought damages in the Authority, but the Authority held it lacked jurisdiction to grant either damages or a compliance order (the usual remedy for such a breach).

On appeal, the Employment Court agreed with Mr Lewis, but the Court of Appeal overturned the Employment Court and held that the settlement agreement was not a variation of the employment agreement, but concerned “*post-employment obligations*”, and so could not come within the scope of an employment relationship problem.

This case meant that a number of potential claims which had their origins in an employment relationship, but which could exist separately too, could not be heard in the Authority. These would include claims such as an employer trying to recover stolen money from an employee, or compensation for damage caused by an employee to a property provided under a service tenancy. Claims which are based in tort were also excluded, due to a wide interpretation of a sub-section of the Act.

A tort is a civil wrong other than a breach of contract, arising out of a breach of a specific duty. There are many types of tort, including negligence causing personal injury, defamation, trespass, fraud and many others. Many cross over with crimes and statutory wrongs.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor or David Appleton.**

Contact Details:

Level 2
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

Jane Taylor
E: jane@mgz.co.nz
M: 021 1539 147

David Appleton
E: David@mgz.co.nz
M: 027 247 4274

The recently released Supreme Court case was about a tort and whether it was excluded from the jurisdiction of the Authority. The Court has anonymized the names in their judgement. FMV was employed by TZB for a period of one year before she resigned in 2010. Almost seven years later, FMV filed proceedings against TZB in the High Court. At the same time, she pursued a personal grievance in the Authority, claiming she had been unjustifiably dismissed and disadvantaged, while her High Court claims were in tort for breach of duties (variously formulated) to ensure a safe work environment.

FMV did not immediately serve the High Court proceedings on TZB. She first pursued her personal grievance in the Authority. But the Authority stayed that proceeding because it considered FMV could not demonstrate that she had the capacity to prosecute her claim. She therefore served and pursued her High Court proceedings. TZB responded by applying to strike out the High Court proceedings, claiming that only the Authority had jurisdiction to hear FMV's claims. The High Court granted the application for strike-out, and that decision was upheld by the Court of Appeal.

One of the long list of matters within the Authority's exclusive jurisdiction is "*any other action ... arising from or related to the employment relationship ... (other than an action founded on tort)*". The Supreme Court was actually split on whether FMV's tort actions could be heard in the Authority, but the majority held that the tort exception above applies only to that specific subsection, and is not a carve-out from the Authority's exclusive jurisdiction generally. This meant that because FMV's High Court claims could also be framed within one or other of the jurisdictional subheadings listed in s 161 (for example, as a personal grievance), the Authority had exclusive jurisdiction even though the claims could also be framed in tort.

As for the interpretation of "*employment relationship problem*" generally, the majority of the Supreme Court held that the Authority's exclusive jurisdiction is not limited to problems that "*directly and essentially*" concern the employment relationship, overruling the approach in **JP**

Morgan Chase Bank NA v Lewis. The majority also held that the Authority's jurisdiction is not necessarily limited to problems between parties to employment relationships themselves.

So, this means that the Authority may now accept those counterclaims from employers against employees for recovery of stolen money or damages that had been excluded since JP Morgan, and can now also accept claims from employees which can also be framed as torts, provided they fall within one of the 35 other types of claim listed in section 161.

Level 2: Time to Put the Slippers Away



The MGZ team are now back working in the office and operating under the current Level 2 restrictions.

We remain fully operational and able to support clients on all matters and do not anticipate any significant disruption to our ability to support our clients.

We are available to attend meetings with you either by video conferencing or in person and we have appropriate procedures in place to adhere to the various Covid Level restrictions.

If you have any questions please get in touch with your usual [MGZ Team Member](#)

Whatever Level you are in around the country – Stay Safe!