ORDER THAT HIGH COURT PROHIBITION OF PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES REMAINS IN FORCE SO LONG AS THE SUPPRESSION ORDER MADE BY THE EMPLOYMENT RELATIONS AUTHORITY REMAINS IN FORCE. SEE [138] OF THIS JUDGMENT.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 72/2019
[2021] NZSC 102

BETWEEN	FMV Appellant
AND	TZB Respondent

Hearing:	17 March 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Williams JJ
Counsel:	R E Harrison QC for Appellant T L Clarke for Respondent
Judgment:	20 August 2021

JUDGMENT OF THE COURT

A **The High Court's suppression order is amended to suppress only the identities of the parties and to remain in force so long as the suppression order made by the Employment Relations Authority remains in force.**

B **The appeal is otherwise dismissed.**

C **Costs are reserved.**

REASONS

WINKELMANN CJ, O'REGAN AND WILLIAMS JJ
(Given by Williams J)

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Introduction

[1] Most adults in the New Zealand labour force are wage or salary-earners,[1] so work drives their economic fortunes, those of their dependants, and ultimately of their communities. And there is dignity in meaningful work, so it also contributes to the social wellbeing of people and communities. Private law principles of contract and tort are not seen as sufficiently responsive to that context. That is why successive legislatures since 1894[2] have enacted legislation to strike what each in their own time considered was a better balance than the common law between competing objectives: on the one hand, ensuring employment contracts are successful market transactions, and on the other hand, protecting employees with unequal bargaining power against the natural tendency of such transactions to commodify their labour.[3]

[2] A common feature of the legislative response from the beginning has been to channel disputes about work to specialist employment adjudicative bodies. This remains the case under the Employment Relations Act 2000 (the Act). It established two specialist employment bodies: the Employment Relations Authority (the Authority) and the Employment Court.[4] This appeal concerns the line between the jurisdiction of the Authority and that of the High Court.

[3] The appellant, FMV, is a former employee of the respondent firm, TZB. FMV has brought parallel proceedings in the Authority and the High Court in relation to prejudice she says she suffered at work. There is no dispute that the Authority has jurisdiction over the claims that FMV has lodged there. The question is whether the High Court also has jurisdiction over the parallel claims FMV has filed in that Court.

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1 See Stats NZ | Tatauranga Aotearoa *Household labour force survey: March 2021 quarter* (5 May 2021) at Tables 1 and 8.
2 See The Industrial Conciliation and Arbitration Act 1894.
3 See Gordon Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38 VUWLR 417.
4 Employment Relations Act 2000 (ERA), ss 156 and 186.

[4] TZB says the High Court does not have jurisdiction because s 161(1) of the Act gives the Authority exclusive jurisdiction over all of FMV's claims. That section provides that the Authority has exclusive jurisdiction over "employment relationship problems generally". FMV's case is that despite the wording in s 161(1), she retains the right to bring a claim in tort in the ordinary courts.

[5] If we conclude that the appellant is able to bring parallel proceedings, there is a subsequent issue as to whether it is nonetheless an abuse of process to do so in the circumstances of this case. Finally, we must address the appropriateness of decisions in the lower Courts to suppress the identities of the parties in this proceeding.

Background

[6] FMV was employed by TZB for a period of one year, beginning in February 2009. She resigned in January 2010, effective one month later. Almost seven years later, in December 2016, FMV filed separate proceedings against TZB in the High Court and in the Employment Relations Authority.

[7] In fact, FMV first raised her employment issues around August 2016 by making a complaint under the Human Rights Act 1993. Because the issue of FMV's capacity to proceed will be relevant in later discussion, it is necessary to note that the Human Rights Commission had arranged a mediation between the parties, but FMV's then counsel advised TZB's counsel that FMV's psychiatrist had concerns for her mental health. The relevant passage of a letter from FMV's clinician provided:

> [FMV] is relatively stable though quite fragile in her mental health. She will thus be unable to manage any legal issues. She expresses an opinion that she feels stable enough to go in for mediation. We are happy for her to attempt the mediation process. However it would be important for both parties involved to keep in mind the fragile but stable mental health of [FMV] during the mediation process.

[8] TZB therefore raised concerns about FMV's capacity to participate in mediation. The mediation did not proceed and FMV's Human Rights Act claim was not further pursued.

The claims

[9] FMV commenced proceedings in the Authority in relation to a personal grievance in terms of s 103(1) of the Employment Relations Act. She claimed that she had been unjustifiably dismissed[5] and that she had been subjected to disadvantage by unjustifiable action on the part of TZB.[6]

[10] FMV's statement of problem[7] is lengthy, but the relevant aspects are as follows:[8]

> - During my employment, I was subjected to:
> - **Bullying:** [TZB] allowed a hostile and unsafe work environment to persist. Particularly, employees of [TZB]:
>   - made consistent and unjustified threats to terminate my employment;
>   - made frequent bullying comments to and about me, and made unjustified criticisms of me, including that I: was incompetent; could do nothing but smile; was unable to properly communicate; would soon be dismissed; was only employed because I was in a relationship with one of the partners; and was only employed because I was attractive.
> - **Discrimination:** [TZB] was aware of my disability but failed to accommodate it:
>   - as itemised above; and
>   - as I was required to work unreasonably long hours and [TZB] did not reduce my workload;
>   - as [TZB] did not take steps to reduce the stressors that were affecting me.
> - I was also subjected to **different treatment on the basis of my disability**:
>   - as itemised above; and

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5 ERA, s 103(1)(a).

6 Section 103(1)(b).

7 Proceedings in the Authority are commenced by an application to the Authority containing a "statement of problem or matter". See ERA, s 158; and Employment Relations Authority Regulations 2000, regs 5–6.

8 FMV later sought to amend her statement of problem, but could not technically do so since the proceeding in the Authority was stayed: see below at [14]–[15]. The proposed amended statement of problem removed reference to negligence and breach of contract.

- as, following my year-end review, and despite good performance, I was not permitted to progress to my second year and was required to repeat my first year because of my disability;

- as [TZB] did not provide me with a copy of my year-end review.

- **Different treatment:**

  - as itemised above; and

  - as I was required to do more work than colleagues at a similar level but was not provided with similar opportunities to develop;

  - as senior staff refused to be my supervisor / coach;

  - as I was excluded from social events; and

  - as I was the object of apparent harassing behaviour, receiving anonymous texts that appear to have emanated from [TZB] staff (starting after I joined [TZB] and ending after I left [TZB]).

- **Negligence/breach of contract:** [TZB] caused a hazardous workplace environment, or allowed one to persist, and did not do all it should have done in the circumstances, and failed to take proper care of me (its employee):

  - as itemised above, and:

  - as it failed to advise me or my parents of my medical condition, even when my parents made specific inquiries, so my family and I were unaware of my diagnosis and unable to address my condition; and

  - as [TZB] failed to notice or address the effect that the above items had on me, and failed to address my complaints and requests for help or proactively address the situation.

[11] In the High Court, FMV brought a tort action in negligence. She alleged that TZB owed FMV duties:

(a) not to cause her psychiatric harm due to the work she was required to perform or the environment in which she was required to perform it;

(b) to establish and implement a safe system of work and support, and to ensure her health and safety at work; and

(c) to inform her of any risks to which she may have been exposed in relation to her health and safety and to provide her with any information it possessed in relation to the state of her health.

[12] She claimed that during the course of her employment and in breach of those duties:

(a) She was bullied by TZB employees.

(b) TZB either caused a hazardous work environment or allowed it to persist.

(c) TZB failed to take proper care of FMV or to take reasonable steps to prevent her suffering from unreasonable or undue stress. Particulars included:

(i) employees of TZB threatening to dismiss FMV unjustifiably;

(ii) employees of TZB bullying and harassing FMV;

(iii) requiring FMV to work unreasonably long hours, and in any event more hours than her peers;

(iv) providing insufficient supervision; and

(v) failing to identify and assess the risks associated with FMV's unsafe workplace or to take remedial steps to mitigate those risks.

(d) FMV's mental wellbeing deteriorated through the course of her employment and TZB, though aware of this, failed to advise her of what it knew of her condition.

Procedural history

[13] Although FMV filed her High Court proceedings a day before her application in the Authority, she did not immediately serve those proceedings on TZB. Instead, she chose to advance her personal grievance-related application in the Authority. It is standard procedure in that forum that the matter be first referred to the specialist mediation service provided by the Ministry of Business, Innovation and Employment.[9]

[14] What happened from this point is recorded in a minute of 7 February 2017[10] and an oral determination of the Authority of 12 April 2017.[11] Following preliminary discussions with counsel, in which the abandoned mediation in the Human Rights Review Tribunal was raised, the Authority considered that a gateway issue was whether FMV had capacity to continue.[12] It invited FMV to file an affidavit from her psychiatrist to indicate whether she was well enough to proceed.[13] By that stage, FMV's counsel had withdrawn and her (lay) representative had difficulty obtaining the required affidavit. Instead, FMV provided a further letter from the psychiatrist confirming that she had sufficient capacity to participate.[14] The Authority accepted the opinion as far as it went,[15] but considered it was not sufficiently current to be reliable because it was based on two consultations that took place in the previous year, one nine months earlier and the other two and a half months earlier.[16]

[15] The Authority concluded that, having herself first raised the issue of her own mental health, the burden was on FMV to satisfy the Authority that she had sufficient capacity and that, in the absence of current information suggesting otherwise, FMV lacked the capacity to continue with her personal grievance.[17] The Authority therefore stayed the proceedings until "firmer evidence of [FMV's] capacity to proceed" was provided.[18]

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9 ERA, s 159.
10 *[FMV] v [TZB]* ERA Auckland 3001443, 7 February 2017 [ERA minute].
11 *FMV v TZB* [2017] NZERA Auckland 112 [ERA decision].
12 See at [9]; and ERA minute, above n 10, at [2].
13 ERA minute, above n 10, at [6(ii)] and [7].
14 ERA decision, above n 11, at [21].
15 At [22].
16 At [24].
17 At [29].
18 At [29] and [33].

[16] Finally, the Authority suggested that the proceeding may also be in difficulty on another ground: whether FMV's personal grievance was raised in time.[19] The Authority cautioned FMV that while it had a discretion in exceptional circumstances to allow personal grievances to be raised out of time, the "standard of proof" required to justify this on the basis of trauma caused by the grievance was very high.[20]

[17] According to TZB, FMV sought to lift the stay on numerous occasions between April and December 2017, but was unsuccessful because she refused to comply with the Authority's direction to provide up-to-date medical information. During this period, FMV filed with the Authority two affidavits from her consultant psychiatrist. He appears to have affirmed FMV's mental capacity to proceed, but we have not seen the affidavits themselves.[21]

[18] Having made no headway in the Authority, FMV turned her attention to the High Court in December 2017. Just before her High Court proceedings would have been treated as discontinued for failure to serve them in time, she served TZB.[22]

[19] TZB responded by applying to strike out the High Court proceeding on two grounds: that the Authority had exclusive jurisdiction in relation to the dispute between the parties, and that the claim is in any event an abuse of process because it merely duplicates FMV's personal grievance.

[20] In the High Court, Brewer J granted TZB's application.[23] FMV appealed unsuccessfully to the Court of Appeal.[24] This Court granted FMV leave to bring the present appeal. The approved question was whether the Court of Appeal was correct

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19 At [30]–[32]. Personal grievances must be raised within 90 days of the date on which the alleged facts establishing the grievance occurred, unless the employer consents or the Authority grants leave in exceptional circumstances: ERA, s 114.

20 At [32].

21 They are referred to in a minute from the Authority dated 24 July 2018, but the Authority simply notes that there was a question as to whether or not FMV would agree to provide access to all medical records relevant to her case. The Authority noted that such records would be important in deciding whether FMV should be given leave to raise and pursue her grievances out of time: *[FMV] v [TZB]* ERA Auckland 3001443, 24 July 2018 at [4].

22 TZB was served on 20 December 2017, two days before FMV's time for service would have expired: High Court Rules 2016, rr 5.72(2) and 1.17(2).

23 *FMV v TZB* [2018] NZHC 1131 [HC judgment].

24 *FMV v TZB* [2019] NZCA 282, [2019] NZAR 1385 (Miller, Simon France and Peters JJ) [CA judgment].

to dismiss the appeal.[25] Meanwhile, though stayed, FMV's personal grievance before the Authority remains extant.

Section 161

[21] This appeal concerns the interpretation of s 161(1) of the Employment Relations Act. It is a lengthy section that sets out the exclusive jurisdiction of the Authority. As at 22 December 2016 when the proceedings were filed, it provided as follows:

> **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) matters about whether a person is an employee (not being matters arising on an application under section 6(5)):
>
> (ca) facilitating bargaining under sections 50A to 50I:
>
> (cb) fixing the provisions of a collective agreement under section 50J:
>
> (cba) determining whether bargaining has concluded under section 50K:
>
> (cc) determining whether an employer has complied with section 69AAE:
>
> (d) matters alleged to arise under section 68 because a party to an individual employment agreement has bargained unfairly:
>
> (da) investigating bargaining under section 69O and, if necessary, determining redundancy entitlements under that section:
>
> (e) personal grievances:
>
> (f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:
>
> (g) matters about the recovery of wages or other money under section 131:

[25] *FMV v TZB* [2019] NZSC 108.

(ga) determining the apportionment of liability for the costs of service-related entitlements under section 69LB(4):

(h) matters about whether the rules of a union, or of an incorporated society that wishes to register as a union, comply with the provisions of this Act:

(i) matters about whether an incorporated society is entitled to register under this Act as a union or is entitled to continue to be so registered:

(j) matters about whether a person is entitled to be a member of a union:

(k) matters related to a failure by a union to comply with its rules:

(l) any proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction):

(la) any proceedings related to the application of section 95D:

(m) actions for the recovery of penalties—

(i) under this Act for a breach of an employment agreement:

(ii) under this Act for a breach of any provision of this Act (being a provision that provides for the penalty to be recovered in the Authority):

(iii) under section 76 of the Holidays Act 2003:

(iiia) under section 25 of the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016:

(iv) under section 10 of the Minimum Wage Act 1983:

(v) under section 13 of the Wages Protection Act 1983:

(n) compliance orders under section 137:

(o) objections under section 225 to demand notices:

(p) orders for interim reinstatement under section 127:

(q) actions of the type referred to in section 228(1):

(qa) disputes about an invention made by an employee (either alone or jointly with any other person) or any patent granted, or to be granted, in respect of that invention:

(qb) reviews under section 30 of the Patents Act 2013:

(qc) determining whether an employer has complied with section 30D of the Parental Leave and Employment Protection Act 1987:

(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):

(s) determinations under such other powers and functions as are conferred on it by this or any other Act.

(2) Except as provided in subsection (1)(ca), (cb), (cba), (d), (da) and (f), the Authority does not have jurisdiction to make a determination about any matter relating to—

(a) bargaining; or

(b) the fixing of new terms and conditions of employment.

(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.

[22] As can be seen, s 161(1) of the Act relevantly provides that the Authority has exclusive jurisdiction to make determinations about "employment relationship problems generally". This phrase is defined in s 5 as follows:

> **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

As a result, s 161(1) effectively reads:

> The Authority has exclusive jurisdiction to make determinations about any problems relating to or arising out of employment relationships, generally…

[23] The second important provision in s 161(1) for the purposes of this appeal is s 161(1)(r). It relevantly provides that the Authority has exclusive jurisdiction over "any other action … arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort)". The meaning of the parenthesised phrase (the tort exception) is at issue in this appeal.

The issues

[24] It is argued for FMV that her claims in negligence are not employment relationship problems as defined in s 5 and so are not subject to the Authority's jurisdiction. It is further argued that they instead come within the "action founded on tort" exception in s 161(1)(r).

[25] The appeal therefore raises two main issues:

(a) Are FMV's High Court claims "employment relationship problems"?

(b) If so, are they nevertheless excluded from the Authority's jurisdiction by the tort exception in s 161(1)(r)?

[26] There are also issues as to abuse of process and name suppression, which we deal with only briefly at the end of these reasons in light of our conclusions on the main issues above.

High Court judgment

[27] The High Court considered that the allegations related to an employment relationship problem within the Authority's exclusive jurisdiction. The Judge put it this way:[26]

> [25] I am satisfied FMV's claim is wholly dependent on the existence of a relationship between an employee and employer and is therefore not subject to the exception for tort in s 161(1)(r). This is because the entire claim is founded upon the employer/employee relationship between TZB and FMV. Absent this relationship, the claim falls down. It is not merely background as counsel for FMV contends, but rather colours the whole picture.

[28] The Judge considered further that repleading FMV's claim as a breach of statutory duty could not save the proceeding because, applying the language of *BDM Grange Ltd v Parker*,[27] an earlier decision of a full court of the High Court, the

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[26] HC judgment, above n 23, (footnote omitted).
[27] *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC) at [66].

essential character of FMV's claim is found entirely within the employment relationship.[28]

[29] In case this conclusion was wrong, the Judge also found that the High Court proceeding was an abuse of process because it was entirely duplicative of FMV's personal grievance; and given the extent to which she had progressed her claim before the Authority, TZB was entitled to be protected from having to litigate the same matter in separate proceedings at the same time.[29] The Judge concluded that the fact the claim in the Authority had been stayed was of no moment. He considered FMV would not be prejudiced by a strike-out because she was entitled to continue with her personal grievance provided she met the requirements of the Authority.[30]

Court of Appeal judgment

[30] The Court of Appeal considered that the matter involved a straightforward application of that Court's decision in *JP Morgan Chase Bank NA v Lewis*.[31] Since the claim "directly and essentially concerns the employment relationship" in accordance with the test in *JP Morgan*, it was within the exclusive jurisdiction of the Authority.[32] For that reason, the Court concluded that the exception in s 161(1)(r) to the Authority's exclusive jurisdiction in relation to actions founded on tort was not engaged.[33]

[31] Although in the Court's view it was unnecessary to go on to consider whether the proceeding was an abuse of process, it found the High Court's reasoning and conclusion in that respect was correct.[34]

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28 HC judgment, above n 23, at [26]–[27].
29 At [45]–[46].
30 At [53]–[54].
31 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.
32 CA judgment, above n 24, at [19]–[21], citing *JP Morgan*, above n 31, at [95].
33 At [20]–[21].
34 At [23].

Submissions on the Authority's jurisdiction

Appellant's submissions

[32] In a carefully constructed submission on jurisdiction, Mr Harrison QC advanced the following propositions. The starting point is the constitutional proposition that access to the ordinary courts (especially courts of inherent jurisdiction) is preserved unless clearly and expressly removed by statutory language. But, it is submitted, the effect of the Court of Appeal's judgment is that the Act has "abolished pro tanto" all causes of action in tort where the underlying grievance also gives rise to different legal claims that are within the Authority's jurisdiction. For example, it is submitted that on the Court of Appeal's reasoning, all of the following scenarios could come within the exclusive jurisdiction of the Authority:[35]

- Employer defames employee by sending an email to all its other employees claiming that employee has been dealing in drugs at work (defamation claim).
- Employee defames employer by alleging to workmates that employer engages in child abuse (defamation claim).
- Employer discloses to its other employees employee's highly sensitive personal information (claim in tort for invasion of privacy or alternatively claim for redress under the Privacy Act 1993).
- Financial controller employee over time steals large sums from employer, with some funds invested at a profit and/or traceable into specific assets or bank accounts ((fiduciary) claim seeking equitable remedies such as an account of profit, and tracing and recovery of tainted assets).
- Company director employee breaches duties owed to employer under one or more of ss 131–137 of the Companies Act 1993 in circumstances which also involve breach of the director's employment agreement (direct claim by company against director for breach of statutory duty).

[33] Mr Harrison argues that this cannot have been intended by Parliament because the effect would be to create a large and problematic "innominate jurisdiction" in the Authority based not on the legal elements of a claim, but on an imprecisely defined factual context.

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35 Footnotes omitted.

[34] As to the statutory context, Mr Harrison submits that none of the purpose provisions, whether for Part 9 (s 101), Part 10 (s 143) or the Act generally (s 3), supports an inference that Parliament intended to confer on the Authority exclusive jurisdiction. He notes that s 143(fa) provides that the Authority's investigations are "generally" to be concluded before "any higher court exercises its jurisdiction in relation to the investigations", not before the Employment Court only.

[35] As to the language of s 161(1), Mr Harrison says that if Parliament wished to abolish a common law cause of action, it would have spoken more plainly. He compares s 161(1) to the way Parliament has transferred two existing common law jurisdictions to the Employment Court. Section 99 gives the Employment Court jurisdiction over tort proceedings in relation to strikes and lockouts. In addition to declaring that the Employment Court has "full and exclusive jurisdiction" in respect of such proceedings,[36] it provides that "[n]o other court has jurisdiction" in respect of these matters.[37] Similarly, s 194 gives the Court special judicial review jurisdiction over decisions made by certain bodies. Section 194(2) provides that this jurisdiction is "full and exclusive" and that such proceedings "must be made to or brought in" the Employment Court. In both instances, Mr Harrison says, jurisdiction is simply transferred "like for like"; no cause of action is abolished.

[36] By contrast, Mr Harrison submits, s 161 is "less explicit" in wording but, according to the lower Courts' judgments, more far-reaching in effect. It appears on its face to found the Authority's jurisdiction on factual situations that fall within the definition of "employment relationship problem". But this is in tension with both the items listed in s 161(1), which refer to legal standards that are independent of s 161 (with the exception of s 161(1)(r)), and the basic rule of law that requires adjudicative bodies to decide disputes by reference to identifiable legal standards.

[37] Mr Harrison submits that Parliament cannot have intended to remove the ordinary courts' jurisdiction over all other employment-related tort claims via the "obscure back-door route" of conferring jurisdiction over "employment relationship problems" on the Authority.

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[36] ERA, s 99(1).
[37] Section 99(2).

[38] In any case, it is submitted that however the expression "employment relationship problem" is interpreted, it is clear that the tort exception in s 161(1)(r) preserves the ordinary courts' jurisdiction over tort actions.

[39] In relation to the cases relied on in the Courts below, Mr Harrison submits that *JP Morgan*[38] focuses on the degree of factual integration between the problem and the employment relationship, but does not address the difficulties of such a test. He submits that this Court should adopt the decision in *BDM Grange*,[39] which focuses on the legal distinctiveness of the claim or cause of action. This would allow concurrent High Court and Authority jurisdiction, not only in relation to tort claims, but also other common law claims.

Respondent's submissions

[40] For TZB, Mr Clarke submits that in applying *JP Morgan*, the Court of Appeal correctly applied settled law to the issue of jurisdiction. Over the past century, Parliament has steadily expanded the jurisdiction of the specialist employment institutions, transferring jurisdiction to them from the High Court. In particular, the Employment Relations Act represents a paradigm shift away from the contractual focus of the Employment Contracts Act 1991 to a recognition that employment relationships are social as well as economic.

[41] Accordingly, it is submitted that the purposefully broad wording in s 161 reflects Parliament's intention that the Authority's jurisdiction should extend to all employment relationship problems, regardless of how a cause of action might be pleaded. It is not permissible to sidestep the Authority's jurisdiction simply by pleading a different cause of action, as doing so would subvert the purpose of the Act. Importantly, Mr Clarke submits that if the claim falls under any of the employment relationship problems listed under s 161(1) other than paragraph (r), then the Authority has jurisdiction even if the claim can be pleaded in tort. The tort exclusion in s 161(1)(r) applies only to "any other action" that is not already listed in s 161(1).

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38 *JP Morgan*, above n 31.
39 *BDM Grange*, above n 27.

[42] Mr Clarke also submits that the test applied in *JP Morgan*, the "essential character" test, upholds Parliament's intention by asking whether the substance of the claim falls within the Authority's jurisdiction, not the form. He disagrees with Mr Harrison's suggestion that as a result of the lower Courts' judgments, all tortious claims that arise in an employment relationship will come within the Authority's jurisdiction. The Court of Appeal in *JP Morgan* rejected the proposition that all issues that arise between an employer and employee will amount to an employment relationship problem. Rather, the High Court retains jurisdiction over problems arising from the factual setting of an employment relationship but the essence of which are not employment relationship problems, such as claims against directors for breach of duty in their capacity as directors, conversion of intellectual property, dishonest theft of money, and defamation.

[43] In this case, it is submitted that the substance of FMV's claims are entirely within the employment relationship and so the Authority has exclusive jurisdiction regardless of how the claims are framed.

The Employment Relations Act 2000

[44] The issues in this appeal relate to the meaning of s 161. That must be ascertained from its text and in light of its purpose.[40] But the broader context is also important.[41] The Act of which s 161 forms part is not simply a statement of legislative policy circa 2000. It enacts a comprehensive regime that responds to and evolved from multiple prior employment regimes, so it contains a mix of both continuity and change. Section 161 must also be read in light of that context.[42]

Theme of the Act: relationships, not contracts

[45] The predecessor to the Employment Relations Act was the Employment Contracts Act (ECA). The ECA abolished the old system of national awards and removed the ability to bring "disputes of interest" to the employment institutions. It

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40 Interpretation Act 1999, s 5(1).

41 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

42 See also the comparative discussion in *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 (EmpC) at [32]–[40].

focused instead on the individual employment contract and the rights and obligations of the parties to it.[43] Section 45 provided that "[t]he persons who are qualified to be parties to a dispute concerning the interpretation, application, or operation of an employment contract are the parties to the employment contract".

[46] While the Employment Relations Act did not reverse the ECA's structural reforms such as the abolition of the national award system, it did step back from the ECA's strictly contractual focus. As its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power.[44] The result is that while the employment agreement remains very important,[45] it is the employment relationship that is the real focus under the current Act.[46] The scope of the employment relationship is wider than the employment contract and it adds an additional dimension to contractual rights and obligations. This is reflected in two important ways.

[47] The first is the statutory incorporation of the principle of good faith into the employment relationship.[47] This principle underpins the Act's relational approach.[48]

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43 The object of Part 4 of the Act, "Enforcement of Employment Contracts", was to establish, among other things, that "[e]mployment contracts create enforceable rights and obligations": Employment Contracts Act 1991 (ECA), s 43(a).

44 For a discussion on relational contracts, see Ian R Macneil "The Many Futures of Contracts" (1974) 47 S Cal L Rev 691. See also Robert C Bird "Employment as a Relational Contract" (2005) 8 U Pa J Lab & Emp L 149 at 151–158.

45 As reflected in s 162 of the ERA, which clarifies that in respect of any matter related to an employment agreement, the Authority may make any order that the High Court or District Court may make under any enactment or rule of law relating to contracts.

46 Under the ECA, the function of the Employment Tribunal was to assist employers and employees to "maintain effective employment relations": s 78(1). That is the only reference in the ECA to employment relations, apart from s 9(b), which provided that the employment relationship could be governed by individual or collective agreements.

47 Prior to the enactment of the ERA, the common law implied into employment contracts an employee's obligation of fidelity and a mutual obligation of trust, confidence and fair dealing: see, for example, *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA) at 248 per Richmond P, 255 per Woodhouse J and 265 per Cooke J; and *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA) at 278 per Cooke P and 285 per Richardson J (both with whom Casey and Hardie Boys JJ and Sir Gordon Bisson agreed). An incident of the obligation of trust and confidence was the obligation to conduct employment-related negotiations in good faith: *New Zealand Medical Laboratory Workers Union Inc v Hamilton Medical Laboratory Ltd* [1998] 1 ERNZ 162 (EmpC) at 172. The concept of good faith was also occasionally referred to generally alongside the obligations of fidelity and confidence, but the extent or content of that as a separate obligation was unclear: see, for example, *Steelink Contracting Services Ltd v Manu* [1999] 1 NZLR 722 (CA) at 727. The idea that an employment contract was one of "utmost good faith" was rejected in *Communications & Energy Workers Union v Tisco Ltd* [1992] 2 ERNZ 1087 (EmpC) at 1102.

48 See Employment Relations Bill 2000 (8-1) (explanatory note) at 2. See also ERA, s 143(a).

[48] Part 1, "Key provisions", begins by stating that the object of the Act is:[49]

> to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship…

[49] This is to be done, first and foremost, by:[50]

> … recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour…

[50] Section 4 then provides that parties to an employment relationship "must deal with each other in good faith".[51] This means, of course, that parties must not mislead or deceive one another,[52] but its effect is wider than that. Parties must also actively and constructively establish and maintain a productive employment relationship; they must be responsive and communicative; and employers must comply with procedural fairness requirements.[53] Further, the obligation applies to bargaining;[54] employer-employee consultations;[55] redundancies;[56] and any proposal that might impact on employees, including proposals to contract work out, or to restructure or sell the employer's business.[57] This list of applicable circumstances is inclusive.[58] Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

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49 ERA, s 3(a).
50 Section 3(a)(i).
51 Section 4(1)(a).
52 Section 4(1)(b).
53 Section 4(1A)(b) and (c). This subsection was inserted in 2004 by s 5(1) of the Employment Relations Amendment Act (No 2) 2004. The purpose of that amendment was to clarify and strengthen the requirements of the duty of good faith: see Employment Relations Law Reform Bill 2003 (92-1) (explanatory note) at 3. The amendment came not long after the Court of Appeal held in *Auckland City Council v New Zealand Public Service Assoc Inc* [2004] 2 NZLR 10 (CA) at [25] that requiring active good faith behaviour in an employment relationship "goes too far". For a detailed discussion on the obligation of good faith, see Christina Inglis "Defining good faith (and Mona Lisa's smile)" (paper presented to Law @ Work Conference, Auckland, Wellington and Christchurch, 2019).
54 Whether collective or individual: ERA, s 4(4)(a) and (ba).
55 Section 4(4)(c).
56 Section 4(4)(e).
57 Section 4(4)(d).
58 Section 4(5).

[51] The second major reflection of the Act's relational approach is the definition of "employment relationship" itself. "Employment relationship" is defined to include not only that between employer and employee (that is, the parties to the employment contract), but also union and employer, a union and union member, a union and another union or its member bargaining for or party to the same collective agreement, and employers bargaining for the same collective agreement.[59]

[52] The good faith obligation reflects the Act's intended levelling effect. As s 3(a)(ii) expressly provides, the object to build productive employment relationships through the promotion of good faith is also to be achieved "by acknowledging and addressing the inherent inequality of power in employment relationships".

Themes of the institutions: empowerment, pragmatism and accessibility

[53] It is in this context that Part 10 of the Act (in which s 161 is located) provides for the two specialist employment institutions: the Employment Relations Authority and the Employment Court. They are intended to give effect to the Act's overall object of building productive employment relationships through the promotion of good faith:[60]

> …
>
> (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
>
> (vi) by reducing the need for judicial intervention…

[54] In short, the Act is designed to empower parties to employment relationships to resolve their own problems where possible and to avoid unnecessary adversarialism. These aims are also evident in s 143 (the object of Part 10), which provides that the Act's dispute resolution regime and specialist institutions are intended relevantly to:

> (a) support successful employment relationships and the good faith obligations that underpin them; and
>
> (b) recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves; and

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59 Section 5 definition of "employment relationship" and s 4(2).
60 ERA, s 3(a).

(c) recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships; and

(d) recognise that the procedures for problem-solving need to be flexible; and

…

(e) recognise that there will always be some cases that require judicial intervention; and

(f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and

(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and

(g) recognise that difficult issues of law will need to be determined by higher courts.

[55] Thus, the focus of Part 10 is on practical, specialised, speedy and informal dispute resolution that is accessible to all parties.[61]

[56] Mediation is therefore preferred in the first instance.[62] But the Act also recognises mediation will not always be effective or appropriate, and so, "at the lowest level", a specialist decision-making body is required.[63] The Authority replaced the ECA's Employment Tribunal in fulfilling this role but has retained some of the Tribunal's features. For example, the Authority still has a broad power to call for evidence, "whether strictly legal evidence or not".[64] It retains the power to follow whatever procedure it thinks fit.[65] There is no requirement for Authority members to

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61 See also comments by the Minister responsible, the Hon Margaret Wilson, that "[t]he whole purpose of the new institution, namely relating to mediation and to adjudication, is quite simply to enable the parties an efficient, prompt, and cheap method to be able to resolve their disputes as quickly as is possible": (9 August 2000) 586 NZPD 4480.

62 Section 159. See also ss 144–155. This continues the former ECA approach: see ECA, ss 76(b) and s 78(1). Mediation used to be provided by the Employment Tribunal itself, whereas it is now external to the Authority: see ECA, ss 78(2)–(4) and 80(1); and ERA, ss 144 and 159(1).

63 ERA, s 143(f).

64 ERA, s 160(1)(a) and (2). Compare ECA, s 96.

65 ERA, s 160(1)(f). Compare ECA, s 88(1).

be legally qualified.[66] And speed in decision-making remains an emphasis for the Authority.[67]

[57] There are, however, also important differences. Apart from its mediating function, the old Tribunal was still primarily adversarial. Where mediation was not appropriate, the function of the Tribunal was to "adjudicate" disputes between the parties.[68] The current Act takes a different approach. It provides that the Authority is an "investigative body".[69] Rather than holding hearings, the Authority holds "investigation meetings".[70] Its job is to "resolv[e] employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities".[71] It must of course comply with the principles of natural justice and support the aims of both Part 10 and the Act generally,[72] but otherwise the Authority is empowered (indeed, it is required) to "act as it thinks fit in equity and good conscience".[73] In addition to calling for evidence, it can interview the parties or any person, examine any witness and hold any investigation meeting in private.[74] And, consistent with natural justice principles, it may allow witnesses to be cross-examined.[75]

[58] Finally, and critically, the Authority is not bound by the way the parties have framed their dispute. If it considers the parties have not understood the real nature of their problem, it can reframe the problem and resolve that.[76] The design of the Authority is therefore premised on a fact-oriented, merits-based approach; a departure from the position under the ECA.

[59] Where this approach is not appropriate to the nature of the dispute or where one or other party is dissatisfied with the Authority's determination, the matter may be

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66 ERA, ss 166 and 167. Compare ECA, ss 81 and 82.
67 See ERA, ss 174(a) and 174A(2)–(3). Compare ECA, s 76(c).
68 ECA, ss 78(3)(b) and 79(1)(b)–(e) and (g)–(i).
69 ERA, s 157(1).
70 Section 160(1).
71 Section 157(1).
72 Section 157(2).
73 Section 157(3). It may not do anything inconsistent with the Act, regulations under the Act, or the relevant employment agreement.
74 Section 160(1)(a) and (c)–(e).
75 Section 160(2A). See also Employment Relations (Validation of Union Registration and Other Matters) Amendment Act 2001, s 3(b).
76 Section 160(3).

dealt with by the Employment Court, in which procedures are more formal and adversarial. The Employment Court has first instance and appellate functions. The Court's first instance jurisdiction includes matters removed to the Court from the Authority under s 178,[77] applications for judicial review in an employment context under s 194,[78] and industrial tort proceedings—that is, proceedings relating to strikes and lockouts.[79] The Court's appellate jurisdiction is triggered by a "challenge" to a determination of the Authority.[80] Such challenges may be heard either on a de novo basis or on the record, at the election of the challenger.[81] Each of these heads of jurisdiction is protected by a provision excluding intrusion into that work by other courts.[82]

Theme of s 161: problems, not causes of action

[60] Section 161 must therefore be read in the above context. Its language reflects the relational framework of the Act and drives the fact-based, problem-solving approach of the Authority. The Authority has exclusive jurisdiction to make determinations about "problems generally", not specific causes of action.[83] The only requirement is that the problem must be an "employment relationship" one; that is, it must relate to or arise from the "employment relationship"[84] in its entire sense as discussed above.[85]

[61] "Problem" is not separately defined.[86] But it is obviously and, it must be presumed, intentionally, used in the Act in a non-technical sense. It just means a difficulty or controversy to be resolved. It is an everyday word intended to be applied by employers and employees to everyday difficulties in a work context; and by

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77 Section 187(1)(e).
78 Section 187(1)(j).
79 Section 187(1)(h).
80 Sections 179 and 187(1)(a).
81 Section 179(3)(b) and (4).
82 See generally s 187(3). In respect of industrial torts, see ss 99(2) and 100(2); and in respect of the transfer of the High Court's traditional judicial review function to the Employment Court, see the more sophisticated exclusion in s 194(2).
83 Section 161(1).
84 Section 5 definition of "employment relationship problem".
85 See above at [51].
86 As noted, s 5 defines the phrase "employment relationship problem", but that definition focuses on the nexus between the problem and the relationship, rather than on what "problem" itself means.

experienced Authority members, employment advocates and union officials with genuine expertise in the work of the employment institutions who may or may not have wider legal training. Problems are not legal categories, they are factual phenomena. The addition of the modifier "generally" in s 161(1) serves to underscore the intention to create a comprehensive jurisdictional class without fine or technical distinctions at the boundaries. The Authority's function is to resolve problems in employment relationships.[87]

[62] It is therefore unsurprising that the examples listed in s 161(1) are extensive and diverse. They are varied in two ways: in subject matter and in form.

[63] The examples vary in subject matter in that they traverse a wide range of issues. They include, of course, issues of interpretation, application, operation or breach of an employment agreement,[88] as well as personal grievances generally,[89] but they also cover (by way of example only) equal pay and unlawful discrimination,[90] and patents and inventions. Specifically, the Authority has jurisdiction to resolve disputes about an invention made by an employee,[91] and to review decisions of the Commissioner of Patents in respect of such inventions.[92]

[64] The examples also come in a variety of forms in the sense that they are not all framed as "actions". The Authority does have jurisdiction over actions,[93] but it also has jurisdiction over disputes,[94] matters,[95] reviews,[96] orders,[97] facilitations,[98] investigations,[99] fixing provisions,[100] making determinations,[101] and joining third

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87 See also *Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24, (2014) 11 NZELR 534 at [17].
88 Section 161(1)(a)–(b).
89 Section 161(1)(e).
90 Section 161(1)(qd) (inserted 6 November 2020).
91 Section 161(1)(qa).
92 Section 161(1)(qb).
93 Section 161(1)(m), (q) and (r).
94 Section 161(1)(a) and (qa).
95 Section 161(1)(b)–(c), (d), (f)–(g), (h)–(k) and (qd) (inserted 6 November 2020).
96 Section 161(1)(qb).
97 Section 161(1)(n) and (p).
98 Section 161(1)(ca).
99 Section 161(1)(da)
100 Section 161(1)(cb).
101 Section 161(1)(cba) (now repealed), (cc) (now also repealed), (daa)–(dab) (inserted 1 April 2019), (da), (ga), (qc) and (s).

parties.[102] Clearly, not all of these items are strictly "problems"—some of them are more in the nature of responses or solutions to problems. Further, the term "matters" occurs 11 times in the subsection.[103] These include "*matters related to* a breach of an employment agreement",[104] "*matters about* whether a person is an employee",[105] "*matters alleged to arise* under section 68",[106] "*matters about* the recovery of wages",[107] and so on. This language is notable because it makes clear, if clarification were necessary, that the Authority's jurisdiction is not intended to be limited to a prescribed set of legal categories, but is rather focused on the factual substance of the problem itself.

[65] By contrast, the jurisdiction of the Employment Tribunal under the ECA was limited in both subject and form. Apart from its mediating function, the Tribunal's jurisdiction was prescribed by reference to specific causes of action and supplemented with the powers necessary to adjudicate on those actions. They were: personal grievances; "disputes"; actions for the recovery of wages; actions for the recovery of penalties; actions for breach of the employment contract; and any question of interpretation of the employment contract or the Act that arose in the course of proceedings.[108] "Dispute" was defined to mean a dispute "about the interpretation, application, or operation of an employment contract" only.[109]

[66] William Young J suggests that the chapeau to s 161(1)—in which the phrase "employment relationship problems generally" appears—was intended to be introductory only, rather than the primary statement of jurisdiction.[110] On his

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102 Section 161(1)(ea) (inserted 27 June 2020).
103 Including the 6 November 2020 insertion of s 161(1)(qd).
104 Section 161(1)(b) (emphasis added).
105 Section 161(1)(c) (emphasis added).
106 Section 161(1)(d). This relates to unfair bargaining for individual employment agreements (emphasis added).
107 Section 161(1)(g) (emphasis added).
108 ECA, s 79(1)(b)–(e) and (g)–(i).
109 Section 2 definition of "dispute". This meaning is carried through to the current Act, although the word "contract" has become "agreement": ERA, s 5 definition of "dispute". "Employment agreement" is defined more broadly than "employment contract" was under the ECA: compare ECA, s 2 definition of "employment contract"; and ERA, s 5 definition of "employment agreement".
110 See below at [170](a).

interpretation, the examples in s 161(1)(a)–(s) are an exhaustive list of the Authority's heads of jurisdiction.[111]

[67] We get to the same substantive result, relying instead on the broad wording of the chapeau. We take that view for four reasons. First, our approach is consistent with the legislative history we set out below.[112] Second, the list is expressly stated to be inclusive rather than exhaustive. Third, William Young J's approach treats the examples as if they define "employment relationship problem" for the purposes of the Act. But that phrase is already defined in s 5. If the statutory definition was not intended to be consequential, the legislature would not have taken the trouble to incorporate it. Fourth, in lockstep with the list of examples, the definition is also expressed inclusively, even though it appears to be comprehensive. There are thus two indications in the Act itself that the examples were intended to be an open-ended list.

Legislative history

[68] The legislative history of s 161 also supports a broad reading of its provisions. Section 161 began as cl 172 of the Employment Relations Bill 2000. That clause did not contain any language of exclusivity. It simply provided that the Authority "may make determinations about employment relationship problems generally".[113] There then followed a list of examples of such problems somewhat shorter than that in the current provision. There was no subcl (2) or (3).

[69] Exclusivity of jurisdiction was separately provided for in a standalone clause, cl 7. It provided:[114]

> **7 Exclusive jurisdiction of Authority and Court**
>
> (1) The Authority and the Court have exclusive jurisdiction to deal with any matter or do any thing or hear and determine *any proceedings that come within the scope of this Act*, including any matter, thing or proceedings relating to employment agreements.
>
> (2) Except as provided in this Act, no other court has jurisdiction to deal with any matter or do any thing or hear and determine any proceedings that come within the scope of this Act.

111 See below at [170](b).
112 At [68]–[74].
113 Employment Relations Bill 2000 (8-1), cl 172.
114 Emphasis added.

[70] There was debate in the Employment and Accident Insurance Legislation Committee about whether cls 7 and 172 conveyed the Authority's intended exclusive jurisdiction with sufficient clarity. The Committee considered that the wording of cl 7 "was too narrow" to fit the policy intent for the employment institutions to have exclusive jurisdiction over employment matters, and discussed amendments "to ensure that the clause would capture the entire intended specialist jurisdiction".[115]

[71] In the end, however, the Committee recommended that cl 7 be deleted and the exclusivity issue be dealt with in cl 172.[116] What was cl 172 became cl 172(1), and the opening words were amended so that they now provided that the Authority "*has exclusive jurisdiction* to make determinations about employment relationship problems generally".[117] The deleted cl 7(2) was effectively transferred to a new cl 172(3) in relation to the Authority.

[72] The Authority's exclusive jurisdiction was therefore changed from covering "proceedings that come within the scope of [the] Act"[118] to covering "employment relationship problems generally".[119] This more direct language demonstrates Parliament intended that the perimeter of the Authority's exclusive jurisdiction should generally be co-extensive with that of the employment relationship, and not limited by the form of the particular proceedings.

[73] That intention is confirmed by Parliament's rejection of a proposed amendment to cl 172(1)(q), which became s 161(1)(r). During debate in Committee stage, a member expressed concerns that the ambit of the Authority's jurisdiction was too wide.[120] A supplementary order paper in that member's name proposed amending cl 172(1)(q) to clarify that "any other action … arising from or related to the employment relationship or related to the interpretation to this Act" excludes "issues relating to company law, intellectual property, restraint of trade, tenancy issues, interlocutory orders including Anton Piller orders, Mareva injunctions and interim

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115 Employment Relations Bill 2000 (8-2) (select committee report) at 6.
116 At 6.
117 Emphasis added.
118 Employment Relations Bill 2000 (8-1), cl 7(1).
119 Employment Relations Bill 2000 (8-2), cl 172(1), now s 161(1) of the ERA.
120 See (9 August 2000) 586 NZPD 4479.

injunctions relating to property, disputed loans and debts, superannuation issues, and taxation issues".[121] The proposed amendment was not adopted.[122]

[74] In responding to the member, the Minister of Labour, the Hon Margaret Wilson, said:[123]

> The authority does have jurisdiction that is extensive, which is required by it to be able to go in and assist the parties and, in effect, have a problem-solving approach to it, rather than a very expensive adversarial approach to it where frequently neither party wins.

Preliminary conclusion

[75] Against this background, it is clear that "problem" is a factual category, not a legal one. It follows, then, that whether the problem "relat[es] to or aris[es] out of" the employment relationship is also a factual enquiry. Mr Harrison is therefore correct that the language of s 161(1) provides for a jurisdiction based on factual context, but incorrect to say that Parliament cannot have intended it.[124] To the contrary, the scheme of the Act and its history suggest that is precisely what was intended.

[76] The question is how this problem-based approach can be articulated in a workable test and applied to FMV's claims. We turn to that next. It will then be appropriate to address the meaning of the tort exclusion in s 161(1)(r) in order to address the second main issue in this appeal.

Issue one: Are FMV's claims "employment relationship problems"?

The case law

[77] Both the employment law institutions and the ordinary courts have struggled to satisfactorily define "employment relationship problem" in practice. The most authoritative statement to date is that provided by the Court of Appeal in *JP Morgan*,[125] which was applied by the Court of Appeal in this case[126] and which

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121 Supplementary Order Paper 2000 (58) Employment Relations Bill 2000 (8-2).
122 (9 August 2000) 586 NZPD 4520–4521.
123 (9 August 2000) 586 NZPD 4480.
124 See above at [33].
125 *JP Morgan*, above n 31.
126 CA judgment, above n 24, at [21].

Mr Harrison criticised in his submissions. Mr Harrison urges this Court to adopt *BDM Grange*,[127] a decision that was affirmed by *JP Morgan*[128] and applied by the High Court in this case.[129]

BDM Grange

[78] *BDM Grange* concerned a dispute between BDM Grange Ltd and its former managing director, Mr Parker. Prior to Mr Parker's resignation, BDM Grange had been the exclusive New Zealand distributor of products from Frostbland Australia Pty Ltd (Frostbland Australia) and Fine Fragrances & Cosmetics Ltd. After his resignation, that right was acquired by Frostbland New Zealand Ltd (Frostbland NZ), the company for which Mr Parker now worked. BDM Grange filed proceedings in both the High Court and the Authority. In the High Court, BDM Grange sued Mr Parker, Frostbland NZ, and Frostbland Australia. It asserted claims:

(a) against Mr Parker for breach of fiduciary duty arising from his use of BDM Grange's confidential information obtained as a result of his position as director;

(b) against Frostbland NZ and Frostbland Australia for inducing Mr Parker to breach contractual and statutory duties;

(c) against all three defendants for misuse of confidential information;

(d) against all three defendants for conspiracy to injure BDM Grange's business through unlawful means; and

(e) against Mr Parker in deceit for making false representations to BDM Grange.

Mr Parker applied to strike out the claims on the ground that they fell within the Authority's exclusive jurisdiction.

[79] The High Court rejected the application.[130] In relation to the claims in tort, the Court considered that the Authority's jurisdiction was "not … intended to extend

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127 *BDM Grange*, above n 27.
128 *JP Morgan*, above n 31, at [98].
129 HC judgment, above n 23, at [27].
130 *BDM Grange*, above n 27, at [100].

beyond claims arising directly within the employment relationship into causes of action such as claims in tort and in equity".[131] Rather, the Court held, the examples in s 161(1) showed that "the objective of the [Act] remains essentially *contract* focused and does not extend to a jurisdiction to determine claims in tort".[132] The Court acknowledged that this approach meant the same conduct would give rise to rights in both the Authority and the High Court, but it considered that could be dealt with through a stay or delay of proceedings in one or other of the jurisdictions.[133]

[80] It will be clear from the discussion of the scheme of the Act above that we do not agree with the approach taken in *BDM Grange*.[134] The Authority's jurisdiction is expressed in factual terms, and the Act signalled a clear departure from the contract-based approach of the ECA. It would defeat the purpose of the specialist scheme to base the Authority's exclusive jurisdiction on the form of the claimant's pleading, thereby permitting parties to plead their way around that very exclusivity.

[81] The High Court's approach to the claim for breach of a director's duty is a separate issue, which we come to later below.[135]

[82] We turn, then, to consider the approach taken by the Court of Appeal in *JP Morgan*.

JP Morgan

[83] *JP Morgan* concerned a dispute between 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

131 At [51].
132 At [54].
133 At [71].
134 Subject to what we say below at [127]–[129] about the relatively narrow tort exception.
135 At [102]–[103].

breaches).[136] Mr Lewis then filed proceedings in the Employment Court, alleging breach of the settlement agreement. He argued that the employment institutions had jurisdiction because the settlement agreement was really a variation of his employment agreement. If correct, this meant that the Authority had exclusive jurisdiction by the terms of s 161(1)(b). The Bank applied to strike out the claims, but was unsuccessful.[137] It therefore appealed.

[84] The Court of Appeal struck out the claim.[138] The Court held that the settlement agreement was not a variation of the employment agreement and so could not come within s 161(1)(a), (b) or (n).[139] Nor was it "any other action" in terms of s 161(1)(r) because the dispute was not in fact an employment relationship problem at all. It concerned "post-employment obligations".[140]

[85] The Court considered that a problem relates to or arises out of an employment relationship in accordance with the s 5 definition if it "directly and essentially concerns the employment relationship".[141] It approved the following statement of principle articulated by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*, the first High Court decision to discuss the meaning of s 161:[142]

> [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?

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136 *Lewis v J P Morgan Chase Bank, NA* [2012] NZERA Auckland 355 at [10]–[11]. The Authority took the view that it did not have jurisdiction to order compliance with the terms of a settlement agreement unless it had been countersigned by an authorised member of the mediation services provided under the Act in accordance with s 149 of the ERA.

137 *Lewis v JPMorgan Chase Bank NA* [2013] NZEmpC 148 at [78].

138 *JP Morgan*, above n 31, at [117].

139 At [74]–[75].

140 At [89] and [92].

141 At [95].

142 At [96]–[97], citing *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001.

[86] Mr Harrison criticises *JP Morgan* for taking a factual approach to the question whether a problem relates to or arises from an employment relationship, without "fac[ing] up to the difficulties" of doing so.

[87] *JP Morgan* is a difficult decision. It appears to formulate the test for jurisdiction in a factual way: "the problem must be one that directly and essentially concerns the employment relationship".[143] What "directly and essentially" concerns the employment relationship, however, is very much in the eye of the beholder.

[88] For example, the Court in *JP Morgan* focused on the contractual basis of the employment relationship between the Bank and Mr Lewis. The Court accepted a submission that the settlement represented a "bilateral discharge" of the employment contract.[144] The terms of the settlement included provision for mutual rights and obligations applying after the relationship of employer and employee had terminated.[145] In the absence of an extant employment contract to underpin their relationship, the problem between Mr Lewis and the Bank could not be an employment relationship problem.[146] In fact, it was a post-employment relationship problem and therefore outside the jurisdiction of the Authority.[147]

[89] The Court in *JP Morgan* also expressly disagreed with the conclusion reached in *Hibernian Catholic Benefit Society v Hagai*, which concerned theft in the course of employment.[148] The High Court in *Hagai* agreed with the same passage from *Pain Management* that was cited in *JP Morgan* and found that the matter was an employment relationship problem.[149] The Court of Appeal in *JP Morgan*, however, considered that theft in the course of employment, although clearly a breach of the employment agreement, is not in essence an employment relationship problem because the existence of the employment relationship would not be "a necessary component of many of the causes of action that could [be] asserted".[150]

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143 At [95].
144 At [59] and [65].
145 At [67].
146 At [74].
147 At [92].
148 At [94]–[95], citing *Hagai*, above n 87, at [11].
149 *Hagai*, above n 87, at [18]–[19].
150 *JP Morgan*, above n 31, at [97].

[90] While purporting to take a fact-based approach, the analysis in *JP Morgan* nevertheless treated employment relationship problems as a separate category exclusive of other legal categories, particularly property, equity and tort. This approach is carried through in the cases that follow it.[151] The effect is that if a claim does not rely on the employment contract or a specific duty under the Act or related Acts, it will not be an employment relationship problem.[152] But *JP Morgan*'s inconsistency has also created confusion. Some cases, for example, have looked to the pleadings to determine which category the dispute belongs to,[153] while others have looked to the overall facts rather than the pleadings and tried to distil from them the true legal essence of the problem.[154]

[91] Both approaches are flawed: the first because it permits parties to plead their way out of the Authority's distinctive jurisdiction with its additional legal obligations and accessible procedures; and the second because the one true essence theory is false. One factual scenario can legitimately give rise to more than one category of legal claim, as the Court in *JP Morgan* accepted.[155] If that is the case, there is no principled basis upon which to prefer one of those legal categories as the true essence of the problem. Selection would be purely arbitrary.

Our approach

[92] In enacting s 161(1), the legislature specifically chose not to ground the Authority's jurisdiction in the way claims might be pleaded or traditionally categorised. It used a non-technical term, "problem", to ensure legal form did not distract the decision maker from focusing on the factual substance of the difficulty confronting the parties. That is the reason "problem" is not a legal category alongside property, or tort, or equity, but a supervening class that may encompass all of these legal forms as long as the problem relates to or arises from an employment

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151 See, for example, *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152, [2017] ERNZ 858 at [86].

152 See, for example, *Performance Cleaners*, above n 151, at [91]; and *Ecostore Co Ltd v Worth* [2017] NZHC 1480, (2017) 15 NZELR 93 at [25].

153 See, for example, *Porteous v The National Mutual Life Assoc of Australasia and AMP Life Ltd* [2018] NZHC 2056 at [17]–[18]; and *Ecostore*, above n 152, at [25]–[29].

154 See, for example, *Barbara Buckett & Associates t/a Buckett Law v Farani* [2016] NZERA Wellington 110 at [19]–[21].

155 *JP Morgan*, above n 31, at [97]. See also *Aztec Packaging Ltd v Malevris* [2012] NZHC 243, (2012) 10 NZELC ¶79-003 at [12].

relationship. And that means the character of a problem is not to be found in its legal presentation.[156]

[93] If a "problem" encompasses any kind of difficulty or controversy, when does it relate to or arise out of the employment relationship? In our view, the "essence" test articulated in *Pain Management* invites an inappropriately narrow inquiry in light of the broad language of the section. The question is simply one 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. That is because the expectations arising out of an employment relationship apply only in a work context. This does not necessarily mean only "at work during work hours", though if the problem arises in that context, it will almost certainly be an employment relationship problem. Rather, an assessment of all of the facts is required, not just time and location. We accept this will sometimes be a question of judgement and degree, but given the statutory language, that is unavoidable.

[94] 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"[157] 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)–(qd), it *must* be brought in the Authority as an employment relationship problem.[158] 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).

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156 We therefore agree with the approach that was taken in *Hagai*, above n 87, and in the Employment Court prior to *JP Morgan* insofar as those cases treated the question of jurisdiction as factual, for example in *Waikato Rugby*, above n 42, at [50]; *Rolling Thunder Motor Co Ltd v Kennedy* [2010] NZEmpC 109 at [22]; and *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90, [2010] ERNZ 290 at [38].

157 *Pain Management*, above n 142, at [22]; cited and applied in *Ecostore*, above n 152, at [19], [25] and [30].

158 See *Aztec Packaging*, above n 155, at [12].

[95] It is therefore misleading to ask whether a pleaded claim *is* an employment relationship problem. Claims cannot *be* problems in the factual sense; problems can only give rise to claims. The correct question is whether the claim *reflects a problem* that relates to or arises from an employment relationship.

Some examples

[96] So, for example, if an employer accuses an employee of dishonesty, notifies other employees of the accusation and dismisses the alleged wrongdoer, that is an employment relationship problem because the words reflect their work context. There has been an unjustified dismissal. The employee may not sue the employer in the High Court, say in an action in defamation, though they would be able to seek compensation under s 123(1)(c) of the Act, which confers a broad discretion to award compensation.[159]

[97] It follows also that the much-debated example of theft by an employee is an employment relationship problem, and that *Hagai* was correctly decided. Stealing from one's employer breaches not only the employment agreement,[160] but also the obligation of good faith that is sourced in the employment relationship.[161] Of course, the employee is also subject to the separate obligation not to steal that is sourced in the Crimes Act 1961, but that has no bearing on whether the problem is an employment relationship problem. The concept of an employment relationship problem that *also* involves criminal conduct is perfectly coherent. On the other hand, had the employee resigned and stolen from their former employer after the termination of their contract, that would not be an employment relationship problem because the theft was not in an employment context and there would no longer be any relevant expectation sourced in the employment relationship.

[98] This, of course, does not mean that all issues arising between employer and employee will come within the exclusive jurisdiction of the Authority, as has

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159 Including for humiliation, loss of dignity, injury to feelings and loss of any benefit the employee might reasonably have been expected to obtain if the personal grievance had not arisen. Some cases, however, may be brought in the High Court if they fall under the tort exception in s 161(1)(r). See below at [127]–[129].

160 ERA, s 161(1)(b).

161 Section 161(1)(f).

sometimes been suggested. For example, if an employee purchases products from their employer's retail outlet, a dispute over the quality of those products will clearly not be an employment relationship problem. The parties are in an employment relationship, but the issue does not arise in a work context. The relevant relationship is that of vendor and purchaser, not employer and employee.[162]

"Post-employment" problems

[99] While the parties must always be able to point to an employment relationship, the "work context in the course of the employment relationship" test does not cover all relevant situations. As discussed above at [46]–[51], the employment relationship under the Act is larger than the employment contract, both in content and scope. For example, obligations that control the relationship are not limited to those in the employment contract. In particular, "post-employment" obligations entered into during the course of the relationship and in the work context are logically aspects of the employment relationship, even if the effect of entering into those obligations was to end the employment contract.[163]

[100] The structure of the Act confirms this position. Section 161(1)(n) provides that the Authority has exclusive jurisdiction over compliance orders.[164] It can grant a compliance order to enforce a settlement agreement, provided the agreement has been countersigned by an authorised mediator.[165] That does not mean that the Authority has jurisdiction over settlement agreements only when they have been countersigned by a mediator (as the Authority held in Mr Lewis's case[166]). Rather, it demonstrates that issues of compliance with settlement agreements generally are employment relationship problems. It must be remembered that s 161(1) is cast in inclusive language.

[101] In turn, the indirect inclusion of settlement agreements in s 161(1) demonstrates the more general principle that post-contractual obligations entered into

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162 This will not always be the case. For example, if there is a practice that staff may obtain factory seconds at lower cost, that circumstance would probably import a work context. That situation gives rise to an expectation that is sourced in the employment relationship.

163 It follows that we consider *JP Morgan*, above n 31, was wrongly decided.

164 Under s 137.

165 Sections 137(1)(a)(iii) and (2) and 151(1)(a). See also s 149.

166 See above at [83] and n 136.

as part of an employment relationship and in a work context can give rise to employment relationship problems within the exclusive jurisdiction of the Authority, even if they are not sourced in the employment contract itself. Problems with restraints of trade, for example, would therefore also be covered. It would not matter whether the obligation arose from a term in the employment contract or from a later severance agreement. The fact that the former is expressly covered by s 161(1)(a) and (b), while the latter is not, is immaterial. The *problem* is the same.

Directors and other split proceedings

[102] Where, as happens occasionally, an employee is also a director of the employer company, any proceedings in the name of the employer company against that person may involve either or both of an employment relationship problem and a dispute within the jurisdiction of the ordinary courts. In these kinds of dual capacity disputes, some allegations will relate to the person's capacity as an employee (and so relate to an employment relationship), and others as director in terms of duties under the Companies Act 1993 (and so be unrelated to any employment relationship), but no single allegation can relate to both at the same time. Which capacity applies is a question of fact.[167] It is possible, therefore, for dual capacity cases to produce a form of split proceeding if there are multiple allegations.

[103] As the High Court noted in *Hagai*, split proceedings will also be likely in multiple defendant cases where only one or some of the defendants are employees.[168] *BDM Grange*[169] and *Global Kiwi NZ Ltd v Fannin*[170] are two examples of this occurring. Claims against the employee that arise from employment relationship problems will need to be brought in the Authority, while claims against third parties will generally belong in the High Court. Any risk of inconsistent factual findings in different forums will need to be managed carefully by procedural means.

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167 In *Global Kiwi NZ Ltd v Fannin* [2014] NZHC 656, for example, the plaintiff company sued Mr Fannin, who was a minority shareholder, an employee, and the sole director. The Court held that some allegations related to Mr Fannin's capacity as director, rather than employee: at [12] and [15].

168 *Hagai*, above n 87, at [16].

169 *BDM Grange*, above n 27.

170 *Global Kiwi*, above n 167.

[104] To be clear, we do not suggest that only parties to employment relationships can have employment relationship problems, or bring or defend proceedings in the Authority. The important element is the nature of the problem, not the identity of the parties. For example, in *Waikato Rugby*, a disagreement between the New Zealand Rugby Football Union Inc (NZRFU) and the Waikato Rugby Union Inc over which union a player should represent was appropriately seen as an employment relationship problem because it was a disagreement over NZRFU's employment agreement with the player.[171]

Overlapping statutes

[105] As William Young J rightly notes,[172] there may on occasion be situations where overlapping statutes create the possibility of competing jurisdictions. Whether the employment institutions should take priority over any competing regime will be a question of statutory interpretation in each case. If a dispute between those in an employment relationship is an employment relationship problem, then the Authority will have exclusive jurisdiction unless that is expressly or impliedly displaced by the language of the overlapping statute. The overlap may displace the Authority's jurisdiction entirely, or it may only displace its exclusivity so that both forums are available, depending on the wording of the overlapping Act.

[106] We have already discussed the Companies Act as one such example of potential overlap. Section 171(3) of the Intelligence and Security Act 2017 is another. This provides, as William Young J points out, that an employee of an intelligence and security agency may complain to the Inspector-General of Intelligence and Security that they have been adversely affected by any act, omission, practice, policy or procedure of their employer.[173] Written consent of the relevant agency's director is required if internal remedies have not been exhausted. The Inspector-General must then decide whether or not to conduct an inquiry.[174] The Act further provides for the procedures applicable to such inquiries.[175]

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171 *Waikato Rugby*, above n 42, at [52].
172 Below at [183].
173 Below at [189].
174 Intelligence and Security Act 2017, s 173(1).
175 See ss 175–184.

[107] This allows the Inspector-General to consider what are in substance personal grievances, thereby displacing the exclusivity of the Authority's jurisdiction where s 171 applies. The Authority's jurisdiction is not, however, displaced entirely. As a starting point, s 76(1) of the Public Service Act 2020 provides that the Employment Relations Act applies to the public service (which includes the intelligence and security agencies[176]), subject only to the exceptions in the Public Service Act itself. Further, the Intelligence and Security Act also inserted a new s 172A into the Employment Relations Act. That section provides that in proceedings in the Authority relating to whether a person should be granted security clearance, a report on the matter must be obtained from the Inspector-General.[177] It must have been envisaged, therefore, that both forums would be available, although in practice it may be that the strict controls over disclosure of sensitive intelligence and security information will make it impossible to bring a claim in the Authority in some instances.[178]

Choice of forum

[108] We accept that the above approach may on occasion result in procedural complexity and, with that, increased expense for parties. But that is inevitable given the Act's firm line on the Authority's monopoly over employment relationship problems. We accept also that there may still be jurisdictional uncertainty at the margins. But, as we noted above at [59], the Authority can remove any cases raising complex legal issues to the Employment Court for resolution,[179] including those raising any difficult questions of jurisdiction.

[109] If Parliament considers this position unsatisfactory, it will no doubt move to amend the legislation accordingly. William Young J suggests that one possibility is to provide for default assignment of employment-related disputes to the Authority, with a power to remove appropriate cases to other courts, tribunals or agencies.[180] We endorse that suggestion. It would, at least, remove the need for parties to file

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176 Public Service Act 2020, sch 2 pt 1. See also Intelligence and Security Act, ss 7 and 8.

177 ERA, s 172A(1)–(3).

178 See, for example, Intelligence and Security Act, ss 41 and 107–109. Conversely, the Inspector-General may decline to inquire into a complaint if satisfied there is, "under the law", an adequate alternative remedy: s 174(1)(a).

179 See ERA, s 178(2)(a) and (d).

180 Below at [214].

proceedings in multiple different institutions to preserve their position where jurisdiction is unclear.

Answering issue one: Do FMV's claims arise from an "employment relationship problem"?

[110] Applying that test to the facts as pleaded in the High Court claim, it is clear that FMV's allegations identify a problem that relates to or arises out of her employment relationship with TZB. As the pleaded duties confirm, the allegations of fact are entirely grounded in that relationship and are completely reliant on the work context. The pleaded duties are:

(a) to keep FMV safe from psychiatric harm in her *work environment*;

(b) to establish a safe *system of work* so as to ensure FMV's health and safety; and

(c) to inform FMV of any health and safety risks to which she may have been exposed.

[111] The answer to issue one is therefore yes.

Issue two: Are FMV's claims nevertheless caught by the tort exception in s 161(1)(r)?

[112] The next issue then is whether, although the facts of the claim constitute an employment relationship problem, the claim may nonetheless proceed in the High Court because s 161(1)(r) expressly excludes such actions from the jurisdiction of the Authority. For ease of reference, we set out the provision again:

> **161 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)…

[113] In plain terms, the provision's effect is that in addition to the facilitations, disputes, matters, grievances, actions, objections and other problems referred to in s 161,[181] all "other actions" arising from or relating to employment relationships must be brought in the Authority, but tort actions must not, even if they also arise from or are related to an employment relationship.

[114] What is not clear is whether the intention was that employment-related tort claims could continue to be brought in the ordinary courts, or whether the intention was rather to require such claims to be reframed where possible as employment relationship problems within the Authority's jurisdiction, such as personal grievances. In other words was "other than an action founded on tort" intended to modify the wider class (employment relationship problems generally) or only the narrower one (any other action)?

[115] Mr Harrison submits that s 161(1)(r) preserves the ordinary courts' jurisdiction over claims between parties to an employment relationship that are framed in tort. Otherwise, Mr Harrison submits, s 161(1) has effectively abolished such causes of action with nothing in their place.

[116] Mr Clarke for TZB submits that s 161(1)(r) is not engaged because FMV's claims fall directly under s 161(1)(b) and (e) (breach of an employment agreement and personal grievance).

Employment institutions and the industrial torts

[117] The law of tort has an important place in the history of employment law development. It is therefore useful to start there.

[118] As mentioned above at [59], the Employment Court has exclusive first instance jurisdiction over tort proceedings relating to strikes and lockouts. These were known as industrial torts, now more commonly referred to as economic torts. They included

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[181] See above at [64].

torts such as conspiracy, intimidation, inducement of breach of contract and interference by unlawful means with trade, business or employment.[182] Jurisdiction over strike and lockout proceedings founded on these torts initially lay with the High Court until it was transferred to the Labour Court by the Labour Relations Act 1987.[183] There it stayed, first under s 73 of the ECA, and now under s 99 of the Employment Relations Act. Section 99(1) provides that the Employment Court has "full and exclusive jurisdiction" over tort proceedings against parties to actual or threatened strikes, lockouts, and picketing. In case there were any doubt about that exclusivity, s 99(2) provides that "[n]o other court has jurisdiction to hear and determine" such proceedings.

[119] It is therefore possible that the tort exclusion in s 161(1)(r) simply refers to industrial torts to reinforce the Employment Court's exclusive jurisdiction, but that is unlikely. If that were the intention, it would also have excluded that Court's exclusive injunctive jurisdiction.[184] In any case, s 161(1)(l) already excludes from the Authority's jurisdiction "any proceedings related to a strike or lockout [that are] founded on tort".

[120] We therefore set that possible construction to one side. Beyond that, there is nothing in the text of paragraph (r) to suggest that one or other of the two available interpretations mentioned above at [114] is plainly to be preferred.

Legislative history

[121] The specific legislative history of s 161(1)(r) is likewise unrevealing. As discussed above, s 161 was originally cl 172 of the Employment Relations Bill. When cl 172 was reported back by the Select Committee along with the reference to the Authority's exclusive jurisdiction,[185] the words "other than an action founded on tort" had been added in parentheses to cl 172(1)(q). This became s 161(1)(r). No explanation was given for that addition to the clause. Indeed, the report did not comment on it at all.

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182 See Labour Relations Act 1987, s 242(1).
183 Sections 242–243.
184 As in s 161(1)(l).
185 See above at [68]–[71].

[122] The purpose of the change is not obvious, located as it is within amendments expressly designed to clarify the broad nature of the Authority's jurisdiction, and in a Bill whose purpose was (among other things) to provide greater access to justice in employment matters by avoiding the more legalistic approach of the mainstream courts.[186] Given the wide scope of "employment relationship problem", excluding from it all actions in tort is too important a step to simply be mentioned in passing in the draft as if for the avoidance of doubt, and without further discussion of the reasons for doing so. We conclude that the legislative history does not suggest that the addition was intended to effect a significant carve-out from the Authority's problem-solving jurisdiction.

Overall purpose

[123] The meaning of the exclusion must therefore be drawn from the object of Part 10 and the Act generally, and from the intention expressed by the Select Committee when redrafting the wider provisions of s 161.

[124] To recap, one of the objects of the Act is to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship".[187] The intention is to cover *all* aspects, not just of the relationship, but of the "environment" within which the relationship subsists. Scope could hardly be expressed more widely.

[125] The employment institutions are then created under Part 10 to support that outcome by actively assisting parties to resolve their own employment relationship problems, and, if they cannot, by providing access to prompt and effective justice with a minimum of formality and cost.[188] The Select Committee therefore struck out cl 7 and amended cl 172 to clarify the exclusivity of the Authority's jurisdiction so as to keep litigation and costs at a minimum.[189]

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186 See Employment Relations Bill 2000 (8-1) (explanatory note) at 2.
187 ERA, s 3(a).
188 Section 143(a), (b) and (f).
189 Employment Relations Bill 2000 (8-2) (select committee report) at 6.

[126] A general tort carve-out would negate that intention. In practical terms, many employment relationship problems will potentially give rise to tort-based claims, including, as in this case, claims in negligence. As Mr Harrison rightly submits, the common law is not necessarily averse to concurrent liability or concurrent remedies as a matter of general principle. But a foundational objective of this Act is to channel employment problems into the employment institutions because of their intended levelling effect. To interpret paragraph (r) as if its effect is to allow any employment-related tort claim to be brought elsewhere would be to undermine both the expressed intention of Parliament in relation to s 161 specifically, and the intent of Part 10 more generally.

[127] The meaning consistent with the legislative intent, therefore, is that, as a starting point,[190] employment relationship problems that can be framed as any of the examples in s 161(1)(a)–(qd) *must* be framed that way and cannot be brought in any other jurisdiction. Only where an employment relationship problem cannot be framed in any way except as a tort claim does the exception in s 161(1)(r) apply. This is, in any event, the most sensible construction of the text of the provision. It recognises that the tort exception sits inside s 161(1)(r) and so should only affect the subclass ("any other action") in that clause. There is no good textual or purposive reason to treat it as if it modifies the other 28 examples in s 161(1).

[128] We therefore accept Mr Clarke's submission on the interpretation of the tort exclusion. We also agree with Associate Judge Bell's assessment of the effect of s 161(1)(r) in *Global Kiwi*.[191] In that case, it was argued that the claims against the third defendant (who was an employee) were pleaded in tort, and therefore were excluded from the Authority's jurisdiction by s 161(1)(r). The Judge held that the tort exclusion in s 161(1)(r) did not apply because the claims could also be brought under s 161(1)(b) (breach of the employment agreement) and s 161(1)(f) (breach of the obligation of good faith).[192]

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190 See our discussion of overlapping statutes above at [105]–[107].
191 *Global Kiwi*, above n 167, at [19].
192 At [17]–[19].

[129] It is true, as Mr Harrison submits, that this interpretation effectively abolishes most employment-related tort actions, other than the industrial torts. We also agree with Mr Harrison that, as a matter of constitutional principle, the courts will strive to construe legislation so as not to deprive citizens of access to justice or of their long-held common law rights.[193] But access to justice in that sense is not at issue in this case because s 161(1) is not a true ouster clause.[194] The right to a remedy that resolves the underlying problem is not removed. Instead, the common law right to sue in tort is replaced by a more accessible regime with relational obligations of active good faith behaviour, objectively reasonable conduct, non-discrimination and procedural fairness. These provide a more than adequate substitute in terms of access to justice. And if there is no applicable substitute category under s 161(1)—that is, where the problem, though work-related, cannot be addressed within another of the examples in the subsection—the tort exception in s 161(1)(r) should be read as preserving the right to bring those tort actions in the ordinary courts. To that extent, Mr Harrison's submissions based on constitutional principle ought to be upheld.

[130] Mr Harrison suggests FMV may be prejudiced by the different limitation rules for personal grievances under the Act compared with those under the applicable general limitation regime. We do not consider this significant in this case.

[131] FMV's claim in the High Court would be out of time under s 4(1) of the Limitation Act 1950.[195] However, FMV intends to argue that she was under a disability when her causes of action accrued, so time must be extended.[196]

[132] FMV's claims may also be out of time in the Authority. In its statement of reply, TZB argued that FMV raised her personal grievance with TZB outside the required 90-day period under s 114(1) of the Act. Section 114(3) and (4) provides that

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193 See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 38.

194 This case does not raise the ouster issues traversed by this Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 and subsequently addressed in *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 and *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433. As noted above at [59], the judicial review function in respect of decisions under relevant employment legislation is expressly retained in the Act but vested in the Employment Court: ERA, s 194.

195 The Limitation Act 1950 applies as a result of s 59 of the Limitation Act 2010.

196 Limitation Act 1950, s 24.

where a personal grievance has not been raised with the employer in time and the employer does not consent to it being raised out of time, the Authority may grant the employee leave to do so out of time provided there are "exceptional circumstances" and it is "just to do so". If the parties do not resolve the grievance, any subsequent application to bring an employment relationship problem to the Authority must be made within three years of the personal grievance having been first raised.[197] There appears to be no discretion to extend that deadline. Whether that requirement was complied with in this case, however, depends on the date FMV first raised her personal grievance with TZB.

[133] It is therefore not at all clear which regime is the more permissive in FMV's particular case. We do not consider this factor to be significant in terms of FMV's access to justice arguments.

Application to the facts

[134] It follows that we consider FMV may not bring tort proceedings in the High Court in relation to what is, in light of our conclusion on issue one, an employment relationship problem. They can be framed as personal grievances, so do not fall within the tort exception in s 161(1)(r). Rather, she must pursue her claims in the Authority.

[135] That brings to the fore the fact that FMV's personal grievance has been stayed, due, it is said, to the fact that FMV's mental health prevents her from participating in the proceeding. This appeal is of course about whether FMV is entitled to pursue her claims in the High Court. We heard no argument about the merits of the Authority's stay of her personal grievance proceeding. It would therefore be inappropriate to express a view on that decision without the benefit of argument from the parties. But, in light of the conclusions above, FMV is left in a highly unsatisfactory position. There appears to be no forum able or willing to address her claim.

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197 ERA, s 114(6).

[136] Given our conclusions about the jurisdiction of the High Court in this matter, FMV may wish to ask the Authority to revisit the question of whether a stay of her proceedings should continue given the changed circumstances.

Abuse of process

[137] In light of our findings in respect of the High Court's jurisdiction, it is not possible to bring duplicate proceedings in that Court. It is therefore unnecessary to address further the question of whether doing so would be an abuse of process.

Name suppression

[138] FMV largely predicated her argument for lifting suppression on succeeding with her argument that the High Court has jurisdiction to deal with her claims. We have found it does not. However, neither party argued that permanent suppression should be maintained in the High Court on grounds separate from maintaining the integrity of existing name suppression in the Authority. We therefore amend the High Court's permanent suppression order so it is maintained only while names are suppressed in the Authority.

[139] We note that the original interim suppression order made by Davison J and made permanent by Brewer J covers not just the parties' identities, but also evidence filed by TZB in this proceeding. As the Authority has suppressed only the parties' identities and both Courts below have proceeded on the same basis in respect of suppression in this proceeding, it is appropriate to amend the scope of the High Court's suppression order so that it suppresses only the names and identifying particulars of the parties.

Result

[140] The High Court's suppression order is amended to suppress only the identities of the parties and to remain in force only so long as the suppression order made by the Employment Relations Authority remains in force.

[141] The appeal is otherwise dismissed.

[142] We reserve costs. If the parties cannot agree on costs in this Court, they should file submissions, not longer than five pages each, according to the following timetable:

(a) Appellant: 17 September 2021

(b) Respondent: 1 October 2021

WILLIAM YOUNG J

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Background

[143] The appellant FMV (the employee) started work for TZB (the employer) in February 2009. She gave one month's notice of resignation in January 2010.

[144] She has subsequently commenced two separate proceedings:

(a) A personal grievance in the Employment Relations Authority (the Authority) under s 102 of the Employment Relations Act 2000 (the Act) alleging unjustifiable dismissal and disadvantage by unjustifiable action on the part of the employer. She later proposed to amend this claim to also allege unjustifiable discrimination based on psychiatric disability.

(b) A tort action in negligence in the High Court. She alleged that TZB had breached what she says are duties to implement a safe system of work, to communicate accurately and candidly with her on risks relevant to her health and safety, to provide her with information in its possession regarding her state of health and not to cause her psychiatric damage. This claim was filed on 22 December 2016 but not served until 20 December 2017 (two days before the anniversary of its filing, which is when the time for service would otherwise have expired under rr 1.17(2) and 5.72(2) of the High Court Rules 2016). She has, since then, signalled the possibility of adding an overlapping claim for breach of statutory duty under the Health and Safety in Employment Act 1992.[198]

[145] As noted, the employee did not initially prosecute (or even serve) the High Court claim. Instead, she pursued her personal grievance. This proceeding was stayed by the Authority on 12 April 2017 because of concerns as to her capacity.[199] According to the employer, the employee attempted to have the stay lifted but was unsuccessful as she would not comply with directions to provide up-to-date medical information. So, in December 2017, with her personal grievance stayed, she then turned to the High Court claim. It was in this context that the proceeding was served.

[146] In the High Court, Brewer J struck the claim out as lying within the exclusive jurisdiction of the Authority and, in any event, as an abuse of process given the overlap

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198 *FMV v TZB* [2018] NZHC 1131 (Brewer J) [HC judgment] at [20].
199 *FMV v TZB* [2017] NZERA Auckland 112 at [33].

in subject matter with the personal grievance before the Authority which she had chosen to bring ahead of the High Court proceedings.[200] The Court of Appeal dismissed a subsequent appeal and, in doing so, agreed with the approach taken by the High Court.[201]

[147] In subsequent parts of these reasons, I will discuss:

(a) the statutory framework;

(b) whether the employee's claim in the High Court proceeding was within the exclusive jurisdiction of the Authority; and

(c) broader questions as to the exclusive jurisdiction of the Authority and Employment Court.

The statutory framework

Jurisdiction of the Authority

[148] Section 161 of the Act (as it was when these proceedings were commenced) relevantly provided:

> **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:
>
> …
>
> (e) personal grievances:
>
> (f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:

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200 HC judgment, above n 198, at [35] and [54].

201 *FMV v TZB* [2019] NZCA 282, [2019] NZAR 1385 (Miller, Simon France and Peters JJ) [CA judgment] at [20]–[23].

…

(l) any proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction):

…

(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.

[149] The expression "employment relationship problem" which appears in the chapeau of s 161(1) is defined in s 5 in this way:

> **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

[150] Various provisions of the Employment Relations Act confer power on the Authority to grant relief in respect of particular forms of proceedings provided for under that Act, such as s 123, which provides for remedies in respect of personal grievances. There is, however, little by way of express provision as to the remedies available to the Authority in respect of disputes which, but for the exclusive jurisdiction of the Authority, would be dealt with in the ordinary courts. This is addressed explicitly only by s 162, which, in its current form,[202] provides:

162 Application of law relating to contracts

Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts, including—

(a) Part 2 of the Contract and Commercial Law Act 2017:

(b) the Fair Trading Act 1986.

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[202] The Contract and Commercial Law Act 2017 was not in force when the proceedings were commenced. It is, however, a revision Act for the purposes of s 35 of the Legislation Act 2012 and it makes for easier comprehension to refer to it rather than the statutes which it in effect replaced.

[151] Section 160 is relevantly in these terms:

> **160 Powers of Authority**
>
> …
>
> (3) The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.
>
> (4) The Authority may not make a freezing order or search order as provided for in the High Court Rules 2016.

[152] Also material is s 157 which provides:

> **157 Role of Authority**
>
> (1) The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.
>
> (2) The Authority must, in carrying out its role,—
>
> (a) comply with the principles of natural justice; and
>
> (b) aim to promote good faith behaviour; and
>
> (c) support successful employment relationships; and
>
> (d) generally further the object of this Act.
>
> (3) The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with—
>
> (a) this Act; or
>
> (b) any regulations made under this Act; or
>
> (c) the relevant employment agreement.

Jurisdiction of the Employment Court

[153] Under s 178, the Employment Court has jurisdiction to hear matters removed to it by the Authority and, under s 179, to deal with challenges to determinations of

the Authority – challenges which can be heard de novo. In these respects, its jurisdiction overlaps that of the Authority. As well, s 187 provides:

> **187 Jurisdiction of court**
>
> (1) The court has exclusive jurisdiction—
>
> …
>
> (h) to hear and determine proceedings founded on tort and resulting from or related to a strike or lockout:
>
> (i) to hear and determine any application for an injunction of a type specified in section 100:
>
> …
>
> (3) Except as provided in this Act, no other court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the court.

[154] Section 100 (as it was when these proceedings were commenced) provided:

> **100 Jurisdiction of court in relation to injunctions**
>
> (1) The court has full and exclusive jurisdiction to hear and determine any proceedings issued for the grant of an injunction—
>
> (a) to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout; or
>
> (b) to stop any picketing related to a strike or lockout or to prevent any threatened picketing related to a strike or lockout; …
>
> ….
>
> (2) No other court has jurisdiction to hear and determine any action or proceedings seeking the grant of an injunction—
>
> (a) to stop a strike or lockout that is occurring or to prevent a threatened strike or lockout; or
>
> (b) to stop any picketing related to a strike or lockout or to prevent any threatened picketing related to a strike or lockout; …
>
> …

[155] Under s 190(1), the Employment Court has all the powers conferred on the Authority under ss 162 and 164. As well, there is s 189(1):

> **189 Equity and good conscience**
>
> (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

Power to add parties

[156] Section 221 provides:

> **221 Joinder, waiver, and extension of time**
>
> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
>
> (a) direct parties to be joined or struck out; and
>
> (b) amend or waive any error or defect in the proceedings; and
>
> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
>
> (d) generally give such directions as are necessary or expedient in the circumstances.

Whether the employee's claim in the High Court proceeding was within the exclusive jurisdiction of the Authority

The issue

[157] The High Court proceeding involves a dispute as to whether the employer breached the appellant's rights as an employee (essentially to a safe system of work). This relates to, and arises out of, an employment relationship and is thus an "employment relationship problem" as defined in s 5. The claim is within the language of the chapeau to s 161(1) and, as well, s 161(1)(a) as a dispute "about the … operation of an employment agreement". This is because the substance of the employee's claim is that the way the employment agreement operated involved

breaches of the employer's duties to provide a safe system of work. It may also be within both s 161(1)(b), as conduct alleged to be in breach of a tortious duty of care (as to a safe system of work) is also likely to be "a breach of an employment agreement", and s 161(1)(e), as involving subject matter which could be dealt with as a personal grievance.

[158] The argument advanced on behalf of the employee rests primarily on s 161(1)(r). The contention is that the exclusion in that subparagraph in relation to "an action founded on tort" confirms (or perhaps exemplifies) that the Authority's lack of a tort jurisdiction applies not just to claims within s 161(1)(r) but to the general jurisdiction of the Authority "to make determinations about employment relationship problems" and, as well, to the specific heads of jurisdiction listed in s 161(1).

Relevance of the remedies provisions of the Act

[159] I have already set out some of the provisions of the Act which confer powers on the Authority and Employment Court to grant remedies. Section 162, applicable to the Authority (and, by reason of s 190, the Employment Court), confers the powers of the District Court and High Court under "any enactment or rule of law relating to contracts". To be noted is the absence of an express power to award damages for tort.

[160] The absence of an express power to resort to the principles and rules of the law of torts provides support for the appellant's argument. If the purpose of the legislation was that the Authority and, via the mechanisms of removal or challenge, the Employment Court, were to have jurisdiction in tort, it might be expected that this would be dealt with explicitly. This view was seen as persuasive in *BDM Grange Ltd v Parker*:[203]

> [60] The fact that Parliament has gone to the trouble of extending the [A]uthority's powers in relation to contractual claims suggests that, had it intended to extend the [A]uthority's jurisdiction to claims in tort, it would have made similar provision for such claims (for example, conferring the powers available under the Contributory Negligence Act [1947], the Law Reform Act [1936] and the Defamation Act [1992]). On its plain wording, s 162 marks the contrast between the [Employment Relations Act]'s extensive contract jurisdiction and the very narrow jurisdiction in tort.

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[203] *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC).

[161] As I will explain later, I see the extent of the remedies available to the Authority as material to the extent of its jurisdiction. But, for reasons I will come to shortly, I do not see this as being of controlling significance in relation to whether the Authority's exclusive jurisdiction extends to the claim which the employee wishes to advance against the employer in this case.

[162] Section 189(1), set out above, can be read – and I am inclined to so read it – as conferring a general power on the Employment Court to grant such remedies as may be necessary to determine "any matter" before it. In this respect, I see the heading "Equity and good conscience" as slightly misleading. In contradistinction, it is not so easy to read s 157(3) as having the same effect in respect of the Authority.

[163] Section 190(3) provides:

> … the [Employment Court] has the same powers of the High Court to make a freezing order and a search order as provided for in the High Court Rules 2016.

This, on the other hand, suggests an assumption that s 189 may be insufficient to confer such powers on the Employment Court. Additionally, the effect of s 160(4) is that the Authority does not have those remedial powers. For these reasons, it does not necessarily follow that conferral on the Authority and Employment Court of jurisdiction to deal with certain types of dispute and, in the case of the Employment Court, s 189, carries all the remedial (including those that are procedural) powers which the ordinary courts can exercise in like cases. Assume, for instance, a claim against an employee alleging misappropriation of tangible or intellectual property of the employer. In respect of such a claim, the ordinary courts might well make freezing or search orders. But if such a claim is before the Authority, there is no corresponding remedial power.

[164] There are a number of decisions addressing the remedies that the Authority and Court can grant.[204] The picture that emerges is not entirely coherent. What is

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[204] See, for example, *Greenlea Premier Meats Ltd v New Zealand Meat & Related Trades Union Inc (No 1)* [2006] ERNZ 312 (EmpC); *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 (EmpC); *Credit Consultants Debt NZ Services Ltd v Wilson (No 4)* [2007] ERNZ 446 (EmpC); and *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2008] ERNZ 196 (EmpC).

important for present purposes is that they show that there is scope for debate as to the extent of remedial powers, particularly of the Authority. The associated uncertainty is relevant to the nature of the exclusive jurisdictions of the Authority and the Employment Court. An absence of power to grant remedies appropriate to a dispute may suggest that the dispute is not within those exclusive jurisdictions. There might also be scope for argument as to whether an absence of power in the Authority is rendered irrelevant by the more extensive powers of the Employment Court, to which the hearing of that dispute may be removed.

[165] As I have said, I regard the remedial powers of the Authority and Employment Court as material to their jurisdiction. But, that said, for the purposes of determining whether the employee in this case may continue with her High Court proceedings, I do not see indeterminacy as to the remedies available to the Authority and the absence of statutory references to remedies relevant to the law of torts as controlling. This is for three reasons:

(a) Under the Employment Contracts Act 1991, there was explicit tying of the jurisdiction of the Employment Tribunal and Employment Court to the law of contracts.[205] With the possible exception of s 162, which I address separately, there is nothing equivalent in the Employment Relations Act. This is because the purpose was, as the majority has outlined, to move away from a disputes resolution system based around common law classification of causes of action.

(b) Turning to s 162, its legislative history suggests that its purpose was not one of confining the jurisdiction of the Authority to matters of contract; rather it was to confirm that the Authority had powers that the ordinary courts can exercise in relation to contracts.[206] So I do not read s 162 as,

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[205] By way of example only, see s 104(g) of the Employment Contracts Act 1991 conferring on the Employment Court jurisdiction to "hear and determine any action founded on an employment contract".

[206] As the Employment Court explained in *Wilson (No 2)*, above n 204, at [41]–[42], the inclusion of this list of statutes appears to have been Parliament's response to a number of cases where the Employment Court had held that the former Employment Tribunal did not have the power to make orders under these enactments.

by implication, excluding a power to give relief by reference to common law principles which are not contractually based.

(c) A conclusion that the jurisdiction of the Authority does not extend to all the components of disputes relating directly to the ordinary incidents of an employment agreement and able to be brought as personal grievances or under other specific provisions of s 161(1) would subvert the operation of the Act. At least where the remedies sought are conceptually similar to those available in contract or in respect of personal grievances, I see the conferral of jurisdiction under s 161 in respect of a particular dispute as carrying with it the powers to grant such remedies as are necessary to determine that dispute.

The place of s 161(1)(r) in the structure of s 161(1)

[166] I agree with the majority that the purpose of s 161(1) was to confer on the Authority jurisdiction much wider than that of the Employment Tribunal. It is, however, awkwardly expressed. On its structure, the chapeau appears to be of paramount significance, creating a jurisdiction to make determinations about employment relationship problems "generally", with the list that follows merely exemplifying the breadth of that jurisdiction rather than defining it. Section 161(1)(r), however, is not congruent with that view of the subsection.

[167] Read with the chapeau, s 161(1)(r) provides:

> (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):

[168] There are four parts to s 161(1)(r):

(a) an extension of jurisdiction in respect of "any other action … arising from or related to the employment relationship" (the first extension);

(b) an extension of jurisdiction in relation to "any other action … related to the interpretation of this Act" (the second extension);

(c) a carve-out from either the first or both extensions, possibly the chapeau and conceivably all other heads of jurisdiction listed in s 161(1) in respect of any action "directly within the jurisdiction of the court" (the Employment Court carve-out); and

(d) a second carve-out from either the second or both extensions, possibly the chapeau and conceivably all other heads of jurisdiction listed in s 161(1) in respect of "an action founded on tort" (the tort carve-out).

For present purposes, it is the first extension and the tort carve-out that are primarily important.

[169] The relationship between the chapeau and s 161(1)(r) is awkward.

(a) The words used in s 161(1)(r) ("arising from or related to the employment relationship") are substantially the same, although in a different order, to the corresponding language in the s 5 definition of "employment relationship problem" ("relating to or arising out of an employment relationship"). So, if the subsection is construed literally, there is a complete overlap between the chapeau of s 161(1) – "jurisdiction to make determinations about employment relationship problems generally" – and the first extension. If this is so, the first extension does not make sense.

(b) If the chapeau is read literally, the second extension is confined to interpretation issues that constitute an employment relationship problem. But if this is so, the second extension also adds nothing to the chapeau.

[170] Against that background, I think it is sensible to construe s 161(1) on the basis that:

(a) the chapeau is an introduction to, and summary of, what follows, rather than an independent and all-encompassing source of jurisdiction;

(b) the heads of jurisdiction listed in s 161(1) comprise the entire jurisdiction of the Authority; and

(c) s 161(1)(r) operates as a catch-all, which means that, with the exception of the carve-outs, the jurisdiction of the Authority is as wide as it would be if the chapeau is construed as a stand-alone and general grant of jurisdiction.

[171] I accept that this is, at best, an awkward fit for the language of the chapeau and the structure of the section but, as explained, construing the chapeau as an overriding conferral of jurisdiction is not consistent with a literal application of the text of s 161(1)(r). The reality is that the drafting of s 161 is so mangled that something has to give: for me, this is the generality of the chapeau and, for the majority, the advantage of a simple and literal application of s 161(1)(r). In the end, it probably does not make much difference which interpretation is applied, as the jurisdiction of the Authority is as ample on mine (under which s 161(1)(r) is a catch-all) as it is on that of the majority. Indeed, given what the majority says at [127] – effectively that the first extension applies to supplement the particular heads of jurisdiction referred to in s 161(1)(a)–(qd) and that the tort carve-out is from the s 161(1)(r) extension(s) only – I do not see any difference in outcome between my interpretation and that of the majority on this point.

[172] On this approach, the present appeal can be determined very simply. The current claim in the High Court involves a dispute about the operation of the employment agreement as between the employer and employee and is thus within s 161(1)(a). It is probably also within s 161(1)(b) and (e). The tort carve-out applies only to s 161(1)(r). It therefore does not affect the width of s 161(1)(a) (or (b) and (e)). The case is thus within the exclusive jurisdiction of the Authority.

[173] I regard s 160(3) as supporting this conclusion. By reason of this subsection, the Authority is not constrained by the description which the parties ascribe to a dispute. It follows that it need not be deterred from resolving a dispute if one of the parties describes a claim as based on the law of torts. Applying this to the present case, a description by the employee of her claim as based on tort does not prevent the Authority treating it as a dispute "about the … operation of an employment agreement" for the purposes of s 161(1)(a).

Broader questions as to the exclusive jurisdiction of the Authority and Employment Court

What are the issues?

[174] Most disputes associated with employment relationships are within the exclusive jurisdiction of the Authority and the Employment Court. For reasons I have explained, these include employees' claims against employers in tort based on duties which substantially overlap with obligations under the employment relationship. There are, however, some types of dispute which give rise to more profound difficulties. To date, they have involved:

(a) Claims between employer and employee to enforce legal obligations or rights which are not particular to employment, for instance, rights under other statutes,[207] the obligation not to steal money,[208] directors' duties[209] and confidentiality.[210] Such claims may relate to conduct which occurs either during the employment relationship, after it comes to an end or both.

(b) Disputes in which an employment relationship provides only the context in which the dispute arises, for instance, a claim for breach of an agreement compromising a personal grievance.[211]

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207 See, for example, *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001. In this case, there was one claim (amongst other claims) brought pursuant to the Fair Trading Act 1986.

208 See, for example, *Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24, (2014) 11 NZELR 534.

209 See, for example, *BDM Grange*, above n 203.

210 See, for example, *Ecostore Co Ltd v Worth* [2017] NZHC 1480, (2017) 15 NZELR 93.

211 See, for example, *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.

(c) Situations where relief is sought by or against parties who are not directly involved in the employment relationship.[212]

Different approaches which have been proposed

[175] Two broad approaches to jurisdiction have been postulated.

[176] The first is a universalist approach as proposed by the majority and suggested in some High Court and Employment Court judgments.[213] Under this approach, the jurisdiction of the Authority extends to making determinations in respect of any employment relationship problem (being any dispute "relating to or arising out of an employment relationship"), irrespective of the legal subject matter. This statutory language is to be applied without gloss. On this approach, it does not matter that the dispute concerns a contract settling an employment dispute or claims based on legal rights or obligations that are not particular to employment relationships. The test is said to be factual. It rests primarily on whether the controversy arose during the course of the employment relationship and in the work context.[214]

[177] The second is the essential character approach as adopted by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*,[215] the High Court and Court of Appeal in this case[216] and in other judgments.[217] This confines the jurisdiction of the Authority to claims where the essential character of the dispute is employment-related.

[178] The tendency of the universalist approach is to increase the jurisdiction of the Authority whereas the essential character approach pulls in the other direction.

[179] I favour an approach which focuses on parliamentary contemplation – that is, determining whether a particular dispute is within the exclusive jurisdiction of the Authority by asking whether it is within parliamentary contemplation as to what that

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212 See, for example, *Wilson (No 2)*, above n 204.
213 See, for example, *Hagai*, above n 208; *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 (EmpC); and *Rolling Thunder Motor Co Ltd v Kennedy* [2010] NZEmpC 109.
214 See the reasons given by Williams J above at [92]–[95].
215 *Pain Management*, above n 207, at [22].
216 HC judgment, above n 198, at [24]; and CA judgment, above n 201, at [19].
217 See, for example, *BDM Grange*, above n 203, at [66]; and *JP Morgan*, above n 211, at [95].

jurisdiction would encompass. This means that the determination of jurisdiction is based on a legal rather than a factual assessment, and in this sense differs from the approach of the majority. To be more explicit, I consider that there may be instances (some of which I am about to discuss) where a dispute is within the language of the definition of employment relationship problem but, nonetheless, lies outside the jurisdiction of the Authority. This will primarily be where the dispute has characteristics which mean that, prima facie, it falls within a particular jurisdiction of an ordinary court or other tribunal. On my preferred approach, the exclusive jurisdiction of the Authority will apply to a range of cases which is not much more limited (and in some respects possibly wider) than on the reasons of the majority.

[180] I take the parliamentary contemplation test primarily from the case law in relation to two broadly similar issues:

(a) in administrative law, the operation of what are often called privative clauses – that is, statutory provisions which appear to preclude judicial review of administrative decisions; and

(b) in tax avoidance cases, how to reconcile the operation of specific tax provisions relied on by taxpayers as conferring tax advantages with general anti-avoidance provisions which the Commissioner of Inland Revenue may rely on to negate such advantages.

[181] In determining whether privative provisions are effective to preclude judicial review claims, the courts have often applied a parliamentary contemplation test – that is, whether the decision is within the parliamentary contemplation of the kind of decisions to which that clause would apply. As this Court explained in *McGuire v Secretary for Justice*:[218]

> [46] A restrictive reading of a privative clause so as to permit judicial review will usually (and perhaps always) represent a conclusion by the court that the decision in question is not a decision of the kind preserved, on the proper interpretation of the statute, from review or perhaps that the particular challenge in issue is not of the kind precluded.

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[218] *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

[182] The now current approach to the reconciliation of specific tax provisions relied on by taxpayers with the general anti-avoidance rule was explained in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* by Tipping, McGrath and Gault JJ in this way:[219]

> [106] Put at the highest level of generality, a specific provision is designed to give the taxpayer a tax advantage if its use falls within its ordinary meaning. That will be a permissible tax advantage. The general provision is designed to avoid the fiscal effect of tax avoidance arrangements having a more than merely incidental purpose or effect of tax avoidance. Its function is to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the Act. Such uses give rise to an impermissible tax advantage which the Commissioner may counteract. The general anti-avoidance provision and its associated reconstruction power provide explicit authority for the Commissioner and New Zealand courts to avoid what has been done and to reconstruct tax avoidance arrangements.
>
> [107] When, as here, a case involves reliance by the taxpayer on specific provisions, the first inquiry concerns the application of those provisions. The taxpayer must satisfy the court that the use made of the specific provision is within its intended scope. If that is shown, a further question arises based on the taxpayer's use of the specific provision viewed in the light of the arrangement as a whole. If, when viewed in that light, it is apparent that the taxpayer has used the specific provision, and thereby altered the incidence of income tax, in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision, the arrangement will be a tax avoidance arrangement.

[183] A broadly similar approach provides an appropriate mechanism to determining jurisdiction as between the Authority on the one hand and the courts (and other tribunals and agencies) on the other. In most cases that fall within the language of the definition of "employment relationship problem", the jurisdiction of the Authority will be plain. But as I will demonstrate, there are some cases where the Authority's jurisdiction is not so clear, for instance where there is another statute which provides a particular statutory process and decision maker, or where the dispute involves a party who is neither employer nor employee. In cases on the margin, a principled outcome can be achieved with an approach which focuses on the text and purpose of the Employment Relations Act (including the institutional, procedural and remedial capability of the Authority to deal with all facets of the dispute), and the text and purpose of any other statute which appears to provide for jurisdiction.

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[219] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

[184] In succeeding sections of this part of my reasons, I will look at particular situations where jurisdiction issues may arise, being:

(a) overlapping jurisdictions specifically addressed by statute;

(b) disputes involving employees of intelligence and security agencies;

(c) claims under the Privacy Act 2020;

(d) disputes involving company law issues;

(e) other examples of jurisdictional conflict; and

(f) disputes to which one of the parties is not the employer or employee.

I will then draw together the threads of that discussion and offer a suggestion for the future.

Overlapping jurisdictions specifically addressed by statute

[185] The Human Rights Act 1993 provides for remedies for discrimination on prohibited grounds (s 22), sexual harassment (s 62), adverse treatment of those affected by family violence (s 62A) and racial harassment (s 63).[220] Where the circumstances are such that an employee could raise a complaint under the Human Rights Act or a personal grievance under the Employment Relations Act, the employee is entitled to choose between the two, but cannot pursue both.[221]

[186] Both the Patents Act 2013 and the Employment Relations Act provide for resolution of disputes between employers and employees as to their rights in respect of inventions made by an employee.[222] In the first instance, these disputes may be determined either by the Commissioner of Patents or the Authority. To this end, s 28(5) of the Patents Act provides for a specific derogation from s 161 to permit

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220 See Part 3 of the Human Rights Act 1993.
221 See s 79A of the Human Rights Act and s 112 of the Employment Relations Act 2000.
222 Patents Act 2013, ss 28–30; and Employment Relations Act, s 161(1)(qa) and (qb).

determination by the Commissioner. Under s 30, a determination by the Commissioner can be reviewed by the Authority.

[187] In these instances, the jurisdiction which overlaps with that of the Authority is vested in adjudicators other than a court. It is at least implicit in the legislative schemes that the Authority may exercise the powers of those adjudicators where appropriate.

[188] In these instances, the overlap of jurisdiction is dealt with explicitly in the other statute. Of more interest, in the context of these reasons, are instances where the overlap is addressed only implicitly or must be addressed by reference to the more general concept of parliamentary contemplation.

Disputes involving employees of intelligence and security agencies

[189] A relatively straightforward illustration of how the parliamentary contemplation test outlined above might apply is provided by the Intelligence and Security Act 2017. Under s 171(3), an employee or former employee of an intelligence and security agency may complain to the Inspector-General of Intelligence and Security that:

> … he or she has, or may have, been adversely affected by any act, omission, practice, policy, or procedure of an intelligence and security agency if—
>
> (a) all established internal remedies have been exhausted; or
>
> (b) the Director-General of the relevant intelligence and security agency agrees in writing.

What happens when such a complaint is made is addressed by ss 173–184. Following the inquiry (where one is held), the Inspector-General must prepare a report with conclusions and recommendations which may extend to appropriate redress.[223] Such complaints involve employment relations problems. A statutory complaint about such a problem would appear to be within the scope of s 161(1)(a) and possibly (b) and, as well, "any other action … arising from or related to" that employment relationship for

[223] Intelligence and Security Act 2017, ss 185–188.

the purposes of s 161(1)(r). Reaching a conclusion as to such a complaint looks rather like a "determination" for the purposes of the chapeau to s 161(1).

[190] Despite the absence of a priority clause in favour of the Inspector-General's role,[224] it is too plain for argument that it is not displaced by the Employment Relations Act. In part, this is because the Intelligence and Security Act is the later statute. But irrespective of the order in which the two statutes were enacted, it would be unrealistic to attribute to Parliament the purpose of vesting the power to investigate s 171(3) complaints in the Authority. As the power can only be exercised following a complaint by a present or former employee, displacement in favour of the Authority would disapply the statutory scheme.

Claims under the Privacy Act 2020

[191] The Privacy Act provides for claims to be made for interference with privacy, investigation of such claims by the Privacy Commissioner (who is invested with appropriate statutory powers) and, if necessary, determination by the Human Rights Review Tribunal.[225] On the universalist approach, disputes between an employee and employer about alleged interference with privacy would be within the exclusive jurisdiction of the Authority, this displacing the role of the Human Rights Review Tribunal. If so, the investigative role of the Privacy Commissioner would presumably also be displaced.

[192] If required to determine whether s 161(1) excludes exercise by the Human Rights Review Tribunal and the Privacy Commissioner of their powers in cases arising in the context of employment, I would look at the text and purposes of both statutes. Relevant to this would be whether it would be consistent with the text and purpose of the Privacy Act for the roles of the Privacy Commissioner and Human Rights Review Tribunal as prescribed in the Privacy Act to be displaced by that of the Authority. This might involve considering whether the Employment Relations Act vests the Authority with the procedural and remedial powers that can be exercised by the Human Rights

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224 The Employment Relations Act contains cross-references to the Intelligence and Security Act in relation to clearances (see s 172A), but there are no cross-references with respect to s 171 complaints.

225 See Part 5 of the Privacy Act 2020.

Review Tribunal and the Privacy Commissioner. I would not see the absence of an express provision in the Privacy Act giving it priority over the Employment Relations Act as controlling. The issue not being before us, it would be inappropriate for me to express a firm conclusion on this point. That said, it seems to me that it is strongly arguable that the roles of the Privacy Commissioner and Human Rights Review Tribunal in respect of such disputes are not displaced by the Employment Relations Act.

Disputes involving company law issues

[193] The Companies Act 1993 confers various powers and heads of jurisdiction on the High Court, a number of which might be invoked in a dispute between an employer company and an employee who is also a shareholder or director. These include the powers or jurisdictions:

(a) to entertain claims against directors for breaches of the duties stipulated in ss 131–137 of the Companies Act;

(b) to grant injunctions restraining a company or director from contravening the constitution of the company (s 164);

(c) to approve, on the application of a shareholder or director, a derivative action (s 165);

(d) to grant relief to a prejudiced shareholder, which can extend to altering the constitution of a company (s 174);

(e) to require a company to provide a shareholder with information it holds (s 178); and

(f) to approve compromises with creditors (ss 235–239) which, subject to the extent of the Authority's exclusive jurisdiction, might encompass claims under employment agreements.

[194] Where the status of the employee as a director or shareholder is a direct consequence of the employment relationship, disputes as to associated rights and obligations are within the ordinary meaning of the definition of employment relationship problem.

[195] At [102] of the majority reasons, it is suggested that claims against a person who is or was both an employee and director may have to be split; this on the basis that such claims would be against that person in different capacities and that "no single allegation can relate to both at the same time". I do not see this as a principled resolution to the jurisdictional difficulties I am discussing:

(a) An employee/director owes the employer/company a duty of fidelity. It is unreal to see this as other than a single duty. An allegation of breach of that duty of fidelity necessarily relates to the obligations of the employee/director in both capacities.

(b) The proposition is that claims, for say breach of that duty, against a person qua employee are within the exclusive jurisdiction of the employment institutions, whereas overlapping claims against that person qua director are not. I see this as a cause of action approach. On the general approach of the majority – that jurisdiction depends on the application of the definition of "employment relationship" to the facts – both claims should be within the jurisdiction of the Authority where that person's position as a director is a consequence and element of the employment relationship.

[196] If required to make a jurisdictional determination in a particular dispute of this kind, I would do so by reference to the language, scheme and purpose of the two statutes (the Employment Relations Act and the Companies Act). This would be by reference to whether the exercise by the Authority of a jurisdiction which is vested in the High Court would be within the parliamentary contemplation of how such disputes should be determined. Relevant to this would be the availability to the Authority of the powers necessary to resolve the dispute. As with the Privacy Act, I do not see the

absence of express provision in the Companies Act addressing jurisdictional overlap as controlling.

Other examples of jurisdictional conflict

[197] There are other examples which could be provided where there is scope for argument whether the jurisdiction of the Authority in employment contexts displaces differently-bounded but overlapping jurisdictions conferred on ordinary courts or other tribunals or agencies. In such cases I see jurisdiction as most appropriately determined by reference to the language, scheme and purpose of both the Employment Relations Act and the other statute in accordance with the parliamentary contemplation test I have proposed.

[198] Similar issues can arise where the competing jurisdiction is that of the ordinary courts deciding cases in accordance with common law or equitable principles. In such cases, literal application of the definition of the employment relationship problem may not solve the jurisdictional issue. This is illustrated by the case of a claim for breach of a contract settling a personal grievance which resulted in the Court of Appeal judgment in *JP Morgan Chase Bank NA v Lewis*.[226] If the settlement agreement was within the definition of "employment agreement", which I think may have been the case,[227] the claim would undoubtedly be within the jurisdiction of the Authority. But, if, as the Court of Appeal held,[228] it was not an employment agreement, the position is not so clear. On one approach, the case was within the jurisdiction of the Authority because it arose out an employment relationship, in the sense that the employment relationship and its breakdown provided the context in which a new contract was entered into. But, on the assumption that the settlement agreement was not an employment agreement, it might be thought to be more natural to conclude that the dispute did not relate to, or arise from, an employment relationship, but rather a post-employment relationship.

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226 *JP Morgan*, above n 211.

227 Because it was entered into when the employment agreement was still in effect and provided for its termination.

228 At [65].

[199] An issue of the kind which arose in *JP Morgan* is not sensibly determined on the basis of a factual "how long is a piece of string" assessment, focusing on the intensity of the connection of the dispute to an employment relationship envisaged by the expressions "arising out of" or "relating to" in the definition of "employment relationship problem". The focus should rather be on whether a conclusion that exclusive jurisdiction lies with the Authority is consistent with the legislative purpose. As *JP Morgan* illustrates, this may sometimes be a close call.

[200] By way of further illustration of the difficulties which might arise, assume a claim for damages against a company, a senior employee and an outside professional firm who advised the company, with cross-claims by the defendants against each other for indemnity and contribution. As between the employee and the company, these cross-claims involve a dispute which relates to or arises out of an employment relationship. But these cross-claims cannot be sensibly determined without the participation of the plaintiff and the professional firm which are therefore necessary parties to the dispute but third parties to the employment relationship. Carving the cross-claim between the company and its employee out from the plaintiff's claim against all three defendants and other cross-claims between the defendants may be impracticable. One option (assuming that the Authority can deal with claims involving a party who is not an employer or employee) would be for the entire dispute to be dealt with by the Authority. But it would be open to question whether such a dispute is what is contemplated by s 161 as being within the exclusive jurisdiction of the Authority. As well, there would be scope for argument whether decisions as to contribution are within the remedial jurisdiction of the Authority.

Disputes to which one of the parties is not the employer or employee

[201] As the illustration just proffered shows, disputes between an employer and employee may sometimes involve others who are (or were) not parties to the employment relationship.

[202] Section 161(1) does not explicitly provide that the jurisdiction of the Authority may be exercised solely in respect of those who are employers or employees. Indeed, the subsection when read as a whole is inconsistent with any such general limitation.

For instance, some of the heads of jurisdiction listed in s 161(1) envisage parties to disputes before the Authority other than employers and employees. I have in mind proceedings relating to collective bargaining (s 161(1)(ca) and (cb)), disputes about union rules, registration, membership and compliance with rules (s 161(1)(h)–(k)) and the ability of a Labour Inspector to pursue claims (s 161(1)(q)). As well, there is power under s 161(1)(ea) to join a "controlling third party" to a personal grievance. Also more generally relevant is the power of the Authority to impose penalties on those who incite breaches of employment agreements (s 134(2)).

[203] Looking at the structure of s 161(1) as a whole – which for reasons already given is not the surest guide to its interpretation – it is of note that the various heads of jurisdiction which specifically encompass parties who are neither employee nor employer are:

(a) treated as subsets of the jurisdiction to "make determinations about employment relationship problems" as described, or introduced, in the chapeau to s 161(1); and

(b) by implication at least from s 161(1)(r), examples of actions "arising from or related to the employment relationship".[229]

[204] I have set out the text of s 221 which provides in general terms for parties to be joined or struck out.[230] Usually this has been applied where there is a question as to the identity of the employer, in which case it is obviously sensible for all parties who might be held to be the employer to be before the Authority or Employment Court.[231] Implicit in this, however, is that the Authority and Employment Court have the power to determine which of two (or more) parties is the employer, which necessarily includes the power to determine that one of those parties is not an employer.

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229 I say this because the language of s 161(1)(r), particularly the word "other", suggests that the various heads of jurisdiction specifically provided for in s 161(1) are such actions.

230 See above at [156].

231 See, for example, *Prasad v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 133.

[205] In *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)*,[232] there was a dispute as to the interpretation and enforcement of certain contractual relations between the parties governing the employment of professional rugby players in New Zealand. The employee at the centre of the dispute was not a party to the proceedings, and the applicant, the Waikato Rugby Union Inc, had not been found to be his employer.[233] Nonetheless, Judge Shaw held that the Waikato Rugby Union could invoke the jurisdiction of the Authority and Employment Court under s 161(1). She said:[234]

> The legislation does not focus on who may bring an employment relationship problem to the Authority/Court but rather defines the jurisdiction according to the subject-matter. The subject-matter focuses on employment relationship problems which are broadly defined. The implication of this is that it is possible for persons who are not direct parties to an employment agreement to file a statement of problem so long as the problems in it are related to or arise out of matters listed in s 161 and are not otherwise excluded from the jurisdiction by the [Employment Relations Act].

[206] If a person who is not a direct party to an employment agreement can invoke s 161(1) – which is what Judge Shaw concluded – it might be thought to follow on the open-textured wording of s 161(1) that a party to such an agreement can invoke s 161(1) against someone who is not a party, providing the dispute with that party relates to or arises out of an employment relationship and is thus able to be categorised as an employment relationship problem for the purposes of s 5. This possibility has not been explored in the New Zealand jurisprudence. It is, however, easy enough to think of situations where such an issue might arise.

[207] Let us assume that:

(a) an insolvent employer has insurance cover in relation to employment claims;

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232 *Waikato Rugby*, above n 213.

233 The Waikato Rugby Union Inc was a party to the wider system of agreements governing the employment of professional rugby players. It was accepted by all parties that New Zealand Rugby Promotions Ltd had an employment relationship with the player. Waikato Rugby Union argued that there was also an employment relationship between it and the player, but Judge Shaw did not find it necessary to conclude whether this was the case.

234 At [50].

(b) an employee with a personal grievance claim against that employer seeks to invoke s 9 of the Law Reform Act 1936 to pursue the insurer directly in place of the insolvent employer; and

(c) the insurer denies that it is liable under its policy.

In such a situation, could the Authority join the insurer as a party to the employee's claim against the employer and, in this way, exercise jurisdiction over the question of whether the insurer is liable on its policy with the insolvent employer?

[208] The problem just postulated was recently addressed by the Court of Appeal of England and Wales in *Watson v Hemingway Design Ltd*[235] – of course in the context of United Kingdom legislation. The legal issue was whether the Employment Tribunal was a "court" for the purposes of United Kingdom legislation enacted in 2010 which covers the same ground as s 9 of the Law Reform Act, albeit somewhat differently expressed. In concluding that the Employment Tribunal was a "court" in this context, the Court of Appeal rejected the contention that Parliament in 2010 could not have intended Employment Tribunals to deal with questions of insurance law (in terms of an approach similar to my parliamentary contemplation test). As to this, Bean LJ commented:[236]

> Employment tribunals regularly have to deal with difficult questions of law across a variety of topics, not confined to what would be regarded as mainstream employment law. Some of the claims with which they have to deal involve millions of pounds (contrasting with the limited jurisdiction of the County Court); others have very complex facts. I doubt whether applications for a declaration that an insurer is liable to meet a judgment in an unfair dismissal claim are even at the top end of the range of difficulty of cases with which employment judges have to grapple.

[209] If such a case arose in New Zealand, it would be well arguable that it fell within s 161(1)(r) and that the Authority is a "court" for the purposes of the Law Reform Act.[237] Indeed, as presently advised, I would be inclined to accept that the Authority

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235 *Watson v Hemingway Design Ltd* [2021] EWCA Civ 67, [2021] ICR 1034.

236 At [40].

237 The Employment Court has said on multiple occasions that the Authority is not a court: see, for example, *Samuels v Employment Relations Authority* [2018] NZEmpC 138, (2018) 16 NZELR 184 at [27]. This, however, has not been in the context of the Law Reform Act. As well, any difficulty in this respect, or as to remedies that the Authority can award, might be able to be resolved by the removal of the dispute to the Employment Court.

could join the insurer as a party and determine liability. In this situation, the insurer is effectively substituted for the employer.

[210] I am a little more hesitant as to whether a solvent but insured employer may join its insurer as a third party in proceedings before the Authority. A number of considerations favour such joinder:

(a) the dispute between the employer and insurer could be categorised as relating to or arising out of the employment relationship;

(b) joinder would be consistent with the language of s 221; and

(c) as a matter of procedural efficiency, it would be desirable for the entire case – that is, as between all three parties – to be determined by the same tribunal and at the same time.

But I have reservations whether, in this situation – where the insurer is not being substituted for the employer – such joinder would be within what Parliament contemplated as the exclusive jurisdiction of the Authority.

[211] As will by now be apparent, I see no scope for a rule that the Authority has jurisdiction only over parties who are either an employee or an employer. On the other hand, I would be slow to accept that the Authority has a general jurisdiction over all non-employer/employee parties who happen to get caught up in a dispute which arises out of or relates to an employment relationship. More particularly, I do not see the conundrums that may arise as best resolved by arguments about degrees of connectedness between the dispute and the employment relationship.

Drawing the threads together and a suggestion for the future

[212] In cases which are clearly within s 161(1), the exclusive jurisdiction of the Authority is unproblematic and must be, and is, respected by the ordinary courts. This is so with the vast majority of cases which come before the Authority. There are, however, a significant number of cases where it is open to argument whether s 161(1) is engaged.

[213] On a literal approach to the Employment Relations Act, the question whether the Authority has exclusive jurisdiction turns on the application of the definition of "employment relationship problem" to the dispute at hand. This, however, provides an inadequate mechanism for determining jurisdiction. This is so in three respects:

(a) Where the dispute involves the exercise of statutory jurisdiction vested in ordinary courts, tribunals or agencies, the question whether that jurisdiction is displaced in favour of the Authority can only be resolved after consideration of the statute which creates that jurisdiction. I have explained this in relation to the Intelligence and Security Act, the Privacy Act and the Companies Act.

(b) In cases where the other competing jurisdiction is that of the ordinary courts exercising common law or equitable jurisdiction, and there is thus no other statute to consider, there will remain scope for an issue as to whether the dispute at hand is within what Parliament contemplated as being the exclusive jurisdiction of the Authority – an issue which I consider is not best addressed by looking simply at degrees of connectedness between the dispute and the employment relationship.

(c) Cases in which there are other parties pose particular jurisdictional difficulties, which again are not susceptible to sensible determination solely by reference to the definition of "employment relationship problem".

[214] I doubt if it is practicable to come up with a verbal formula which results in a logical separation of disputes into distinct categories: (a) those which can only be determined by the Authority; (b) those which cannot be determined by the Authority and must therefore be resolved by an ordinary court or another tribunal or agency; and (c) those which can be determined by both the Authority and an ordinary court or another tribunal or agency (as is the case with the jurisdiction under the Human Rights Act and Patents Act discussed above at [185]–[188]). It would, however, be possible to devise a legislative mechanism providing for a default assignment of disputes associated with employment to the Authority but with a power to remove to the courts

or another tribunal or agency those which present particular jurisdictional difficulty, such as the exercise of statutory jurisdiction under another statute, an only loose connection between the dispute and the employment relationship or the involvement of parties who are not the employer or employee under the employment relationship in question.

Suppression

[215] I agree with the majority that the High Court's suppression order should be varied so that it only suppresses the names and identifying particulars of the parties and is maintained only while names are suppressed in the Authority.

GLAZEBROOK J

[216] I would have allowed the appeal. As mine is the minority view, I set out my reasons briefly.

[217] Section 161(1) of the Employment Relations Act 2000 (the Act) is an oddly drafted provision. It purports to define the exclusive jurisdiction of the Employment Relations Authority (the Authority) by reference to introductory wording followed by a list of included terms. Further, in the list of inclusions, there is a catch-all provision in s 161(1)(r) which, in turn, has an exclusion for actions founded on tort.

[218] I am unable to read the exclusion in s 161(1)(r) as meaning other than the plain words would suggest. That is, actions in tort are excluded from the exclusive jurisdiction of the Authority. This plain reading of s 161(1)(r) is supported by the submissions made by Mr Harrison QC on the constitutional and policy issues involved in denying litigants access to courts of general jurisdiction.[238] It is also supported by the absence of an express statutory power for the Authority to resort to the principles and rules of the law of torts and the issues related to the availability of remedial powers.[239]

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238 See the reasons of the majority above at [32]–[37].
239 See the reasons given by William Young J above at [159]–[164].

[219] I recognise that the interpretation I favour opens the possibility that the same dispute might, depending on how it is framed, come within one of the other paragraphs in s 161(1). For example, if it is framed as a personal grievance (s 161(1)(e)) or as a breach of an employment agreement (s 161(1)(b)), it would come within the exclusive jurisdiction of the Authority. By contrast, if the dispute is framed as an action in tort, it would come within the exclusion in s 161(1)(r) and, therefore, be able to be brought in the High Court. This could lead to concurrent proceedings.

[220] If that occurs, one set of proceedings would need to be stayed. I would normally expect the Authority proceeding to take precedence, given the object of Part 10 of the Act as provided at s 143, and in particular, s 143(b)–(fa). In this case, however, the case before the Authority has stalled. Therefore, I would have allowed Ms FMV's High Court action in tort to proceed.

[221] It follows from what I say above that I agree with William Young J that what he calls the chapeau is an introduction to and summary of the following list in s 161(1) and not an independent description of the jurisdiction.[240] However, I see what he calls the tort carve-out as being a carve-out from the exclusive jurisdiction of the Authority and not merely from the catch-all provision in s 161(1)(r).[241]

[222] I agree with William Young J that there remain issues with the tort carve-out and, indeed, with the jurisdiction of the Authority in certain circumstances.[242] It is not necessary in this appeal for me to decide whether the universalist, the essential character or the hybrid (parliamentary contemplation) approach should be adopted.[243] I would, however, tend not to favour a universalist approach, particularly where third parties are involved or where other legislative schemes are involved.

[223] I comment, finally, that the situation that has arisen is concerning. Essentially, Ms FMV has not been able to pursue her personal grievance before the Authority (that her employer, TZB, made her ill) unless she proves she is no longer ill. This is not intended as a criticism of TZB which is, no doubt, concerned that any mediated

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240 See the reasons given by William Young J above at [170](a).
241 Contrast William Young J's view above at [172].
242 See the reasons given by William Young J above at [174].
243 See the reasons given by William Young J above at [176]–[179].

settlement might later be challenged on the basis of incapacity. However, as the majority notes, it does now leave her without any forum.[244] In my view, this does not accord with the principles of the Act.

[224] I consider that there is need for legislative clarification with regard to the Authority's jurisdiction. I do not, however, comment on the form of any such clarification.[245]

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244 See the reasons of the majority above at [135].

245 I, therefore, do not comment on [109] of the majority's reasons or [214] of William Young J's reasons.