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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 72/2019
[2020] NZSC Trans 8

BETWEEN **FMV**
Appellant

AND **TZB**
Respondent

Hearing: 17 March 2020

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Williams J

Appearances: R E Harrison QC for the Appellant
T L Clarke for the Respondent

CIVIL APPEAL

MR HARRISON QC:

As Your Honours please, I appear for the appellant.

WINKELMANN CJ:
Tēnā koe Mr Harrison.

MR CLARKE:
May it please Your Honours, my name is Clarke, I appear for the respondent.

WINKELMANN CJ:
Tēnā koe Mr Clarke. Mr Harrison?

MR HARRISON QC:
Yes, I will speak to my written submissions and hope to exercise a right of reply to some of the points raised by my learned friend rather than, for the most part, rather than doing so in my opening.

We go to the introductory section at page 1, that can really be taken as read. Page 2, paragraph 6, there are the three issues that I there identify. The jurisdiction issue is plainly the meatiest of the three and I'll be spending most of my time on that. The section that follows at page 3, the comparison of the claims in the Authority and in the High Court is, I hope, generally instructive, but it particularly bites when we come later to the abuse of process issue where I compare the two claims with a view to arguing that they're not simply interchangeable such that the High Court claim, if there is jurisdiction, should happily have been struck out.

So looking at the two sets of proceedings I will take Your Honours to the actual statement of problem which is at page 75 of the case on appeal. That, in the form that is prescribed, begins at page 75 by identifying the problem or matter as twofold, an unjustifiable dismissal, being a constructive dismissal, and a disadvantage grievance by some unjustifiable action. The claim then sets out various matters that the appellant claims she was subjected to on page 76 under headings "Bullying" and "Discrimination" so it's really also a discrimination grievance as well. Then over the page, page 77, a third of the way down, as has been emphasised by the respondent, this original version of the statement of problem referred to negligence/breach of contract and the

causing of a hazardous workplace, in particular by the bullying and various other things. So then at page 78 there is a specific caveat, if you like, put on the scope of the problem, and I've set this out also in my submissions at the top of page 4. "The Authority should note that my complaints regarding bullying, stress and negligence are being pursued elsewhere. My discrimination claim is to be dealt with by the Human Rights Review Tribunal." So that's where that currently stands, although as I come onto note there was a subsequent attempt by the appellant to amend that statement of problem to make the delineation between the two sets of claims clear.

It's also useful at this stage, although it's not mentioned at the top of page 4, to go to the respondent's reply to the statement of problem, which is at case page 81 and this is relevant to the issues that I address later about differing limitation periods. In paragraph 1.2, page 82, there's an immediate assertion that the claims arose in 2009 and are therefore time-barred. There are, in effect, two separate time-bars or limitations raised. One is 1.4, not raising a personal grievance within 90 days of the date on which the alleged personal grievance occurred, or came to notice, and the respondent says it doesn't consent to the raising of the personal grievance outside the 90 days. Secondly, at 1.8 it's alleged that the breach of contract claim was filed more than six years and is barred by the Limitation Act 2010, although I suggest that in fact the issue arises under the earlier Act in my written submissions.

Then at 1.11 another bar, not a time-bar, is raised, which is in relation to the discrimination complaint. It's said that the appellant has elected to pursue her rights under the Human Rights Act, and there's a statutory provision that states the consequences of an election along those lines. Then the, an abuse of process argument is raised at 1.15. So we can see that the respondent, and this is not said by way of criticism, the respondent is raising every possible ground in its defence not to deal with the personal grievance side of the appellant's claims on the legal merits.

O'REGAN J:
Presumably at this time they didn't know there was a High Court claim as well? Because it hadn't been served on them by this stage, had it?

MR HARRISON QC:
Yes.

O'REGAN J:
Is that right?

MR HARRISON QC:
Yes Your Honour. So then turning to the High Court statement of claim, which is at page 43 of the case, this pleads duties of care in tort at page 44, paragraph 3, three specific duties of care, and then in paragraph 4 it pleads particulars of breach in some detail for, (a) bullying, (b) hazardous workplace environment, (c) failure to take proper care of the plaintiff, and so on. And then page 48, para 8, there is, as I note, a pre-emptive claim allegation that she was under a disability when her causes of action accrued, and that disability has continued.

So then she alleges that she suffered psychiatric injuries or exacerbation of her psychiatric injuries, and that's in essence the claim as pleaded.

So I then go on at page 4 to contrast what I call the juridical features of the claim in tort as against the claim asserting personal grievances and, as I say, these may be stating the obvious so I won't go through them paragraph by paragraph but simply argue, submit that there are significant differences as to the nature of liabilities pleaded in each Court or body, there are significant remedial differences, I've set those out, and then there are significant limitation defence issues, including some, as I note on page 6 and 7, some difficult questions as to what limitation period on top of those, what limitation periods, if any, under the Limitation Act 1950 or the 2010 Act apply to a personal grievance proceeding, I've noted that in para 26. So the point simply is there are significant differences between the two claims, the one in the tort

of negligence and the other by way of personal grievance and maybe breach of contract, there's very little pleading of that as it stands, and these differences are a long way, go a long way further than merely being a matter of form, as the respondents would have it, it's claimed at several points of the respondent's submissions that all this is just a matter of form.

So the jurisdiction issue, I've set out an overview of the argument there, and of course I emphasise the constitutional importance of the argument which, in effect, if the Court of Appeal judgment is accepted, either or both abolishes the causes of action in tort that previously existed or, and/or removes the internal jurisdiction of the High Court to hear and determine employment related claims in tort, and that is, as I have noted, despite the express language of section 161(a)(r).

WINKELMANN CJ:
So, Mr Harrison, is your submission that it removes the High Court's jurisdiction in tort, the respondent's interpretation, but the ERA does not have a jurisdiction in tort, is that your submission?

MR HARRISON QC:
Yes, yes, that is my bottom-line submission. The implications are wider because there are other common law causes of action that seem to be affected, but tort is the more significant removal on the respondent's argument because it flies in the face of section 161(1)(r), which I have referred to at the top of page 9.

Now, just the argument overall, if I can put it this way, invites the Court to address the task of interpreting the Employment Relations Act provisions at three levels. First of all there has to be an examination of the scope of an employment relationship problem jurisdiction conferred by section 161(1) of the Act, given that its structure is to confer on the Authority exclusive jurisdiction to make determinations about employment relationship problems generally including. So then there's a long list and a couple of catch-all subparagraphs at the end. So how is that to be interpreted. Secondly, and

this has been the focus of most of the previous cases, how do, on top of that, when we get into defining an employment relationship problem as such, how do we interpret the expression any other problem relating to or arising out of an employment relationship. Thirdly, how do we interpret the section 161(3) privative clause, which says “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.” So I look at each of those in turn –

WINKELMANN CJ:
So on the last one I can just indicate that we are interested to hear from you as to whether this is properly classed as a privative clause.

MR HARRISON QC:
Yes.

WINKELMANN CJ:
Because it’s channelling jurisdiction from one court to another.

MR HARRISON QC:
Yes.

WINKELMANN CJ:
And I think the answer might lie in your first submission that it’s removing causes of action but we’re just interested to hear that.

MR HARRISON QC:
Yes, I'll certainly attempt to address that Your Honour.

WILLIAM YOUNG J:
It’s a clunky subsection because there are two exclusions, aren't there? One is an action within the jurisdiction of the Employment Court, and the other is an action found on tort.

MR HARRISON QC:
Yes. Are Your Honours referring just directly to –

WILLIAM YOUNG J:

To 161.

MR HARRISON QC:

– (r)?

WILLIAM YOUNG J:

Yes.

MR HARRISON QC:

Yes. Yes, because as I note the Court is by definition the Employment Court in that expression.

WILLIAM YOUNG J:

I mean it does sort of assume that there can be an action arising from or related to the employment relationship, which is also an action founded on tort.

MR HARRISON QC:

Yes, yes –

WILLIAM YOUNG J:

And in fact if it's an action founded on tort well then it's not within the jurisdiction of the Authority. Now that just treats the words "other than an action founded on tort" as meaning what they say I suppose.

MR HARRISON QC:

Excluding them.

WILLIAM YOUNG J:

Yes. So that providing it's an action that can be legitimately described as one in tort, then it's simply not within the jurisdiction of the ERA.

MR HARRISON QC:

Yes, yes, and the expression is founded on rather than a cause of action in tort. I'm not sure that that is necessarily drawing any significant distinction though but –

WINKELMANN CJ:

I was just going to say is that your first argument, is it, but then you have a more profound argument about the operation of the section generally, which would restrict it beyond just carving out tort.

MR HARRISON QC:

Yes, yes, that's the, I think, if I've got myself right, that's my first argument which is to say that if you look at section 161 overall, even though it refers to employment problems generally including, when you look at the subparagraphs which follow they are all, to use the old terminology, disputes of rights. They are specific, they pose specific legal problems for determination, which is the expression used in relation to the Authority. So if you look at all of those subparagraphs, including the catchall (s), "Determinations under such other powers and functions as are conferred on it by this or any other Act," you have a series of specific legal disputes which, I'm jumping ahead, given the coercive powers of the Authority, the ability to, the unlimited monetary jurisdiction, you need to read section 161 down despite the words "generally" and "including" so that it only governs legal disputes. The fallacy that has crept in –

WINKELMANN CJ:

Legal disputes of the kind listed in the subparagraphs or…

MR HARRISON QC:

Legal disputes –

WILLIAMS J:

Do you mean disputes of right?

MR HARRISON QC:

Yes, yes. Disputes of rights arising – well they may, one can quarrel looking at the list in section 161(1) whether you call each of those a dispute of rights. Some of them you might. Not, for example, (cb) Your Honour. "Fixing the provisions under section 50J."

WILLIAMS J:

What's 50J?

MR HARRISON QC:

50J I think is when from memory there is a failure to fulfil the duty of collective bargaining so that if –

WILLIAMS J:

So that's a procedural right, it won't be…

MR HARRISON QC:

Yes, it's still a procedural right, it's a right, but when I say I'd have to get into my computer and spend a minute going back to that provision, but –

WINKELMANN CJ:

It's, "Remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining."

MR HARRISON QC:

Yes, so if one party to collective bargaining –

WILLIAMS J:

Yes, I understand what that means. But this list distinguishes disputes of rights from the old disputes of interest, right?

MR HARRISON QC:

Yes.

WILLIAMS J:

There are no disputes of interest in this list?

MR HARRISON QC:

That's, yes, that's basically my submission.

O'REGAN J:

But that asks us to read "including" as meaning "but limited to" which is the complete opposite I think.

MR HARRISON QC:

Well, what I'm submitting is that you have to read down the first introductory clause of section 161(1) so that it doesn't enable, it doesn't empower the Authority to determine a dispute simply because the parties are in an employment relationship and they have a factual problem. You can't, it's not that wide. You can't just say, well, I've got a problem with my employer here. He's changed the brand of coffee in the tearoom.

WILLIAMS J:

That's a very serious employment matter Mr Harrison.

MR HARRISON QC:

Yes, yes.

WILLIAM YOUNG J:

I mean it's trivial but, in fact, couldn't it be a sort of a disadvantage or justified disadvantage?

MR HARRISON QC:

Well if it's formulated as a disadvantage grievance, then it can certainly be raised, but it can't be raised in some generic or overarching way.

WINKELMANN CJ:

Isn't another way, I think you put it somewhere in your submissions that for the ERA to have jurisdiction the employment relationship has to be effectively an element of the cause of action.

MR HARRISON QC:

Yes, yes. That submission is, draws support from existing authorities that I'll be coming to. It's not an original or out there submission. So can I just perhaps go back to page 9 for a minute and just –

WINKELMANN CJ:

So I think we've been taking you a little bit out of order, but you were going to make the point, you said your first argument is this, and your second argument is the one that Justice Young referred to which is simply on the plain words of (r) this isn't the…

MR HARRISON QC:

The second argument focuses on exegesis, if you like, of the definition of "employment relationship problem" and in particular the expression relating to arising out of a relationship problem, which is where most of the previous cases have concentrated their efforts.

WILLIAMS J:

Just before you get to the exegesis, all of that falls away if the only issue is whether tort is in or out. You don't need to worry about what "generally" means and what "related to" means if it's clear that tort is out of the ERA's jurisdiction and must therefore be in the High Court's jurisdiction.

MR HARRISON QC:

Yes –

WILLIAMS J:

So do we need to go there?

MR HARRISON QC:

Well, other than –

WINKELMANN CJ:

So that's what I'm asking, is that one of your arguments?

MR HARRISON QC:

That tort's out?

WINKELMANN CJ:

Yes.

MR HARRISON QC:

Definitely, yes.

WINKELMANN CJ:

So that's your first argument really.

MR HARRISON QC:

Yes. As I say somewhere in my submissions, it's the bottom line argument. I mean if you –

GLAZEBROOK J:

We might just be suggesting it's your best argument and perhaps you could concentrate on it I think.

MR HARRISON QC:

Yes, but I mean the way, the jurisdiction issue is an important one and it's raised in other contexts than tort, for example, breach of fiduciary duty and so on and I propose to address it in various ways but –

WILLIAMS J:

You want to walk out of here one way or another with a bright line?

MR HARRISON QC:

Yes please, yes. But certainly I submit that subclause (r) of section 161(1) properly interpreted excludes tort claims and leaves the tort jurisdiction of the ordinary courts intact. I mean that's, I most definitely do advance that as the correct interpretation of (r) and I – while I'm on that, and as that scene is possibly my strongest ground, I just want to make a couple of points. They are in my written submissions. First of all we have, the overall approach of the Employment Relations Act is that where common law causes of action or rights of access are interfered with, the Act does so expressly. One example is section 113(1) which I refer to at the top of page 11. So the Act expressly provided for, in effect, the abolition of the common law contract right to sue for dismissal. It has to be brought forward as a personal grievance. So the Act is there, if you like, abolishing a common law right, no matter where the jurisdiction to entertain it may have been, it's done that and in, as I note also in my submissions in relation to certain categories of tort there is an express conferral of a tort jurisdiction on the Employment Court, and that is not an abolition of a common law cause of action, it takes the common law cause of action in relation to the specified subject matters, striking, lockouts, etc, and transfers it like for like to another court. But it does so, takes the trouble to do so expressly and gives the Employment Court full and exclusive jurisdiction and likewise, as we all know, with certain categories of application for judicial review. With certain subject matters the jurisdiction of the High Court over judicial review is transferred holus-bolus to the Employment Court. So that's the pattern of the Act looking at it in its broader way, so that when we come to look at the existing, the pre-existing jurisdiction of the ordinary courts in tort, aside from the special jurisdiction expressly conferred on the Employment Court, its as a matter of overview interpretation of the Act that seems highly unlikely that the tort jurisdiction not transferred to the Employment Court would have been removed by a side wind and all the more so is that unlikely given subclause (r). So that's the tort argument, I suppose, in a nutshell.

WILLIAMS J:

Well let's say running against you on that is the general proposition that the purpose of the Act is to provide cheap rather less lawyer dominated fairness

and equity procedures for dealing with these things. With mediation first the parties can resolve their own issues, if they can, and then the Authority is inquisitorial not adversarial, so on and so forth, the intention was to channel employment fights into that more accessible process for the benefit of both employers and employees, and if the tort is holus-bolus out, that's a big chunk of employment fights that can just go to the mainstream courts inconsistently with that underlying ideology. What do you say to that?

MR HARRISON QC:

Well, first of all I would quarrel with respect that it's a big chunk of employment fights, both in theory and in practice I would submit it's only to be a tiny sliver because most employment related fights are either going to, well are going to depend on the terms of an employment contract or come within the concept of that personal grievance such as a disadvantage grievance or an unjustified dismissal. So if you think about it how many employment fights, particularly ones that arise while the employment relationship still subsists, are likely to give rise to an issue of tortious liability. It's going to be, the fight, in practice I submit if we look at the cases it's the fights that occur after an employment relationship is terminated that give rise to tortious battles or breaches of fiduciary duty where people with business knowledge of former directors start competing and so on, and of course if it's a restraint of trade post-employment fight then it's likely to end up as a contract dispute back before the Employment Relations Authority. But Your Honour I don't shy away from the possibility that there could be, certainly in theory but to a limited extent in practice, a duplication of the two jurisdictions. That's what we had under the Employment Contracts Act, and we have it too under the Employment Relations Act because things like breach of fiduciary duty claims, and claims against spin off companies and so on, still have to be addressed in the High Court, and that will ultimately take me onto my discussion of how the abuse of process safeguard works, because again jumping ahead just for a moment, the High Court, at least the High Court can use its abuse of process jurisdiction to avoid abuse of a duplication of the two jurisdictions by staying one and also the principle that avoids double compensation. So my submission is that, yes, in theory but not to a major extent.

WILLIAMS J:

In practice these are disputes that almost always arise post-employment in the way that the *JP Morgan Chase Bank v Lewis* [2015] NZCA 225, 3 NZLR 618 case did.

MR HARRISON QC:

Yes.

WILLIAMS J:

Is that what you're saying?

MR HARRISON QC:

Very rarely I would submit is an existing employee going to be suing the employer in tort. The one exception to that is, of course, precisely the areas of tortious jurisdiction which are conferred on the Employment Court, strikes and lockout and so on. So…

WINKELMANN CJ:

You go back to where you want to in your argument, Mr Harrison.

MR HARRISON QC:

Yes. Well, I'm covering it apace anyway, and I'm not concerned about that, but I did want to just go back a bit. So, page 9, I just want to mention, the para 32 propositions, 32.2, "No obstacle to concurrent duties of care in contract and in tort," or, indeed, duties arising by statute. Now you get the flavour reading the respondent's submissions that it's either or. At several points it argued that because there is an implied terms in a contract of employment as to health and safety and possibly even the statutory duties under health and safety legislation are imported as implied term, that means that that cannot, as a matter of law, permit the existence of a duty of care in tort. Well, with respect, that's simply wrong and the cases the I cite in footnote 30 are to the contrary, and I don't know whether I need to take Your Honours to those cases, but it's a fairly proposition that we can have concurrent duties in contract and in tort. They may not have precisely the

same content of course, but they can concurrently cover the same subject matter here, workplace bullying and causing an unsafe workplace, resulting in psychiatric injury.

GLAZEBROOK J:

And your answer, because of course you can, but normally they would be dealt with in the Court, but your answer – because if, I mean to say, it's a solicitor's duty of care as against the contractual relationship, they'd be dealt with together in the same Court – so your answer to the fact they're dealt with in – and would cover the same subject matter often – but your answer to the fact they're in different Courts is, your abuse of process jurisdiction, is that…

MR HARRISON QC:

Yes.

GLAZEBROOK J:

Do I understand that?

MR HARRISON QC:

Yes.

GLAZEBROOK J:

Thank you.

MR HARRISON QC:

And I won't jump ahead to that just at the moment, I'll develop that argument further down the track.

GLAZEBROOK J:

No, no, I wasn't asking you to, I was just checking that that…

MR HARRISON QC:

Yes, that's the position there.

GLAZEBROOK J:

Because the other argument could be that that tells against, and I mean I assume the other argument could well be that that tells against there being a remaining jurisdiction in the High Court, absent the subparagraph (r)

MR HARRISON QC:

Yes. Well, I mean the proposition I'm advancing right at this point is simply a one of common law. Common law, it's not only possible, the cases I cite recognise it in the employment law area, under the previous regime, but common law, leaving aside the question of jurisdiction, which I am coming to.

WINKELMANN CJ:

And there's nothing in the legislation to suggest that that common law has been abrogated in any way?

MR HARRISON QC:

That's my submission. And, as I note as 32.4, under the Employment Contracts Act the Employment Tribunal and Employment Court also had an exclusive jurisdiction to hear and determine proceedings founded on an employment contract, but it didn't follow that the High Court lacked the jurisdiction to determine claims advancing the same or similar grievances, and again I've –

WILLIAMS J:

But that was because of the you know, the wording was much more constrained in the ECA compared with the ERA, wasn't it?

MR HARRISON QC:

The wording was different.

WILLIAMS J:

I mean, you have to give some meaning to the word "generally", it's not often deployed in legislative language, but there it is.

MR HARRISON QC:

The wording is different, but the point I am making is the one right at the very bottom of page 9, it's only if the reformulation of the Authority's exclusive jurisdiction must be interpreted as reversing the previous legal position notwithstanding the express exclusion of an action founded on tort. You could, the High Court's concurrent jurisdiction could be abrogated so that was the previous law pre-Employment Relations Act. Has the Employment Relations Act, section 161 impliedly, and it could only be impliedly, changed that. I say plainly not impliedly, and the clincher is an action founded on tort in (r). But then at paragraph 33 of course I attempt to bring to bear some fundamental principles of statutory interpretation, access to justice and so on. In paragraph 33, footnote 34, I cite *Canterbury Regional Council v Independent Fisheries Ltd* [2013] 2 NZLR 57 which is at tab 6 of my bundle of authorities, and there's a useful discussion by the Court of Appeal –

WILLIAMS J:

Have you got a page number there?

MR HARRISON QC:

Yes I do, page 116, I think if the system is working properly, with my efforts at electronic document compliance, not necessarily the case. When I say "mine", the ones for which I take responsibility. So if we've got page 91 of the report and page 116 of the volume, you've got a heading, paragraph 136 "Unlawful denial of access to Environment Court. There is no doubt that the right of access to the Courts is well established as part of the rule of law in New Zealand. We agree with Mr Joseph, who presented the submissions for the respondents on this issue, that access to the Courts for the purpose of seeking justice, especially when decisions of the Government are involved, is a fundamental right."

Then at 140, and Your Honours are well familiar with these principles, "… a statute may by clear words expressly or by necessary implication abrogate a fundamental right such as the right of access to the courts." Then there's a reference to a submission that this can only be done by express language, but

over the page, page 92 of the report, there's a reference to Lord Hoffmann in *Secretary of State for the Home Department, ex parte Simms*, necessary implication, and then 141 there's the usual "necessary implication" definition of Lord Hobhouse.

So that's the principle. I'm relying in footnote, back to my submissions at page 10, I'm relying on footnote 34 also on well-known English cases. *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286, *Chester v Bateson* [1920] 1 KB 829, 836 and I go on to note in that footnote that the paradigm application of the general principle occurs in relation to privative clauses and this Court's recent decision in *H (SC52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.

Now can I just go to that because I will now address a point that was raised with my earlier as to whether section 161(3) is a privative clause. If we just go to *H* and this starts at page 118 of the electronic volume, and I'm hoping to refer to paragraph 62.

WINKELMANN CJ:
Can I, I'm just, your argument is that the ERA has no jurisdiction in tort, and is that based simply on (r) or is it based on this broader reading of the provision which says the ERA's jurisdiction is really limited to disputes of rights.

MR HARRISON QC:
Well, both, but I also throw in, on the topic of tort jurisdiction I do throw in as a kind of expressio unius argument the express conferral of tort jurisdiction on the Employment Court. So I'm saying, well, when tort jurisdiction is conferred under the Act it's expressly conferred and is so conferred by way of a, quote, "full and exclusive jurisdiction" on the Employment Court. So if you put that alongside (r) the result is that all other tort jurisdiction of the ordinary has to be seen as preserved, even if the litigants are parties or former parties to an employment relationship. I mean, you sue in tort, you may or may not make out the elements of your claim, whether it's a negligence or whatever, you

take that risk. But the cause of action, as a matter of jurisdiction the cause of action exists.

Now, just going –

WINKELMANN CJ:
That's really helpful. I was just trying to get the structure of your argument. Because for it to be a privative it has to be effectively taking away all rights, so that argument depends on the ERA having no jurisdiction, yes?

MR HARRISON QC:
Yes.

WINKELMANN CJ:
Right. So you're at one one…

MR HARRISON QC:
Yes, well, I just wanted to –

GLAZEBROOK J:
Sorry, I just missed the page number we're going to now.

MR HARRISON QC:
The page number is 127, Your Honour.

GLAZEBROOK J:
Thank you.

MR HARRISON QC:
The only point I'm wanting to make about what is a privative clause is that in (H) *(SC52/2018)*, if we go back to para 59, the Court was looking at whether section 249(1) was a privative clause. In 59 it said, "While 249(1) provides for deferral of judicial review until after an appeal has been heard and determined, it's arguable that it would preclude judicial review of the decision in practical terms. Then the conclusion is at 62, " This leads us to conclude

that although section 249 provides for deferral of judicial the reality is that in practice it operates to preclude judicial review. For this reason we treat section 249 as in effect a privative provision. So a privative provision is not – on this approach it's the practical effect of the provisions as a whole, indeed, not merely 161(3), which is the one I've identified as the privative provision. Is the practical effect of the provisions in question privative rather than is its mode of expression classic privative clause? That seems to be the test. So I do submit that we are dealing with a privative provision. The fact that what it's depriving us of it a common law cause of action in tort rather than judicial review doesn't change the approach, it's still be read down and interpreted narrowly so as to preserve what would otherwise be fundamental common law rights of action, and that's the point at para 33 and 34.

WILLIAMS J:

So perhaps I'm just going too slowly, but if the, "Other than an action founded on tort," phrase in the brackets didn't apply as you suggested it did, and that in fact what's going on on tort issues is a channelling, that argument would fall over, that's right? Or do you say access to justice means access to both Courts?

MR HARRISON QC:

Well, if this is an answer, the argument I am advancing now, in my submission, would preserve the tort jurisdiction even if those words in (r), "Other than an action founded on tort," were not present.

WILLIAMS J:

Why so?

MR HARRISON QC:

Why so? Because the pre-existing jurisdiction of the ordinary Courts in tort prior to the Employment Relations Act can only be taken away by express language or necessary implication that was pre-existing under the Employment Contracts Act the authorities had so held. There is no express privation of the right in tort, there is no necessary implication.

WILLIAMS J:
And you say is you read 161 generally, particularly the head part of it, and any other action in (r) as giving the ERA tort jurisdiction, it would still be a privative clause if the effect of it was to take away co-ordinate jurisdiction in the High Court?

MR HARRISON QC:
Yes, existing rights and access to – so that's the, those are the principles of statutory interpretation which I say are brought to bear in any event, regardless of how you interpret (r) and its express reference to tort.

Of course if you give (r) the meaning I'm urging, then you don't need this argument except perhaps when it comes to other common law causes of action than tort, which the Court may or may not want to get into. But in any event that's the point that I am making here.

Now page 11, at paragraph 36 I try to develop the argument around the language at 161 and really I think I've probably already spent some time, and maybe enough time, on this, developing this point orally. It was something I tried to address earlier. Yes. So I think actually, I think I'd really, I have covered off page 11 already and I, of course, I developed the argument around the tort jurisdiction by looking at various scenarios, these are on page 12, just to show that the issues transcend the tort of negligence with which we happen to be concerned here. So as I note at paragraph 39 what you've got is a logical first line of enquiry without worrying about whether there is a privative clause and how it should be interpreted is to identify the inherent limits of the Authority's jurisdiction as conferred by section 161 and that's where my first line of argument, paragraph 40, comes in, and I have already identified that. The proposition, bottom of page 12, is that all aspects of the Authority's jurisdiction, including any innominate jurisdiction, that's to say any jurisdiction beyond subparagraph (a) and following, limited to the determination of problems which are legally justiciable. That is, to be determined by reference to some legal standard, power or duty which arises independently of section 161(1) itself.

I come back to that point, but that's really the first major issue, and at page 13 I briefly critique the judgments below. The, as I say in paragraph 41, the Court of Appeal judgment under appeal is cursory and conclusory. There's no textual analysis and there's only the briefest of passing references to subparagraph (r). And again, my para 43, there's only a passing reference to *JP Morgan Chase Bank* and no analysis of *BDM Grange Ltd v Parker* [2006] 1 NZLR 353, [2005] ERNZ 343, and I'll look at those two cases later.

So I then go back to the text and purpose of the Act and I go through all that, and in my submission we really don't get much help. But there is, from the objects provisions – this is my para 43 – there is the – and 46 – there is, as Your Honour Justice Williams notes, there is the aim of establishing the Authority at a lowest level, a specialist decision-making body, for inter alia personal grievances, but my submission is that that doesn't equate to a statutory purpose of abolishing or curtailing pre-existing rights of access to the ordinary Courts.

I will just mention, because I think that I perhaps have insufficiently emphasised it in the written submissions, section 101(d), if Your Honours could – it's not, I'm afraid, even in the volume of materials, it's an omission. So in part, this is the object of Part 9 of the Act, dealing with personal grievances, disputes and enforcement, and the object of this part is, "(d) to ensure that the role of the Authority and the Employment Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment. So in terms of the exchange we were having previously about disputes of rights and disputes of interest and limiting the operation of section 161, that jurisdiction too, matters which are independently justiciable, 101(d) provides, in my submission, strong support for the reading-down interpretation of section 161(1) which I am urging.

WINKELMANN CJ:

Can I ask you what you mean, "independently justiciable"?

MR HARRISON QC:

Well, I mean that just because in factual terms there is something that you could fit within the definition of "employment relationship problem", there are parties to an employment relationship and they have a problem, that is not enough to empower the Authority to make a determination unless there is a legal peg on which the case, the dispute turns, and that legal peg has to arise independently from the mere fact that it comes within the definition, it has to be something that is independently justiciable, that's the best I can do with it. Otherwise –

WINKELMANN CJ:

Or do you – because that wouldn't capture everything, so you must be limiting it by reference to it being, having an element of the employment relationship, employment relationship as an element, don't you? because it would be independently justiciable but it's tort, it would be…

MR HARRISON QC:

Well, if we go back to section 161(1), which is at page 10, if you like, of my bundle of authorities, you've got such a long list of specific justiciable matters, and then the two final catch-alls in (r) and (s) that it's hard to envisage anything that would fall outside those. But if there is anything – and if there isn't anything well and good, because that suits my argument. If there is notionally anything else that could crop up that isn't a personal grievance and isn't a breach of an employment agreement and so on and so forth, the apparent jurisdiction of the Authority, because it seemingly fits into the definition of employment relationship problem, is inherently limited to dealing with something which is legally justiciable. Otherwise you would have a dispute for which there was no legal criteria being decided by a body with legal and remedial and enforcement powers, and that just can't be the case, and that's why I've just submitted that section 101(d) is important because it steers us very much in that direction.

WILLIAMS J:

Doesn't 161 somewhere say, "No interest-based disputes"?

MR HARRISON QC:

Section 161(2)…

WILLIAMS J:

Well, I remember reading it somewhere, I can't…

MR HARRISON QC:

Yes. To some extent –

WILLIAMS J:

Right. So that makes your point.

MR HARRISON QC:

Yes. I also, in my submissions I've relied on that as well. So subsection (2) to some extent again also backs my argument about, the submission I'm advancing now.

WILLIAMS J:

It does though seem to me that the extraordinarily broad language of 262, particularly the fact that it uses the word "generally", which is inherently an imprecise term, and then makes the list inclusive, not exclusive, and I don't know how many items there are on that list but it's a long list, was a way of Parliament indicating to the Courts, "We want this stuff done under the ERA. Judges, do not try to grab back jurisdiction that we intend to be channelled in that direction," because in the past that's exactly what the Judges had done.

MR HARRISON QC:

Well, except that on that approach it's not done directly and by express language and nor is there a sufficient necessary implication, in my submission.

WILLIAMS J:

What does "generally" mean then?

MR HARRISON QC:

The way to deal with, in my submission, and this is almost where I'm at in the written submissions, the way to deal with "generally" and "including" in 161(1), is by saying, well, it still has to be read noscitur a sociis, it still has to be influenced by the list which follows, it has to be influenced by section 101(d), and it has to be influenced by subsection (2).

WILLIAMS J:

But, so, if you look at (d)…

MR HARRISON QC:

So you're still not empowering the Authority to deal with disputes of interest.

WILLIAMS J:

With interests. Yes, well, I don't think there's any real dispute about that. But the words of 101(d) would capture a tort fight, because they are justiciable and there is hook. So where does that get you?

MR HARRISON QC:

Well…

WINKELMANN CJ:

Yes, because that's I think what I was asking you, Mr Harrison. I don't understand how it helps you just to say it has to be legally justiciable, because every cause of action is legally justiciable. So I'm not understanding where you get to at the end of your paragraph 40.

MR HARRISON QC:

Right. well, where it gets to is first of all, the first proposition is section 161(1) does not confer unlimited jurisdiction on the Authority, there are limits, we need to identify those first, and we do so by adopting tools of interpretation such as reading down and noscitur a sociis to say, right, the disputes of rights must be ones that arise under the Act and in the context of the employment relationship. To that extent the jurisdiction is read down. Then we look at

whether on principles of interpretation regarding removal of common law rights and jurisdiction of the ordinary Courts. It can be said that section 161 as a whole is sufficiently explicit to remove the jurisdiction of the ordinary Courts, one in tort, given (r), and two more generally. The answer is if, well, one of the answers is quite plainly if the subject, if the cause of action that is attempted to be litigated in the ordinary Court expressly comes within any of paragraphs A and following then the exclusive jurisdiction bites. That's why you can't sue for breach of an employment contract in the High Court, for example, it's expressly there, but when we've gone beyond subparagraphs (a) to (qc), leaving us only with (r) and (s), we've still got to ask, well, is the subject matter of the cause of action that's to be put forward in the ordinary Court one that is caught by either (r) or (s), particularly (r), and bringing to bear the principles of interpretation I have been urging the answer must be no. But logically we need to identify the scope of what I've called the general jurisdiction to accept, I argue that it is not unlimited, it gets cut down for the reasons I have been advance and move onto the next step of the analysis.

So I don't want to spend more time on these arguments than I already have because I think I have really covered them off particularly the ones about the Employment Court tort jurisdiction and so on, that's pages 14, 15 and 16. The issue of reading down section 161 is addressed at pages 16, 17 and 18 and again I think I've sufficiently covered that off. An eiusdem generis submission is advanced on page 18 at paragraph 62 and, as I say, at para 63 so on this approach even before you reach the privative clause you've got this critical first inquiry as to the true scope of the jurisdiction conferred.

Then I turn at the bottom of page 18 and following to the section 161(3) privative clause and I then argue at page 19 on that it's to be read down by reference to the matters identified including but not limited to the introductory words of subsection (3) except as provided in this Act.

I'm concerned about the time, I will treat that argument which I think I have canvassed to some extent already as read and look at the previous leading authorities in a section that starts at the bottom of page 20 and turn to

JP Morgan Chase, page 21, which is at tab 10 of my bundle of authorities which is to say page 146. Now in assessing the importance of *J P Morgan Chase* as an authority in this field it's important to note that it was limited to a question whether a settlement agreement which terminated the respondent's employment fell within the jurisdiction of the Authority and could be enforced in the Authority. And it was not, as I note in 73, it was not a settlement documented under section 149 of the Act, which provides for a specific means of documenting a settlement and specific powers of enforcement. The settlement has to be witnessed by an Authority member under those provisions and this settlement agreement had not been. So the narrow issue was whether the settlement agreement could be enforced and there was no question which arose as to the exclusivity of the jurisdiction, as against some other Court, there wasn't a contest of jurisdiction but simply a question: how far did the authorities' contractual jurisdiction extend? And, as I note, the key passages appear from para 95 on, and page 163, the Court of Appeal was disagreeing with reasoning of Associate Judge Bell in the case referred to in para 94 *Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24, (2014) 11 NZELR 534, and at 95 they, "Do not agree with the reasoning," which was that an employee who had stolen her employer's money had to be dealt with under the Act, couldn't be sued in the ordinary Courts, and at 95 they say the reasoning, "Effectively treats all issues that arise between employer and employee as exclusively within the Authority's jurisdiction because of the existence of that relationship," "Not Parliament's intention," "In accordance with the definition in s 5 an 'employee relationship problem' must relate to or arise out of an employment relationship," which really simply states the definition. "We consider this means that the problem must be one that directly and essentially concerns the employment relationship." That, with respect, is not a particularly informative formulation as a general test.

Then there's a reference to Justice Pankhurst in *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, which it's said at 97 that it's accepted as, "Sufficient for present purposes," and I'm going to come back to *Pain Management* later. So there's also a reference to at 98 to *BDM Grange*, the next case that I'll come to.

So *JP Morgan Chase* isn't a competing jurisdictions case and therefore doesn't really help us on the central issues here. *BDM Grange* I discuss at page 22 of the written submissions, and it's at tab 11, which is at page 168 of the bundle of authorities. This is a decision of Justices Baragwanath and Courtney sitting together in the High Court, and it's a much more comprehensive analysis of the legal issue, and I won't take Your Honours right though all of the reasoning but I rely on the concluding remarks of the Court at para 74, which I have set out in my para 77 in my submissions, "We have reason that Parliament's purpose cannot be to shift the Authority and the Employment Court the responsibility to deal with claims in tort outside those covered by section 99 or claims in equity," et cetera. Then it is, "refrain from providing tools equivalent to those furnished by section 162 for contract cases. The only way to reconcile the language of subclause (r) with the policies in the ERA is to treat it as its penultimate position in the list of jurisdictions suggests is something ancillary to the core business of the Authority and the Employment Court. The exclusion of tort jurisdiction implicit in that as a whole is there made explicit no doubt out of caution.

And I note that at 78 while the line is drawn by reference to the expression "relate to" or "arise out of" an employment relationship problem, *BDM Grange* is focusing on the legal distinctiveness of the claim or cause of action being advance rather than on the factual elements or subject matter the parties dispute.

So to interpolate that, as the argument for the respondent and the approach in the Courts below as to say these factual allegations are being made in both jurisdictions. The factual elements are the same or largely similar therefore the exclusive jurisdiction of the Authority applies because those factual elements could be advanced by way of, say, personal grievance or breach of contract. It is not the factual distinctiveness of the two claims at issue but the legal distinctiveness and a common law claim in the tort of negligence is as I have argued in the earlier sections of my submissions legally quite distinct on a number of fronts to the personal grievance that's alleged.

So that's the approach and as I note *BDM Grange* comes down in favour of concurrent High Court and Authority jurisdiction not only in relation to claims framed in tort could also other common law claims but that is with the exclusion of claims suing on an employment agreement and of course the specific areas of tort conferred on the Employment Court. So my submission is that *BDM Grange* supports the appellant's position and if properly applied would have left her claim in the High Court intact.

So page 23 and following I've included a summary of, perhaps pretentiously called, "Drawing the threads together." I don't intend to go through that but I certainly stand by it.

Now turning to the abuse of process issue at page 25. I have included in para 82(a) a reasonably lengthy quote from the Court of Appeal dealing with the various abuse of process and related strikeout grounds in the relevant High Court rule. I haven't provided a copy of that case which is reported because really it's only just this passage that is of present use and of course there is the well established principle in the final sentence that if the defect in the pleadings can be cured then the Court would normally order an amendment of the statement of claim.

Now that has a particular resonance or twist if you like in this case because there are two claims which are capable of amendment, the one in the Authority and the one in the High Court so that if in an abuse of process context there is a repugnant overlap between claims in two jurisdictions the abuse of process evaluation ought, in my submission, to be prepared to contemplate the amendment of the claim in either jurisdiction so as to remove any repugnant overlap and in that context I just want to draw to Your Honour's attention from the case on appeal the fact that the appellant made an attempt to amend her statement of problem in the Authority in a way that would have lessened or removed the overlap with which the abuse of process ruling was concerned. The documents appear at page 101 and following of the case on appeal.

I add for completeness that they are moves as from 25 June 2018 and therefore post-date the judgment of Justice Brewer in first instance. So after Justice Brewer's judgment the appellant then self-representing as we can see attempted to introduce an amended statement of problem by the memorandum which appears at page 102 and there she says in para 3, "Recently the appellant has learned she should have made her ERA application to focus only on issues pursued before the Authority to prevent the respondent confusing the background information of the facts matters," et cetera. Then an amended statement of problem was offered and that is limited in effect I think it's fair to say to exclude the workplace bullying and similar allegations. Now that was not accepted for lodging, as we can see from the member's minute which begins at page 107, and in essence the Authority member says, "This proceeding is already stayed and I'm not going to permit an amended problem." So that's merely by way of making the point that the way the abuse of process argument proceeded before Justice Brewer did not take into account the possibility that one or the other or both of the pleadings in the different jurisdictions could be amended to avoid what His Honour saw as repugnant overlap.

Now before I get too much further into the abuse of process topic it may be a suitable time for the morning adjournment, Your Honour.

WINKELMANN CJ:
Yes, we will take the morning adjournment.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.45 AM

MR HARRISON QC:
Yes, Your Honours, we're at page 25 of my outline of submissions. I make the point in para 83 that the abuse of process issue logically only arises if

there is jurisdiction to entertain the claim, if there's not then there's no duplication between the two jurisdictions to be addressed.

Now I note at para 84 that Justice Brewer treated the primary question to be addressed as, "Whether the proceedings traversed the same issues as I develop in what follows." That, with respect, is not the test, or certainly not the entire test by any means. It's part of the inquiry, but that is not the definition of abusing the process, as we shall see. So that approach by Justice Brewer, with respect, as set out in paragraph 85 of the submissions, should not have been the definitive question and answer. But, as I note also there, the Court of Appeal on appeal essentially adopted Justice Brewer's reasoning conclusions without more.

So I do not accept, given my earlier analysis of the different elements and legal and factual issues for determination as between the two sets of proceedings, that the appellant is advancing substantially the same claim but in a different garb. Factually there are overlaps, legally they are substantially different claims. And, as I already mentioned, my para 86, the question of traversing the same issues is not determinative of the dispute, the abuse of process issue. My submission is that it's not abuse of process per se to bring proceedings concerning the same overall subject matter in different jurisdictions, in particular here in the employment relations institutions and in the High Court and, as I say, there are perfectly valid reasons to do that. Basically anyone who practices in this area has experienced issuing proceedings in the High Court to be told, "You should have issued in the Employment Relations Authority or Employment Court," and issuing in the Employment Relations Authority to be told that the jurisdiction is not available. So that particularly when there are multiple parties and multiple causes of action in the sort post-employment termination scenario type of case it's perfectly understandable that rather than fall between two stools a plaintiff or applicant might issue in both jurisdictions, particularly when there are time limits running, different time limits what's more.

So turning to *Beattie v Premier Events Group Ltd* [2014] NZCA 184, [2015] NZAR 1413, my submission is that *Beattie v Premier Events*, which is at tab 13, page 213, of my volume of authorities, supports that very submission, and I've set out the key passages there in my para 87, "Given the statutory context and the creation of exclusive Employment Court jurisdiction, a party who has claims within the jurisdiction of that Court as well as claims that fall within the jurisdiction of the High Court will not in our view abuse the process of either Court by commencing an appropriate claim in each.
1150

WILLIAMS J:
Which paragraph are you in?

MR HARRISON QC:
It's paragraph 48 and it's set out in my para 87 but 48 of the judgment at page 221 of the volume. So it was also noted that the – and this is a case under the Employment Relations Act of course not under the previous legislation. "The Act creates a potential for overlap," para 47, "where the different kinds of claim are based on the same or similar facts but the fact that there are existing claims in the Employment Court does not make the commencement of a proceeding in the High Court an abuse of process."

WILLIAM YOUNG J:
What about if the other claimers have been stayed?

MR HARRISON QC:
Well –

WILLIAM YOUNG J:
I know the High Court proceedings were issued before the Employment Relations Authority proceedings were issued but they weren't served and they were only served after the Employment Relations Authority proceedings were stayed.

MR HARRISON QC:

My submission is that whether or not the other claim has been stayed it can't be determinative of the issue nor whether or not the other proceedings have been served. What happened here was unusual but the question of principle which I am addressing is the fact of issuing in the two jurisdictions.

WILLIAM YOUNG J:

Well I don't really have a problem with that.

MR HARRISON QC:

Right.

WILLIAM YOUNG J:

What I do have I suppose potentially a problem with is where one set of proceedings is used to go round a stay issued in the other proceedings.

MR HARRISON QC:

Well I believe I sufficiently addressed that in submissions I am coming to, that's more of an issue directly related to the way this case unfolded so I will come to that in just a moment.

WILLIAM YOUNG J:

All right, fine.

MR HARRISON QC:

But just because the respondent contends and the Court of Appeal in a judgment under appeal held that its approach was consistent with *Beattie* I'm just tackling this point.

WILLIAM YOUNG J:

Okay.

MR HARRISON QC:

So what the Court of Appeal here said is at page 41 of the case, paras 27 to 28 dealing with *Beattie*, sorry, and I haven't got it quite right because para 27,

page 41 of the case on appeal discussing *Beattie* Their Honours say: “In the High Court Justice Ellis declined to strike out the claim because the issues in the two proceedings were different. The defendants in each proceeding were sued in different capacity and in respect of different alleged wrongs in respect of which the Authority did not have jurisdiction.” Then 28: “This case is different from premier events because the parties sue and are sued in the same capacity and in respect of the same issues. This difference explains the different decisions.”

Now I don't accept that that's a valid point of differentiation nor do I accept that for all intents and purposes the *Beattie* decision turned on the fact that the parties there were sued and suing in different capacities. So to explain that submission we need to go back to *Beattie* starting at paragraph 2 which is a Court of Appeal decision there.

GLAZEBROOK J:
Sorry, I was looking at your submissions, so what page are we on?

MR HARRISON QC:
We're going to B*eattie* at page 214 of the appellant’s bundle of authorities. The Court is explaining how the issue of abuse of process arises in para 2. “Abuse of process was asserted on the basis that the claims advanced in the High Court had the same factual setting as is relied on in separate proceedings
on foot. The appellants claim the damages are sought, in the same amount, and the claims are made by and against the same parties or their privies.” So the argument there is not about different capacities, the argument is the same point that Justice Brewer relied on, duplication of issues. Then if we go, still in *Beattie*, to paragraph 53, which is at page 222 of the electronic case, at para 53 they’re discussing a English case where the causes of action, an abuse of process was upheld because two separate proceedings were issued alleging identical causes of action in each case – we can see that from para 52 just before the quote from Sir Wilfred Greene, “The causes of action in ach Court were identical,” the decision turned on the fact. 53, “Plainly that is not this

case, where the causes of action relied on in the High Court and Employment Court are different," and then there is an argument from counsel that "cause of action" is defined in particular way. And then the Court goes on, "However, to give just one example, the existence of a fiduciary duty owed as a director obviously involves establishing different facts from a claim based on a breach of a restraint of trade provision in an employment contract, even if many of the relevant facts will be common to both claims. The simple point is that here the causes of action in the two Courts are not the same; breach of a contract of employment is not the same cause of action as breach of fiduciary duty." And then at 55, "Nor do we consider that the fact that there has been a hearing in the Employment Court" – there was actually, in this case there'd been a liability only hearing, a full hearing, on which there'd been a long-outstanding reserved decision not delivered in the Employment Court – "Nor do we consider the fact that there has been a hearing in the Employment Court means the respondent has elected that forum to the exclusion of the High Court or is attempting to achieve 'double recovery'. The suggestion is premature." And then I omit words. "It is only at the point when the respondent seeks entry of judgment that an issue of double recovery could arise," and at that point there's an election.

So my submission is that the *Beattie* statements of principle, which I have set out in para 87 of my submission, do govern – for what it's worth, because Your Honours will be taking a fresh look at it in any event – the way the Court of Appeal in this case distinguished *Beattie* is not valid and, as I say at the top of page 27, para 87, even if a putative abuse of process by reason of duplication of proceedings does arise, even if there is on the face of it the bones of argument that the duplicate potentially is an abuse of process, the question is what should the Court determining the issue do in response? A rational and proportionate response is required, and that cannot simply be to strike out whichever proceeding happens to be the subject of a defence application. There are alternatives which were not considered either by Justice Brewer or the Court of Appeal, including stay or putting the plaintiff or applicant to his or her election.

1200

So, as I note, if we go to para 90, if we go to the High Court judgment, Justice Brewer identifies two reasons why the Court proceedings should be struck out but he fails to consider the alternative of staying the High Court proceeding in the meantime if the Employment Relations Authority is the better bet or allowing the applicant to elect. Paragraph 91 Justice Brewer's first reason is that by the appellant's choice the proceeding before the authority has progressed far beyond the High Court proceeding and equally that she chose to, clearly chose to advance the authority proceeding before the High Court proceeding, so it is not just to allow her to change lanes simply because the proceeding before the authority has stalled. I think this is coming close to Your Honour Justice Young's concern.

Now first of all paragraph 92: "The statement that the authority proceeding has progressed far beyond the High Court proceedings is incorrect. It is inconsistent with the authority's own summary at para 62 of the High Court judgment," and that's in the case, page 28 of the electronic version of the case. Justice Brewer is setting out the authority determination on the suppression order and stay and in clause 2, "The capacity of Ms G to proceed has become a preliminary issue to determine the parties have not yet attended mediation, they have not had any discussions," and so on. So in terms of progress that the authority cases simply stalled at the outset, hasn't even got to the first step of mediation in paragraph 66 Justice Brewer confirms that saying that the subsequent stages of investigation and determination have not yet been reached.

So in my submission at 92 is the authority proceeding was stayed at the very outset and the High Court proceedings themselves have not been advanced because the respondent's first step was a strikeout application.

The stay was objected to by the appellant and the reasons for those objections can be, if they are needed, can be seen in the appellant's two affidavits in opposition to the strikeout application which are included in the case on appeal but I won't take Your Honours to them unless I am asked to.

Para 93 Justice Brewer's second reason involves attempting to weigh relative disadvantage or prejudice. His Honour considered on the one hand that allowing continued pursuit of the High Court proceeding risk a real degree of prejudice to the respondent given the expenses they have already incurred defending a duplicate claim before the authority but there was no evidence on that point to support that conclusion. No evidence even that any expense had been incurred by the respondent, after all as I noted earlier, the proceeding hadn't even got to a mediation stage. In any event, the respondent's costs – one can't be too tender about a large commercial entity as a respondent – it's costs were and should have been treated as a matter for the authority.

Ninety-four, Justice Brewer also contends that the appellant would not be significantly disadvantaged by striking out this proceeding and that I submit is plainly wrong. There are significant differences as I have identified in the legal and factual issues raised and it was for the appellants to assess the relative disadvantage. I mean I don't expect to be put to this choice but if it was a choice given the limitation issues that I've explored and the liability issues, if there was a choice between the two proceedings the choice would have to be in favour of the High Court proceeding because on the face of it faces at the very least significantly fewer potential limitation obstacles.
1205
Someone in the position of the appellant, assuming the jurisdiction argument is correct, must in my submission be able to make the choice for herself if the only response to an alleged abuse of process is to require that as distinct from staying one or the other.

WINKELMANN CJ:
You say you don't expect to be put that choice, do you say that the appellant should be able to proceed in both the ERA and in the Court?

MR HARRISON QC:
No, she is obviously currently attempting to proceed in the High Court and her – this is a point I make later on in terms of relief – her Authority proceeding is currently stayed. Were she allowed, left free to pursue her High Court

proceeding as a result of a decision of this Court because the strikeout application is rejected, she pursues that claim. Her other claim remains stayed and she may well leave it stayed. If she attempted to resurrect it the issue could then be addressed at that stage either in the Authority which would have the power to continue its stay or indeed in the High Court under its inherent jurisdiction to stay the proceedings in the Authority. The inherent jurisdiction extends to control of proceedings in subordinate tribunals, I think that's a safe proposition. I actually do have an authority but not right at my fingertips for that, and it's like an anti-suit inherent jurisdiction . If hypothetically she's left free to pursue the High Court proceeding but tries to pursue on both fronts and that is seen as unduly burdensome for the current respondent that could be controlled at that stage. What I'm saying is it doesn't need to be because we currently have her wish to pursue the High Court proceeding and the stayed Authority proceeding.

GLAZEBROOK J:

Can I just check on that because it's not a subordinate tribunal to the High Court because the High Court has no jurisdiction at all in employment matters, sorry, subject obviously to the argument where tort lies but if it is purely the ERA jurisdiction the High Court has no jurisdiction so I'm not entirely certain that it would have the ability to stay an ERA.

MR HARRISON QC:

Well, there were two cases in the then Supreme Court of New Zealand way back in the day. One of them I know is called *Butler v Attorney-General* [1953] NZLR 999 where at a stage when the then I think Arbitration Court lacked its own power to punish for contempt of Court the inherent jurisdiction was held capable of invocation to punish a contempt of the then Arbitration Court so that the proposition which I am advancing is that the inherent jurisdiction is wide enough but even if I'm wrong the Authority remains seized of that stay and it could order its own stay.

WINKELMANN CJ:

Well isn't the simple answer that the High Court, if she persists the High Court could just stay the High Court proceeding?

MR HARRISON QC:

Well that's right, I mean if there was an egregious attempt to pursue both proceedings in a way that was oppressive to the defendant one way or another the High Court could knock that on the head and, if not, the Authority could. But that's not what happened here. The reasoning was, "No significant disadvantage if we strike out the High Court, we're not giving you an option to elect which, and we're not adopting the lesser alternative of simply staying one or the other."

Now just coming round to Justice Young's concern to the extent that I haven't addressed it, obviously I have not been involved in this case at the earliest stages and what we do have is an assertion that in the aftermath of events about which she sue post-resignation, she was under a disability, she had a nervous breakdown that's asserted in the affidavits and was incapacitated for a period, there is no, I don't think there's any direct explanation for why the delay in serving the High Court proceedings, there may be, but if there is it's slipped my mind. All I can say is that drawing the necessary inference, that should not be held against her relative to the alternative, which is striking out, which is ex hypothesi, a valid, tenable High Court claim in tort.

WINKELMANN CJ:

So Justice Young's question is whether she is actually using this proceeding for a collateral purpose, which is to step around the stay, and your response would be no, she's not, she's pursuing a right of action that she doesn't have in the ERA?

MR HARRISON QC:

Well, she's certainly doing that. She originally issued both proceedings, she's now in receipt of the respondent's reply in the Authority which raises all manner of limitation and other jurisdictional objections, she's entitled to

reassess her position and say, “Right, rather than argue about whether the Authority has jurisdiction and all these technical arguments that have been raised, it’s more clear-cut for me to proceed. The only obstacle I have, if jurisdiction is resolved, is a limitation defence which I believe I can meet.” So one should not lightly draw a conclusion that the whole thing is a deliberate abuse of the process to get round the temporary stay in the Authority.

O’REGAN J:
Well, why doesn’t she then discontinue the ERA proceeding?

MR HARRISON QC:
Because if she does that until, while awaiting this Court’s decision on the jurisdiction point.

O’REGAN J:
No, but she should have done it before she went before Justice Brewer, if she was facing the duplication. Point.

MR HARRISON QC:
What Your Honour is suggesting is that faced with an argument that the High Court completely lacks jurisdiction to hear her tort claim, she should discontinue –

O’REGAN J:
No, no, I’m saying having got to the point where she’s accused of an abuse of process in a claim, why does she now persist with that claim?

MR HARRISON QC:
Because if – well, Your Honour’s question was different, it was why hasn’t she discontinued? The answer is if this appeal goes against her on the jurisdiction point that would leave her with nothing.

O’REGAN J:
So she’d go back to the ERA.

MR HARRISON QC:

No, she would – she already faces limitation claims. If she withdraws that claim and then brings a fresh one, she just compounding her problems. She's got to leave the Authority proceeding afoot even if stayed until she knows whether the High Court has jurisdiction.

1215

O'REGAN J:

Well has she indicated that if she can proceed on the High Court she won't proceed in the ERA?

MR HARRISON:

I don't have firm instructions from her on that.

O'REGAN J:

So she's still contemplating running duplicate of claims or at least claims arising out of the same facts.

MR HARRISON:

She's merely left the two claims afoot until this Court determines the jurisdiction issue. To put it another way, if the concern that Your Honour is taxing me with was determinative on the abuse of process issue the response would be that the Court would put her to her election and that would have been an option if that was the concern rather than simply striking out the High Court and making the decision for her so that all she is left with is a stayed Authority proceeding with a whole raft of limitation type objections.

GLAZEBROOK J:

Mr Harrison, can I just – I mean I have a bit of trouble with the whole abuse of process thing if in fact, as you assert, the High Court has exclusive jurisdiction in tort or at least the ERA doesn't have a jurisdiction and the ERA has exclusive jurisdiction in contract. Now if they were in the same Court there would be nothing wrong with putting the two together as you clearly point out because you do have concurrent liability in tort and contract in respect of a

contract. So I have a bit of difficulty with any argument that says you actually have to give away one or the other and that it's an abuse of process to file two claims when you actually can't file them in the same jurisdiction. And so if you've got the right to do that I have a bit of difficulty with an argument that you're getting around the stay or any of that sort of pejorative type analysis when you actually have two claims you're perfectly entitled to file.

Now it might be later that it has to be worked out which one takes precedence as you were noting earlier because you may not be able to run the two of them in the same jurisdiction but to say it's an abuse of process just seems to me very odd in that context. Now that's assuming you're right on the High Court having exclusive jurisdiction or at least the ERA not having jurisdiction in tort. I'm probably just putting your points in another way.

MR HARRISON:

And that's consistent with the *Beattie* case where they're saying well the abuse doesn't arise until the plaintiff is attempting to achieve a double recovery and at that stage we can control that anyway by either requiring the election at that stage and the other approach is, if I could just come to a case that my learned friend cites which is *Anderson v Northland Health Limited* HC Whangarei CP2/96, 13 October 1997 which he cites in a way that suggests he thinks it supports him but in my submission it doesn't, it's a case in my learned friend's bundle of authorities at page 121, a decision of Justice Barker, a Judge with respect who knew his procedure and was a very pragmatic Judge as well, and if we go to this case it was a case where the plaintiff had filed a claim in the Employment Tribunal and she claimed that there had been an unsafe workplace but this was chemicals rather than bullying, this is page 2 or 122 of the volume, and also page 123. She filed a claim in the High Court making similar allegations but seeking exemplary damages for gross negligence, because of the ACC bar she was suing for exemplary damages, and as noted on page 123, page 3 of judgment, the plaintiff, "Applied for orders staying the proceedings in the Employment Tribunal and preventing the plaintiff for prosecuting those proceedings." So obviously His Honour Justice Barker thought that, or at least was prepared to contemplate

entertaining that stay application in relation to the Tribunal proceedings. Now this is why I'm citing it – down the bottom of page 123 – "The defendant relies on the well-known principle that it is an abuse of process," note the language, "to allow to proceed two concurrent proceedings involving the same matter," not to issue them but to allow them to proceed. So this was a contest over which of the two proceedings should proceed first, not that one of them should be struck out against the other. So it's to allow to proceed two concurrent proceedings. And the result was to stay one of the proceedings, not to strike out, as we can see from page 8 of the judgment, which is at page 128 of the volume.

So there was a reference to *Accident Rehabilitation and Compensation Insurance Corporation v Kelly* (1997) ERNZ 173; (1997) ERNZ 193 (CA), that's discussed, the Employment Court Judge – this is halfway down the page – said, "Appropriate judicial oversight would ensure that the plaintiff will not recover twice for the same loss. The Court of Appeal did not interfere with Judge Palmer's decision. This case does provide authority for separate concurrent proceedings where distinct claims must be heard in separate jurisdictions," and then there's a quote from the Court of Appeal in the *Accident Compensation* case, last sentence, "Any concern at possible double recovery can be addressed when and if it arises," and then the decision goes on, looking at issue estoppel, then finally page 11, weighing up everything, after weighing up everything in the facts of this case, "I conclude it appropriate that the proceedings in the Tribunal to determine the plaintiff's claim be heard first," and, "Whether the plaintiff will have the opportunity of seeking exemplary damages in tort in this Court will have to be determined once the Tribunal decision has been made." And so the proceedings in the High Court were stayed pending the – down the bottom of the page – "Pending the expeditious conduct of the plaintiff of her proceedings before the Tribunal." Now I'm not citing this because I say that here it should be Authority proceedings go first, I'm just submitting that this is the kind of balanced approach that's needed. It's not that mere duplication of proceedings is the abuse, the pursuit of both proceedings to trial in tandem and concurrently in different jurisdictions may be an abuse and the Court has jurisdiction to

control that by staying one or the other or other appropriate directions. And that's the kind of nuanced approach that ought to have been adopted here, with the result that I urge – which is basically that if the appeal succeeds overall there's no dismissal on the grounds of abuse of process nor any stay, just leading the stay in the Authority extant, which is a sufficient response to the way matters have ended up.

So then page 29, the appeal in relation to the suppression order. My main point here is that para 101, Justice Brewer, is suppressing names of the parties in the High Court proceeding having found that the Court has no jurisdiction. Now in particular if that conclusion about jurisdiction is overturned and the High Court proceeding is left able to be pursued, the suppression order appears to be a permanent order in relation to the High Court as distinct from the interim order in relation to the Authority proceedings. The suppression order is no longer appropriate and should be lifted, judged by the *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 standard with which Your Honours will be well familiar.

So all that is set out and I won't take Your Honours through it but I rely on those submissions.

O'REGAN J:
The Court wouldn't be able to publish the names in the meantime though because the Court would then be in breach of the Employment Relations Authority's order.

MR HARRISON QC:
I don't accept that literally he would be in breach.

O'REGAN J:
Well wouldn't the Court need to set that aside or something? I mean I just don't see how you can – you're suggesting that the Courts of New Zealand website, for example, should publish something which is subject to a suppression order.

MR HARRISON:

Well if we go back to the basics, with respect, I don't agree with Your Honour. If a subordinate tribunal such as the Authority suppresses the names of the parties in a proceeding before it that suppression operates in relation to that proceeding. If the matter comes –

O'REGAN J:

Yes, but the judgment identifies that –

MR HARRISON:

If I may, Your Honour, if I may just finish this. If the matter comes before the High Court in some other context the High Court may decide that it will make its own suppression order out of comity, if you like or respect for the Authority order may but not must. It's not an automatic thing so the question is leaving the temporary Authority order intact ought the names of the parties in the High Court proceeding to be able to be published.

O'REGAN J:

Well how would you suggest the Court would identify the Employment Relations Authority judgment in its judgment which will be published?

MR HARRISON:

This Court?

O'REGAN J:

Yes.

MR HARRISON:

Well it will be obvious that the parties to this appeal and the Authority proceeding are the same. That may just be a collateral problem.

O'REGAN J:

A collateral problem is acting completely inconsistently with a select extant order.

MR HARRISON:

I mean there are other ways of crafting the order. What I am submitting is that there should not have been a permanent name suppression order in the High Court. If ex hypothesi the High Court proceeding is able to resume in that Court as a claim in negligence. As things stand there is a permanent name suppression order in the High Court. There should not be. Whether there is some kind of interim solution which is that there is interim suppression of name in the High Court and in this Court so long as there is continued interim suppression in the Authority but if Your Honours feel a need to craft it that way that would be one way through. My bottom line is there should not have been and should not continue to be permanent name suppression in the High Court proceedings.

WINKELMANN CJ:

Sorry, what was the solution, that last point, I missed it?

WILLIAM YOUNG J:

Saying that the suppression in the High Court proceedings remains as long as there is suppression in relation to the ERA proceedings.

MR HARRISON:

Yes, it becomes a temporary suppression order of the names of the parties in the High Court rather than permanent suppression, that would be one way of addressing it, if the High Court proceeding is allowed to continue further.

WINKELMANN CJ:

But discontinuing the employment authority proceeding would not solve your problem, would it? You'd have to apply…

MR HARRISON QC:

We might well – I'd have to look at that. I mean, if it was important enough then we might have to go back to the Authority to life that interim suppression order. The interim suppression order was only because it was, a concern was raised about the appellant's then mental state and whether she could cope

with name suppression, and she never, that wasn't her initiative, she didn't want that, but it was imposed.

WINKELMANN CJ:

So it was for her benefit, not the respondent's?

MR HARRISON QC:

Yes, it was, in terms of what was then seen as her fragile mental state, and she's moved on from that and she doesn't want that name suppression. Of course it's quite possible, if my argument about inherent jurisdiction of the High Court is right then maybe the High Court could deal with the interim suppression in the Tribunal. But I think there are the more important issues than this that the Court will have to grapple with. So unless I can be of any further assistance, Your Honours, those are my submissions for the appellant.

WILLIAMS J:

I just have one question. It may not matter very much, but the appellant is referred to as Ms G in the HC judgment, but that's not her name, is it?

MR HARRISON QC:

Yes.

WILLIAMS J:

It's Ms Y.

MR HARRISON QC:

No.

WILLIAMS J:

If LY or, or YL, is her mother…

MR HARRISON QC:

Yes.

WILLIAMS J:

The family name is Y, not G.

MR HARRISON QC:

All right, well, if Your Honour says.

WILLIAMS J:

Well, I mean, I'm just – I think the person who was assisting her was her mother.

WINKELMANN CJ:

How does she refer to herself, Mr Harrison, is the question.

MR HARRISON QC:

G, Ms G.

WILLIAMS J:

Does she?

MR HARRISON QC:

SG is the name she's known to me as.

WINKELMANN CJ:

Yes, so that's what her name as.

MR HARRISON QC:

SG. Right, Your Honours, thank you.

WINKELMANN CJ:

Thank you, Mr Harrison. Mr Clarke?

MR CLARKE:

Your Honours, I have prepared a very short oral outline of argument which, with your leave, I'll tender to you.

WINKELMANN CJ:
Yes.

MR CLARKE:
Your Honours have had the benefit of lengthy written submissions and I don't propose to take you through my written submissions at length. What I propose to do is to address you on the oral argument that I've handed up and also a number of point that have been raised by my learned friend, and my preference would be to engage with Your Honours on those questions.

Perhaps to start with I would frame the hearing as this. I think the issue for Your Honours to determine is the correct legal test for demarcating the boundary between the employment institutions and the High Court, that seems to be the key issue. And the focus really is on what do we mean by "jurisdiction" about employment relationship problems generally. Because once that issue –

WILLIAM YOUNG J:
You rely on the opening words of section 161(1)?

MR CLARKE:
I rely on the three points, Your Honour. The opening of section 161(1), because it's very broad, it says about employment relationship problems generally, and one thing we haven't focused on is the definition of employment relationship problems. But secondly this is also a breach of employment agreement claim because of the implied duty to ensure health and safety and, thirdly, because the claimant says she was forced to resign and was bullied that's a personal grievance for unjustified constructive dismissal and disadvantage.
1235

So we don't even need to get to – once those are invoked we don't effectively need to get down to understand what subset clause (r) means.

GLAZEBROOK J:

Just repeat what you just said?

MR CLARKE:

I apologise. My primary position is that this comes within the definition of the first subsection 161(1) because the claim is framed in the High Court is about an employment relationship problem. Secondly in addition to that it comes within the list of specific subclauses because effectively a breach of implied duty to ensure health and safety workplace comes within (b)

WINKELMANN CJ:

So is your argument there that it doesn't matter how you legally characterise if it's factually within that.

MR CLARKE:

Correct.

WILLIAM YOUNG J:

Just dealing with that, I looked at the definition before, employment relationship problem is defined in a way that correlates quite well to s 161(r).

MR CLARKE:

That's correct, it's a little bit circular.

WILLIAM YOUNG J:

What I really am struggling with. If you look at section 161(r) it appears to be drafted on the presupposition that a claim can conceivably both concern an employment relationship problem but also be in tort in which case the ERA doesn't have jurisdiction.

MR CLARKE:

Yes I agree that subclause (r) is problematic. I think it's circular because if you look at that introductory wording determinations about employment

relationship problems and then you look at the definition of employment relationship problems it includes matters relating to employment relationship.

WILLIAM YOUNG J:

Relating to or arising out of an employment relationship which is the same language as in section 161(r).

MR CLARKE:

Yes, so its quite circular but what I do put a lot of emphasis on is those first three words “any other action” so it contemplates actions which don't fall within effectively (a)(2)(q)(c) above.

WILLIAM YOUNG J:

Say a claim for exemplary damages.

MR CLARKE:

I beg your pardon?

WILLIAM YOUNG J:

Say there were a claim for exemplary damages.

MR CLARKE:

Out of a negligence claim?

WILLIAM YOUNG J:

Yes.

MR CLARKE:

The issue is again about the cause of action in my view.

WILLIAM YOUNG J:

Well wouldn't that be a claim founded in tort?

MR CLARKE:

Well I think one of the interesting issues is what is a cause of action and there is an English case, Court of Appeal decision *Letang v Cooper* which describes a cause of action as a set of facts which give rise to remedy against the defendant.

WILLIAM YOUNG J:

Rather than a legal formulation.

MR CLARKE:

Correct and in that judgment Lord Diplock went on at length to say, “It's not about the form in which its being pleaded or the description that's been given to the pleading it's about the facts.

WILLIAM YOUNG J:

I mean I suppose the point that Justice Glazebrook made is that if there were no hard edge jurisdictional limits and the High Court retained complete jurisdiction over all claims and likewise the ERA had complete jurisdiction then there would be nothing objectionable about a claim premised on (a) the language of section 161(1) treating it effectively as an employment relationship problem, breach of employment agreement, et cetera, but a concurrent claim in tort.

MR CLARKE:

Well I do think there is a distinction that can be drawn.

WILLIAM YOUNG J:

Sorry, but say there were no hard edged jurisdictional issues then you could have concurrent claims under the statue and in tort, couldn't you.

MR CLARKE:

Yes, but this is why the Courts have tried to give meaning to the words “exclusive jurisdiction” because –

WILLIAM YOUNG J:

I'm sorry I'm just getting ahead of myself, sorry, you're getting ahead of me. It used to be very common in claims against solicitors or accountants for claims to be pleaded in tort in contract. Now why should the Act be construed as requiring a claimant to abandon a claim in tort and pursue only the claims under the statute?

1240

MR CLARKE:

The reason is because the whole purpose of the statue is to confer exclusivity on the Employment Relations Authority if it is in fact a claim about an employment relationship.

WILLIAM YOUNG J:

Why wouldn't it then give the ERA exclusive jurisdiction if the claim is founded in tort but which arise out of an employment relationship?

MR CLARKE:

Well that's simply because the Employment Relations Authority and Employment Court are creatures of statue.

WILLIAM YOUNG J:

But they could have a jurisdiction conferred on them.

MR CLARKE:

Yes they could and they haven't. The issue here is that not all tort claims are gone as had been suggested. In fact the Courts have said where there is a tort claim which arises independently of the employment –

WILLIAM YOUNG J:

The exclusion is unnecessary in section 161(r) if that's the approach because no claim that's founded on an employment relationship will ever be concurrently a tort claim. I mean the words are sort of rendered otiose, aren't they, on this interpretation.

MR CLARKE:

I do agree that subclause (r) is problematic generally and it's hard to make sense of it but as I said that a cause of action is a set of facts and if a set of facts come within an employment relationship problem then Parliament's intention is it should go to a specialist Court which is cheap and quick and effective and gives access to justice.

WINKELMANN CJ:

But there's a tension there because it's actually using – you're saying it's a set of facts but then it uses a legal construct to refer to a tort.

MR CLARKE:

Yes, well I'm talking about a set of facts is essentially the definition of a cause of action and the way in which the Courts below have dealt with this is to look again at the substance of the claim which is again looking at the facts to say, in essence, are we really talking about an employment relationship problem because if so it must go to the Authority.

WINKELMANN CJ:

But I'm saying to you that they are not using the expression cause of action there in the sense of just a lot of facts, it's not the sort of deconstructed factual soup it's actually, they're talking about causes of action in terms of legal forms.

MR CLARKE:

Yes, well let's put it another way. If you're entitled to plead a set of facts that are identical in the Authority and the Court but you add the label "negligence" it means that we will end up with claims in both Courts because in this case there are factually no differences between the statement of problem and statement of claim. There's no one fact that's asserted which makes it different.

GLAZEBROOK J:

Well that would be the case if it was all in one Court though, wouldn't it, I mean that's the difficulty. I can understand your argument that says it is essentially unemployment relationship problem and that's within the jurisdiction but if in fact tort is taken out and you are allowed to formulate it you've got a set of facts and you've got a cause of action it's difficult to say the tort action is not a cause of action, isn't it.

MR CLARKE:

Yes and I understand.

GLAZEBROOK J:

But I can understand what you're probably.

MR CLARKE:

The point is if Your Honours look at the statement of problem, the nature of those allegations are about bullying in a workplace, poor treatment by colleagues, the employer's failure to keep someone safe. There is no question that is an employment relationship problem, absolutely none, so there's no question it's correctly before the Employment Relations Authority. The only reason that case is not proceeding is because the applicant in that case has refused to provide medical evidence and I will take Your Honours through a chronology on that.

She has then waited a year to start her High Court claim because they have effectively reached a stalemate where the Authority says we need medical evidence to proceed if you want to proceed and she has point blank refused to provide that. Lo and behold the High Court proceeding is served when a strikeout was given in the High Court she went back to the Authority and tried to amend the statement of problem.

WINKELMANN CJ:

Can we go back to the statue though because that's the problem we're dealing with at the moment.

WILLIAMS J:

Just on one of the points you were making just before you mentioned the disability issue in the ERA. Do you still have to make some sense of those words in bracket in (r) and you can't wish them out of the section what then do they mean?

1245

MR CLARKE:

Yes, well if we look at closely so we start with “any other action” so that suggests something that doesn't fall between (a)(2)(q)(c) and then we have, as you say, the first exception or qualification being an action that is not directly within the jurisdiction of the Court. Well my submission is that statement is squarely within the jurisdiction of the Court so its hard to understand –

WILLIAMS J:

That's referring to the Employment Court not the authority?

MR CLARKE:

Well the use of the word “Court” in this sense is used as well for the Authority.

WINKELMANN CJ:

Are you sure? Where?

MR CLARKE:

I beg your pardon.

WINKELMANN CJ:

It seems an unlikley thing for them to do.

MR CLARKE:

No, sorry, at the start of 161 is it's the Authority’s jurisdiction.

WILLIAM YOUNG J:

I think “Court” means the Employment Court, doesn't it?

MR CLARKE:

Yes it must do.

WILLIAMS J:

So that must mean that that first exclusion is unless the Court has first instance jurisdiction, right?

MR CLARKE:

Yes.

WILLIAMS J:

Then arising from or related from the employment relationship or related to the interpretation of this Act. Now up until that point it seems to me your argument is unassailable, an allegation of bullying, et cetera, is clearly, one might say, an employment relationship problem. Then what do you make of the words that follow that? Why exclude that?

MR CLARKE:

Yes, well I think it's unnecessary to in the sense that.

WILLIAMS J:

Well it's unnecessary on your argument.

MR CLARKE:

Yes. Of course I think what Parliament was intending to do was intending you to do was to say that tort conferred on the Employment Relations Authority is extremely narrow or the Employment Court and that's to do with strikes and lockouts. So they very clearly reserve the tort jurisdiction to the High Court and Courts of general jurisdiction and the question then really is in terms of the way the Courts have approached it is to give meaning to that they have carved out torts that do not arise out of the employment relationship so some other source, some other capacity. So, for example, in this context if the claim was breach of the Health and Safety and Employment Act the supplier duty,

so still owed between employer and employee but in different capacities that wouldn't be Court.

WILLIAMS J:
But that doesn't really make a lot of sense if you read section 161(1) the head part and (r) as a single statement it's hard to see how that's right.

MR CLARKE:
Well so in the situation that I've just explained and this is what the Courts are trying to do is the distinguishing between whether the rights arise, are they out of the employment relationship or out of some other source, what are the capacities in which they're owed, is it as employer or –

WILLIAMS J:
Yes, I understand what the Courts are saying but 161(1) says, “The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally including any other action arising from or related to the employment relationship or the interpretation of this Act other than an action founded on tort. Now that just seems as plain as day to me. Why is this hard.

MR CLARKE:
Well in my submission if you accept my argument about we're talking about the subject matter of the claim rather than the label that's being ascribed to it.

WILLIAMS J:
I'm just reading the words, I'm not applying any esoteric analysis at all, that's what the words –

WILLIAM YOUNG J:
The words “founded in tort” suggest a cause of action label.

MR CLARKE:

Yes they do. Look, I'm not sure if I can assist Your Honours with making sense of that.

WILLIAM YOUNG J:

A number of the cases cited are actually broadly similar to this so *Gilbert v Attorney-General.*

MR CLARKE:

Yes.

WILLIAM YOUNG J:

Anderson v Northland Health Limited, Brickell v Attorney-General [2000] 2 ERNZ 529 and *Caldwell v Croft Timber Co Limited* [1997] ERNZ 136 are all broadly similar cases, some in the High Court some in the Employment Court.

MR CLARKE:

Yes Sir, they are all distinguishable in my view. *Brickell* for instance was described as the first case of its kind in New Zealand. There was no analysis on the existence of the duty of care. It was under the old employment contracts at 1991 which had a different jurisdictional foundation and importantly under the Police Act it excludes the application of the Employment Contracts Act. So there was no choice but to sue in the High Court. That case has only ever been applied once and that was in *Attorney-General v Benge* [1997] 2 NZLR 435 (CA) and that was a similar pattern with a policeman not able to bring a claim in the Employment Tribunal in those days.

The *Caldwell* case, Your Honours, also –

WILLIAM YOUNG J:

Sorry if we just go back a little bit. The idea that employers owe a duty of care to employees to provide a safe system of work isn't novel.

MR CLARKE:

No but it's recognised as a contractual duty.

WILLIAM YOUNG J:

No, I don't think it is. I'm unfortunately old enough to remember personal injury claims. I'm fortunate enough having been born long enough to be involved, and I'm fortunate enough to still be able to remember them but anyway.

WINKELMANN CJ:

Moving on from you.

WILLIAM YOUNG J:

Those claims were pleaded in tort as a duty of care.

MR CLARKE:

Yes, and I suspect they were, were they pre-ACC legislation?

WILLIAM YOUNG J:

Yes, of course, so I don't think the ACC Act took away the concept of the duty of care it just meant that you couldn't sue for personal injury.

MR CLARKE:

Yes, and what we're talking about here is psychiatric harm which may or may not be prohibited by the –

WILLIAM YOUNG J:

All the old cases of course were physical harm.

MR CLARKE:

Yes, but we haven't seen High Court cases alleging negligence for psychiatric harm arising out of employment relationship.

WILLIAM YOUNG J:

Other than *Brickell.*

MR CLARKE:

Other than *Brickell* which is the police case.

WILLIAM YOUNG J:

Gilbert is similar except it's in an Employment Court.

MR CLARKE:

Well *Gilbert* is helpful because it clearly identifies the contractual duty to ensure health and safe workplaces. I mean the other jurisdictional boundary –

WILLIAM YOUNG J:

I mean I agree they are overlapping claims.

MR CLARKE:

Well potentially that's what this issue is before Your Honours.

WINKELMANN CJ:

If we look at the definitions of these things the employment relationship problem it is possible to take a narrow interpretation of that or an interpretation of it, not necessarily narrow which limits it to the contract.

MR CLARKE:

I'm not sure I understand why it would be limited to the agreement. The whole construct of the Act is on employment relationships which is defined quite broadly and this is a significant move away from the Employment Contracts Act which was –

WINKELMANN CJ:

Well it's defined by reference to a series of relationships which includes union to union.

MR CLARKE:

Yes, so a very broad definition of what an employment relationship is but if they had intended it to be limited to employment agreements.

WINKELMANN CJ:

It's not that broad a definition.

MR CLARKE:

Section 162 deals with breaches of employment agreements.

WINKELMANN CJ:

No, but employment relationship is not that broad, it captures a lot of relationships you might not think but in the critical one it's an employer and an employee employed by the employer so that's not that broad.

MR CLARKE:

Correct, and then if we look at the definition of employment relationship problem.

WINKELMANN CJ:

It includes a personal grievance.

MR CLARKE:

In this case the resignation based on breaches of bullying is a constructive dismissal claim, that's how it's traditionally brought.

WINKELMANN CJ:

Yes, I mean and your point is that you can fit the appellant's factual claims, she could have formulated as a personal grievance and she could have formulated a dispute but why is it necessary to read and any other problem relating to arising out of an employment relationship is basically extending to any kind of cause of action which is connected in some way as opposed to having – connected factually in some way to the employment relationship as opposed to having the employment relationship as an element of it.

MR CLARKE:

Arising out of and relating to – well I'm not quite sure what the alternative formulation is, you can't say a breach of an employment relationship.

The whole idea was moving away from the Employment Contracts Act to the Relations Act was to enlarge the jurisdiction so that it covered all aspects of the employment relationship. So it was intended to stop these sorts of claims where you can effectively bring multiple proceedings in different Courts and we have to give meaning to the word "exclusive". Exclusive means not permitting any other means otherwise this becomes a futile section.

WINKELMANN CJ:

It's just that your interpretation involves taking away rights and is there any – it does, doesn't it? It says that you just have to bring it within the existing forms and this and you can't have your tort cause of action.

MR CLARKE:

I'm not sure if you'd say it's taking away rights, it's essentially creating them as a statutory, a claim under a statue as opposed to a common law. They're still all the other tortious actions that continue to exist and we've seen cases like *Beattie* where you can still sue for breach of fiduciary duty, conversion, breach of copyright, breach of confidential information, defamation, they're all alive.

WILLIAM YOUNG J:

Even though it's probably a breach of contract to steal your employer's money.

GLAZEBROOK J:

Yes, that's what I was going to say.

MR CLARKE:

So the issue is, well, and that's what I think the case (citation 12:55:07) was about is theft, something that you would expect of your employment relationship or as independent to that.

GLAZEBROOK J:

I would have thought it was certainly grounds to dismiss somebody having gone through the proper procedure.

MR CLARKE:

Yes.

GLAZEBROOK J:

Because there would be certainly at least an implied duty not to steal from your employer.

MR CLARKE:

Absolutely, Your Honour.

WILLIAMS J:

There's a lot to be said from what Associate Judge Bell, or the approach Associate Judge Bell took I would have thought. It seems rather obvious to me that theft as a servant, to use the criminal form is something related to the employment relationship.

MR CLARKE:

Yes, I think it can be argued both ways. Associate Judge Bell actually has issued a number of judgments which are quite interesting because he has defended quite hard the exclusive jurisdiction of the Employment Court and in particular made a number of pronouncement warning against sidestepping or trying to defeat the exclusivity by pleading in tort. I haven't put those before Your Honours but I can obviously send citations.

WILLIAMS J:

Well he seemed to have got disagreed with but.

MR CLARKE:

On that case, Sir, yes.

WILLIAMS J:

I'd be interested to hear from you, we're getting close to time now but I'd be interested to hear from you about the way in which section 161 got constructed, in particular the removal of clause 7 from the Bill and the

placement of some of its words into section 161, the head part and in (r). I don't know whether we've got time to do that now or whether you want to think about it over the lunchbreak.

MR CLARKE:
I think I would need the opportunity over the lunchbreak.

WILLIAMS J:
It's just the point is that clause 7 refers specifically to agreements and actions under the Act.

WINKELMANN CJ:
Do you have that material?

WILLIAMS J:
You refer to it in your submissions.

MR CLARKE:
Right, I no doubt will have it in my bundle of authorities but I'm not sure if – I certainly appreciate the opportunity over the lunchbreak.

WINKELMANN CJ:
Do you want to take the lunchbreak three minutes early? Okay, we will do that.

MR CLARKE:
I'm grateful.

COURT ADJOURNS: 12.57 PM

COURT RESUMES: 2.15 PM

MR CLARKE:
Your Honours, before the luncheon adjournment I was asked the question about the removal of clause 7 from the Employment Relations Bill if I can

address that. I have some papers which, with your leave, I will tender to you. They include the original clause 7 and the two clauses dealing with jurisdiction together with a speech from the Honourable Margret Wilson which explains a little bit about that.

If I can start first with the bundle of authorities, the respondent's bundle of authorities at page 56 because that really gives the explanation. This is the select committee reporting back to Parliament and it noted that "The policy intent of the Bill is for the employment institutions to have exclusive jurisdiction over employment matters. During consideration we felt that the current wording of the Bill was too narrow to fit this intent and discussed possible amendments to ensure the clause would capture the entire intended specialist jurisdiction. The majority, however, now recommends that clause 7 be omitted and that exclusivity of jurisdiction should be dealt with in the relevant jurisdiction clauses. The majority believe the approach would mitigate concerns of those members and submitters who felt the clauses drafted will result in increased litigation and costs.

If Your Honours look at the clause 7 as original drafted it's extremely broad and refers to the authority and the Court having exclusive jurisdiction to deal with any matter or do anything or here and determine any proceedings that come within the scope of this Act including any matter, thing or proceedings relating to employment agreements.

It's my understanding based on the research that I've been able to do over the lunchbreak is that there are a huge number of submissions but there were some concerns that that was too broad, the scope of the Act was too vague and given the fact that there were existing jurisdiction clauses under 172 which became section 161, and clause 197 which became clause 183 I believe, it was felt that it was better to deal with exclusive jurisdiction in those provisions so Your Honours will see that they've changed the entire basis for exclusive jurisdiction from being something as broad as within the scope of the Act and have tied it back to some of the key concepts in the Act which are the employment relationship and the employment relationship problem and

that is a theme that runs throughout the entire statue so it makes sense that they tied jurisdiction back to those concepts.

WILLIAMS J:
Well the relationship was always in that clause, wasn't it?

MR CLARKE:
In clause 7?

WILLIAMS J:
In 172?

MR CLARKE:
Yes, in 172 it was. So they haven't changed that clause they just simply removed an almost redundant clause which was inconsistent with 172. And the concerns that were expressed were increased litigation and cost because of the inconsistency and the vagueness of clause 7.

WILLIAMS J:
Yes. But my question is really around the point that clause 7 refers to the scope of the Act and including any agreement, so those two items?

MR CLARKE:
Yes.

WILLIAMS J:
Exclusive of anything in scope in the Act and including any agreement, obviously the agreement is in the scope because it was in the 172 list but they are making that clear, right?

MR CLARKE:
Yes, they are.

WILLIAMS J:

So when they move it all across to 172 they add the phrase “exclusive jurisdiction” in the opening words of subsection (1)?

MR CLARKE:

Yes.

WILLIAMS J:

And then they add the words “other than an action founded in Court” in (r) so they do it at the same time.

MR CLARKE:

Yes, I haven't found any commentary on that. There may be but I haven't seen that, Sir.

WILLIAMS J:

Well the logical perhaps, at least one available inference is that that was because clause 7 was never intended to cover an action founded on tort.

MR CLARKE:

Yes, and I believe that's the case. They are trying to carve out a classic tortious action that doesn't come out of the employment relationship and saying that's still in the High Court.

GLAZEBROOK J:

But if it doesn't come out of the employment relationship how could it ever even be considered to have been part of the jurisdiction of a Tribunal that is only looking at employment matters?

MR CLARKE:

Well I suspect it's for the avoidance of doubt.

GLAZEBROOK J:

A lot would be avoided if it's not a relationship probable within the Act.

MR CLARKE:

We do have this, we have this –

GLAZEBROOK J:

I mean it's like saying for the avoidance of doubt the ERA doesn't have jurisdiction to try someone for murder.

MR CLARKE:

Yes. Well the problem with these boundary claims which we've seen in the cases where something can be characterised to say a breach of confidence claim could be founded in equity, it could be founded in employment law and it can be founded in tort.

WILLIAMS J:

By way carve out tort, why specifically carve out tort? What's so magic about tort compared with fiduciary obligation, obligations of confidence and so forth?

MR CLARKE:

Why has Parliament chosen to do that?

WILLIAMS J:

Why is tort specifically mentioned and those problems not?

MR CLARKE:

Well I guess we take it back to the purpose of the Act which is to say specialist institution which have specialist expertise in dealing with employment relationship problems but things that are classic torts are really within the general jurisdiction of the High Court and they are better resourced to deal with those issues.

WINKELMANN CJ:

That could be true of lots of areas though, couldn't it, that are put into this on your analysis.

MR CLARKE:

Yes, yes, absolutely, but I guess I come back to the point where very clear intention by Parliament to enlarge jurisdiction and to found it on something much broader than employment contracts, that's very clear, and it was clear that it was intended to deal with all issues arising out of employment relationship so very broad and as Your Honour has noted the language is extremely broad to talk about employment relationships generally and the list is not limited to it illustrative only.

So there was a very clear intention by Parliament that anything that comes out of your employment relationship must be dealt with in the specialist institutions.

WILLIAMS J:

Except.

MR CLARKE:

Except tort but, for instance, the way the High Court dealt with that in *BDM Grange* was interesting because they effectively said –

WILLIAMS J:

It's the avoidance of doubt.

MR CLARKE:

Well in the judgment they said, “They Authority could only possess tort jurisdiction if the claimant tort was to be regarded as being about an employment relationship.” So that's the way that the High Court reconciled that issue.

WILLIAMS J:

Yes, I think Justice Baragwanath said it was just put there to avoid any doubt about non-employment relationship torts.

MR CLARKE:

Torts, yes.

WILLIAMS J:

But it's hard, well I have to say for myself it's hard to see the logic of that both in terms of picking up tort and not everything else that is actionable but not arising out of the relationship and because they've made the exclusion in such unqualified terms.

MR CLARKE:

That's right, in the Honourable Margret Wilson speech she clarifies that, well, reinforces at the bottom of that page.

WILLIAM YOUNG J:

Where's that?

MR CLARKE:

Sorry, that is in the materials I've just handed up. "The whole purpose of the new institution relating to mediation and adjudication is quite simply to enable parties an efficient, prompt and cheap method to resolve their disputes as quickly as possible."

Then it goes on over the page, "The Authority does have jurisdiction and 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 rather than a very expensive adversarial approach to it where frequently neither party wins. We've had 10 years of that experience." So the idea would be that if there were bullying claims that came out of your employment relationship that within 90 days your employee would raise a claim and you would go off and mediate and resolve that there and, if not, go to a specialist institution and resolve that quickly, cheaply and flexibly rather than engage in classic High Court litigation.

That takes me back to I wonder whether it is helpful to go through the cases, the preceding caselaw which I've set out in my written submissions which illustrates the way in which the Courts have tried to reconcile this jurisdiction.

So in *BDM Grange* that was a case relied on by my learned friend, that was a case which is 2005 and it illustrates those types of tortious claims where the High Court has said they are not claims the essence of which come out of the employment relationship and I think in those cases you can have quite a bright line between tortious claims and employment relationships and those founded on different types of duties so in that case the allegations were breach of fiduciary duties, misuse of confidential information, conspiracy to injure and inaction and deceit. And so in that case –

WINKELMANN CJ:
Didn't they all flow out of the employment relationship though?

MR CLARKE:
Well so the Court in that case said they are not claims that come out of the employment relationship, they come out of different sources of obligation because the essence of the claim, for example, breach of fiduciary duty against the managing director as qua-director, it's not out of their relationship as an employee and, for example, breach of confidence or conspiracy to injure, action and deceit so those are clearly torts that the High Court has said are clearly still in the High Court, they haven't been abrogated by the Employment Relations Act so they survive.

WINKELMANN CJ:
The breach of confidence is a bit hard to fit into that is it I think, isn't breach of confidence hard to fit into that?

MR CLARKE:
It depends again on the source of the obligation, for example, if the breach of confidence comes out of the employment contract so there’s an express clause and they breach –

WINKELMANN CJ:
Or the nature of their relationship which is an employment relationship.

MR CLARKE:
Yes, but if the breach happens during the currency of the employment agreement in breach of the express clause then, yes, it is an employment issue. If it comes out of an equitable obligation of confidence that happens after the employment comes to an end then no. So breach of confidence is one of those examples of where it is on that boundary and does give rise to difficult issues.

So part of the focus of *BDM Grange Limited v Parker* is really about the capacities in which these obligations are owed and the nature of those obligations so again a focus really on the essence of the claim as opposed to the way in which it has been framed. At 37 of the judgment which is page 181 of the bundle, that's the comment there.

GLAZEBROOK J:
Your bundle?

MR CLARKE:
Sorry, my bundle, yes.

GLAZEBROOK J:
What tab?

MR CLARKE:
Tab 11 at page 181. So that's the comment by the High Court that the –

WINKELMANN CJ:
Your bundle or – because it doesn't seem to have a tab 11.

WILLIAMS J:
It does but it's not that.

MR CLARKE:

It should be page 181 of the paginated bundle of authorities.

WILLIAMS J:

I think you're referring to the appellant's bundle.

MR CLARKE:

I beg your pardon, I am. So paragraph 37 of that judgment Justice Baragwanath is essentially saying there that again looking at the substance by saying that the authority could only possess jurisdiction if a claim framed in tort, that's my word "framed" is to be regarded about an employment relationship problem it goes on to consider the words "relating to" and considers that's much broader than "arising out of". And then at page 184 of the bundle.

GLAZEBROOK J:

Where does he say that?

MR CLARKE:

Sorry.

GLAZEBROOK J:

Sorry, you didn't say where he said that?

MR CLARKE:

At 37.

GLAZEBROOK J:

Well he doesn't say it's broader, does he?

MR CLARKE:

Sorry to read that accurately he says, "It could possess such jurisdiction only if a claimant order is to be regarded as being about an employment relationship problem.

At paragraph 49 which is at page 184 of the bundle His Honour talks about the phrase “relating to” and how it was intended to be a significant change from the Employment Contracts Act and on the next page at paragraphs 52 it focuses on the capacities in which the duties are owed. And just above that at 50 His Honour emphasises the importance of the whole purpose of the Act is to encourage access to justice essentially through informal speedy resolution at mediation and judicial intervention was to be reduced.

GLAZEBROOK J:
What did he say about 53?

MR CLARKE:
So at 53 His Honour talks about the fact that subsection 1 goes on to identify, well the first sentence is interesting. “The Act does not expressly list causes of action for which the Authority has jurisdiction but instead it has a list of types of employment relationship problems which the Authority has jurisdiction. It is not exhaustive but gives some insight into what the drafter contemplated as likely disputes.

GLAZEBROOK J:
So are you going to comment on that?

MR CLARKE:
Am I going to comment on it?

GLAZEBROOK J:
Well that's what I asked you. Sorry I wasn't sure what you were –

MR CLARKE:
Well in my view it's supportive of the respondent’s position which is that it's the essence of the claim that's essential not the way in which it has been framed or pleaded and His Honour goes on later to talk about that at paragraph 66 of his judgment, page 189.

GLAZEBROOK J:

Perhaps you should look at 54 as well because I can't quite for the life of me see how either 53 or 54 is supportive of what you're saying so you perhaps need to explain to me why they would be especially that last sentence in 53 and then what's said in 54.

MR CLARKE:

Yes, I agree with the first part of 53 in the sense that it says we're not interested in the types of the cause of action but within the facts come within those subclauses in subsection (1) but I don't agree with His Honour's analysis with respect in that last sentence and 54 where His Honour says that the Act is –

GLAZEBROOK J:

So they are not supportive of your position is the answer to my question.

MR CLARKE:

Well there are two parts to this, two components. The first part is the second where His Honour says it's contract focused, I don't agree with that because it is clear from a reading of the Act, it is employment relationship focused throughout the entire statute.

WILLIAMS J:

Well he does say alter the provisions of the Act. I mean what the Act introduces is the obligation of good faith.

MR CLARKE:

Yes.

WILLIAMS J:

Owed by the employer to the employee which extends the common law, right?

MR CLARKE:

Yes.

WILLIAMS J:
That's why the reference is required to relationship as opposed to agreement because the Act is all about that relationship of good faith between the parties.

MR CLARKE:
Yes, and it moves away from a contract analysis.

WILLIAMS J:
Exactly, so the contract is to be read within the context of that relationship of good faith that's why relationship is so important in contract as a subset of it.

MR CLARKE:
Yes, I agree with that proposition.

WILLIAMS J:
But that doesn't really help you with deciding whether tort is in or out.

MR CLARKE:
Yes, the position I get to is tort is out if it doesn't come out of the employment relationship.

WILLIAMS J:
Sure.

MR CLARKE:
But it is hard to read subclause (r).

Just going back to my submissions at page 23, I've set out at paragraph 6.73 examples of tortious claims that arise in the context of the relationship but don't fall within the jurisdiction and at page 24 there’s a list of examples of that so as I mentioned they are claims against managing directors and that's because it is in their capacity as directors and not in there capacity as employees. You may have a situation where an employee was also the

owner of a business and sold it and is in breach of an agreement for sale and purchase, again the character or the nature of that breach is different. There are a number of cases with conversion of intellectual property or breach of copyright, they are clearly outside. We've talked about the dishonest theft of money and how that maybe arguably part of the employment relationship or not. Defamation clearly not within an issue that as an employee you owe qua-employee to an employer and vice versa. So those are claims which are recognised by the Courts as arising independently of the employment relationship.

WILLIAMS J:
What about, “My boss is a terrible boss?”

MR CLARKE:
That's an employment relationship problem.

WILLIAMS J:
It's defamatory.

MR CLARKE:
As a statement?

WILLIAMS J:
Yes. I mean my boss isn't a terrible boss, she’s wonderful, just for the record.

MR CLARKE:
Yes.

WINKELMANN CJ:
Too late.

MR CLARKE:
Sorry, so I misunderstood you, so the statement to a third party would be capable of being a defamation and in the High Court.

WILLIAMS J:
But it's a statement about her boss as her boss.

MR CLARKE:
Yes.

WILLIAMS J:
Why does that not arise out of the employment relationship?

MR CLARKE:
Because it's not – you don't owe an obligation in your capacity as an employee not to speak disparaging about your boss.

WILLIAMS J:
Don't you in a good faith relationship?

MR CLARKE:
Well potentially in terms of undermining or disloyalty but that would be – so that could be in the Employment Relations Authority.

WILLIAMS J:
So that form of defamation would be out on your analysis, you couldn't sue in defamation because it's too closely related to the employment.

MR CLARKE:
No, so I think your boss could sue in defamation, not the company but your boss would sue personally for defamation but you could bring – but the company could bring a claim for a breach of – well in fact it would be an employment process for disloyalty.

WILLIAMS J:
So in those circumstances let's say it's a, you know, we're not talking about a division between a corporate and a boss, the boss is the owner, the boss is the boss, it's a sole trader who says, “My employee is terrible,” or the

employee says, “My boss is terrible as a boss or as a worker,” they don't arise out of the employment relationship and are suable in defamation.

MR CLARKE:
No, I think that would be defamatory.

WILLIAM YOUNG J:
But there have been claims, haven't there, where those allegations of that sort have been dealt with in the employment institutions. I've got a feeling there was a nasty sort of note on – a mark on a cake or something.

MR CLARKE:
That was in the Human Rights Review Tribunal.

WILLIAM YOUNG J:
Okay, but that could be within the employment institutions, couldn't it?

MR CLARKE:
I think the issue is there would need to be a few more facts so what would happen is the employer would act upon that defamatory statement, start a process and if they are dismissed that would be an unjustified dismissal type claim but there are other components to that claim other than just the statement.

WILLIAMS J:
You see Justice Baragwanath in that case says defamation is clearly out. I'm just testing that proposition because I don't think it is, it really depends on what the statement is which makes it a very grey boundary.

MR CLARKE:
Yes, and to be fair, and I think this is the reason why this Court is interested in this issue is where these issues are particularly problematic is not a case like this one. This is not a difficult case in my view. The difficult cases are where you have five different defendants in different capacities with multiple

breaches that are capable of being construed as employment issues or outside that and the claimants are forced to bring claims in both the High Court and the Authority, that's the difficult boundary line.

In this case we have copy and paste allegations and they are clearly employment relationship problems about bullying. They have been put on a statement of claim with virtually no changes and brought as a tort. That to me is clearly within the exclusive jurisdiction of the Authority but where employment practitioners are particularly troubled is that other scenario, do we have to bring claims in both proceedings? Now if Your Honours are with my learned friend and say, no you can sue in tort in this case then we end up with that problem multiplied. We end up with multiple proceedings in the Authority and in the High Court and in a case like this we can also be in the District Court for a prosecution for breach of the Health and Safety at Work Act, so it's going to increase litigation, it's going to increase time delaying cost and that's the very mischief that this Act is aimed against.

WILLIAMS J:

Mr Harrison said that's overstated to me because I asked him the same question. He said, “No floodgates here because these are all post-employment, ex-employee situations which the Courts have, and we've been giving examples, let in anyway. *Grange* is an example of that or, sorry, *JP Morgan* is an example of that.

MR CLARKE:

But if by that logic this case if it had been brought much earlier timing is not the issue, the issue is about what is the correct jurisdiction. If this had been brought –

GLAZEBROOK J:

Sorry, can you just repeat just that last bit, I didn't hear?

MR CLARKE:

I said timing is not the issue of a claim had been brought within time we would be facing claims in the Authority and the High Court so it's not necessarily a post-employment issue at all.

WILLIAMS J:

Are there many cases of suits in tort or quasi tort where the relationship hasn't ended?

MR CLARKE:

Yes there are and they are generally in the High Court and they are cases which involve those scenarios such as the managing director who was also a shareholder who sold the business and so you've got multiple capacities and different duties but in this jurisdiction that is the area that is the most troublesome and I don't think at the moment with the current law that there is a neat answer to that or bright line.

WINKELMANN CJ:

Is it possible that the extensive nature of the employment relationship problem is due to the fact that they have included so many unusual relationships within an employment relationship so, for instance, union relationships, union to union relationships?

MR CLARKE:

That certainly expands what is already quite a broad jurisdiction but it's not the – I mean there's a clear intention that the authority has extensive jurisdiction in relation to all employment matters and you can see from the previous draft clause 7 of what Parliament initially intended was anything within the scope of the Act which is breathtakingly broad but the idea is any employment issue you run off to mediation and you resolve it quickly. So the purpose of the Act is very important in terms of the interpretation of section 161.

WINKELMANN CJ:

Yes and my point is there is actually when you read these provisions including 161 we have to bear in mind they are not just governing relationship between employers and employees there is strangely enough governing relationships between unions.

MR CLARKE:

Yes.

WINKELMANN CJ:

Between unions and their members.

MR CLARKE:

I think that's partly because of the good faith obligation that Justice Williams mentioned that good faith needs to be broader than just employer/employee but also extend to unions and their members.

WINKELMANN CJ:

And between unions.

MR CLARKE:

Yes, for multiple employment contract agreements and MECAs.

WILLIAMS J:

Also there will be some history behind this because in the times before 1991 the Arbitration Court and the Labour Court dealt with those things, didn't they?

MR CLARKE:

Which things, sorry?

WILLIAMS J:

Union to union demarcation disputes all that sort of thing dealt with.

MR CLARKE:

Yes, absolutely.

WILLIAMS J:
In the institutions, that's what they seem to call them.

MR CLARKE:
That's right, I've tried to track through the legislative history as best I can but essentially what we've seen over 120 years is a couple of consistent things, a specialist Court, specialist expertise and an enlarging of the jurisdiction over the years so that originally it was quite confined in terms of who could bring a personal grievance and the types of rights, demarcation disputes, rights versus interests to a statute that governed everyone under the 91 Act but governed firmly on a contractual basis and then with the Labour Government expanding that to a more relationship based statute where everything is in.

WILLIAMS J:
A move back in some ways to – well it does seem to me the old system was quite relationship based as well.

MR CLARKE:
Yes I think that's a fair point, Your Honour. It's very inclusive of everything rather than excluding anything.

Your Honours, I have previously addressed you on the *Brickell and Benge* case so unless you want to hear me on those further those are the cases that were brought under the Police Act. They are old cases and therefore the relevant employment legislation didn't apply and I've talked about *Gilbert* but I think at this point it's useful then just to talk about why is this an employment relation problem and why it is within the exclusive jurisdiction and that's because if you go through the statement of claim word for word we see everything coming out of the employment relationship so obligations, duty owed by respondent in its capacity as employer owed to her as employee and owed only during the currency of her employment relationship.

Secondly, the nature of that duty is to ensure the safety of employees while at work. Thirdly, the employer's obligations to manage risk so that's again in its

capacity as employer. The fact that the complaints are about bullying behaviours by colleagues is recognised as a psychosocial hazard that must be managed by an employer and but for their employment relationship none of these duties would have applied. So that employment relationship is a necessary ingredient of that claim.

Just to develop I guess some of the arguments I was making before. If a claim like this is allowed to proceed in the High Court we end up with multiple concurrent proceedings in different Courts. So rather than the bright line test that practitioners would be looking for we're actually going to have a situation that is less certain. We will have parties that will deliberately plead the employment relationship problems as torts in order to plead around that exclusive jurisdiction. That will subvert the purpose of the Act which is to confer exclusive jurisdiction on employment institutions to deal with these things swiftly and defeat Parliament's intention in that sense and we have to give some meaning to the word "exclusive". It's not concurrent but exclusive meaning permitting no other proceedings in other jurisdictions.

GLAZEBROOK J:
Well the meaning if you just take (r) absolutely literally is they have exclusive jurisdiction apart from anything to do with tort and in tort they have no jurisdiction.

MR CLARKE:
Yes, and so the common law test that has been developed is to look at the substance of the claim rather than the way it is framed.

GLAZEBROOK J:
I mean the substance of the claim is it's tort. She could have filed a claim in tort on that basis, it doesn't mean that it's not a claim just because there is a jurisdiction argument.

WINKELMANN CJ:
What do you mean by the common law test that has been developed?

MR CLARKE:

The preceding caselaw on this line of authority. So that if we look at the different tests they have all focused on the substance, so previously it was what is the gist of the claim what's the heart of the claim, what's the essential character of the claim, does it directly and essentially concern the employment relationship, all of the Courts in order to give sense to this have looked at the facts as the cause of action and whether it comes within that very broad term and then given effect to Parliament's intention that these things should be dealt with by specialist institutions.

GLAZEBROOK J:

What is it about the facts that make it not a tort claim?

MR CLARKE:

Well I would accept that in the absence of this statute it is capable as being pleaded as a tort as it is a breach of contract claim as well and a breach of statutory duty claim.

WINKELMANN CJ:

And the effect of this statue is?

MR CLARKE:

Well to exclude tortious claims that are probably characterised as the nature of it as being about employment relationships.

WINKELMANN CJ:

So it's to exclude the claims themselves, you know, you no longer have a claim in tort if you're an employee?

MR CLARKE:

That's the effect of it, yes.

WILLIAMS J:
When you look at the words in 161 it is hard to read the essential heart of requirements into words that are so broad because the words that we have now are an intentional departure from the old founded on an agreement.

MR CLARKE:
Yes.

WILLIAMS J:
In which essential heart of and so on all make perfect sense but Parliament has adopted an extraordinarily broad way of scribing its perimeter which in heart is probably too narrow I would have thought.

MR CLARKE:
Yes.

WILLIAMS J:
Except for those pesky words in the bracket.

MR CLARKE QC:
I agree under the old Implement Contracts Act that was too narrow, it was seen as being too narrow. The words founded on were interpreted in a particular way and it had to be based on contract but, to be fair, that was the scheme of the Employment Contracts Act.

WILLIAMS J:
Yes, I'm just talking about the cases that say that it has to be essentially about the relationship agreement or it has to be – the heart of the claim has to be the relationship, sorry, the relationship, the employment relationship but on its face 161 is bigger than that.

MR CLARKE QC:
Yes I agree, it is, it's broader, the Courts have read it in a limited way.

WILLIAMS J:
Yes, well they had to to make sense of it.

MR CLARKE QC:
Yes, and that's the whole point here is, we have to make sense of an exclusive jurisdiction clause where Parliament has made it clear that anything that comes up between employer and employee in their capacities and their various rights should be dealt with by specialist institution quickly and to avoid a case like this going through the Courts taking time and costing parties a lot of money. It was the deliberate intention of Parliament to avoid things like this.

Your Honours, the decision of the Court of Appeal in *Beattie* is in fact I think a good example of actually the really difficult question here about the boundary and that's a case where in fact the defendants were sued in different capacities in respect of different wrongs. Do breach of fiduciary duties under section 131 of the Companies Act, misuse of confidential information, unlawful receiving, conspiracy. Now in that case the High Court held that there was no suggestion that those were within the employment relationship. So this is again the Courts trying to make sense of what section 161 means and looking at indicia such as capacity, source of those duties the nature of the claims, the substance or subject matter of those claims.

Your Honour I would like to just talk a little bit about one of the issues that came up previously with my learned friend in questions was whether there was a collateral purpose.

WINKELMANN CJ:
So we're onto duplication proceedings now?

MR CLARKE QC:
Sorry, yes I am. In terms of the duplication point this is only relevant, for example, if Your Honours are against me on the first point and say that the High Court does have jurisdiction in tort in relation to claims for bullying

because if Your Honours are with me on that point then the matter was correctly struck out and the Court of Appeal correctly upheld that.

So in relation to the second argument about duplication, my learned friend has described the two claims as being distinct with some minimum overlap but if I can take Your Honours to the comparative table at the back of my submissions and Your Honours will see on the left "SOP" standing for statement of problems so that's the application that is lodged with the authority and on the right is the statement of claim that's been filed with the High Court and what I've done there is mapped across the language from the various allegations and Your Honours will see that apart from, well, largely the language is if not verbatim it's almost identical. So there is no suggestion for instance that there any extra facts that distinguish the two claims at all. My learned friend has talked about a different justiciable basis or a distinct legal action but based on that English Court of Appeal in *Letang v Cooper* in that case, as I mentioned, the Court of Appeal held that a cause of action is simply a set of facts which give rise to a remedy, and these facts are the same facts. So Justice Brewer in his decision carefully went through those allegations and considered that they were claims would traverse the same issues and considered that the duplication amounted to an abuse of process. Now in some cases it is possible to stay one proceeding and allow another to proceed, but it was also open to His Honour to have struck the proceeding out, which he had already done on the first basis, which was it was within the exclusive jurisdiction, and the principle, or the policy that sits behind that principle is relevant to this case. In this case my client has been sued in the Human Rights Review Tribunal, Employment Relations Authority, the High Court, the Court of Appeal and the Supreme Court now.

MR HARRISON QC:

There was no – in the Tribunal, no proceeding was ever issued there.

MR CLARKE:

Sorry there were two claims in the, one was a discrimination claim which didn't proceed. There's a breach of confidence – sorry, breach of Privacy Act

claim in the Human Rights Review Tribunal. So this is a situation which this principle is intended to protect litigants against hardship of being vexed twice. The costs and the trouble it's been put to. These claims first arose in 2015 and also the importance of showing inter-curial comity.

Now in the High Court Justice Brewer considered that this was essentially an attempt to get around the stay that had been ordered in the Authority, so I think it's worth taking you through that briefly.

WINKELMANN CJ:
Well these proceedings were issued before this stay, weren't they?

MR CLARKE:
Yes they were but not served.

WILLIAM YOUNG J:
You've got a year to serve them don't you, there's a year to serve them under the High Court Rules?

MR CLARKE:
Well not really because you are meant to serve as soon as possible, but after a year it's deemed abandoned.

WILLIAM YOUNG J:
I see, okay.

MR CLARKE:
So in terms of just the basic chronology, Your Honour is correct that the High Court proceeding was filed on the 22nd of December 2016, and the problem was lodged with the Authority on the 23rd, so the very next day. Those proceedings were served, the Authority proceedings were served and they were stayed in April 2017. What Your Honours won't have seen is that over the next eight months there were constant challenges by the appellant to those decisions. So there were five memoranda filed with the Authority, two

affidavits filed purporting to address the medical evidence that the Authority required, and over 12 emails challenging the Authority Member's decision.

GLAZEBROOK J:

What do you take from that? Are you just saying she was carrying on with those proceedings, because as I understand it I don't think she was represented a long period there. Isn't that exactly what the Employment Relations Tribunal was supposed to do to allow employees to vent whatever they wished to vent in the course of the proceedings?

MR CLARKE:

My point that I'm going to develop is essentially she has switched between these two proceedings as it suited her, and so up to that point she was challenging the Authority Member's decision saying, "I'm going to stay the proceeding for lack of capacity until you provide medical evidence to suggest that you do have capacity," and she consistently challenged it, although not through an appeal or review.

GLAZEBROOK J:

Didn't that rather leave her in a bit of a Kafkaesque position, didn't it. I'm saying that you made me ill and I want to have that ventilated," but, "No, you're not allowed to do that because I don't know whether you're well enough to maintain that claim."

MR CLARKE:

That medical evidence is absolutely critical for three reasons. One is, did she have the capacity to bring the proceeding in the first place? Because at the time she brought the proceeding her counsel advised us that she could attend mediation in the Human Rights Review Tribunal proceedings but she didn't have the necessary legal understanding to make decisions. So my client was concerned –

GLAZEBROOK J:

And he was a doctor?

MR CLARKE:

It was a psychiatrist who advised her counsel, she was represented by counsel, that he had concerns about her legal understanding. On that basis –

WILLIAM YOUNG J:

So just pause there. The purpose of the mediation, I guess, was to get a settlement?

MR CLARKE:

Yes. And so my client wasn't prepared to try to enter into a binding and enforceable agreement when it's on notice about her capacity.

WINKELMANN CJ:

But how could you use that information? It was disclosed to you for the purposes of the mediation.

WILLIAM YOUNG J:

To see if she's got capacity to enter into a binding settlement.

WINKELMANN CJ:

Because that was the purpose of…

MR CLARKE:

So we refused to attend mediation on the basis that she didn't have capacity.

WINKELMANN CJ:

So why did her lawyer disclose that to you?

MR CLARKE:

I have no idea. So essentially the medical evidence is important for three reasons. One is capacity, secondly because of the delay in bringing proceedings, you'll need to show the disability has continued. For instance, if she has had lucidity or period of lucidity during those six or seven years, then time may start running again. And, thirdly, the evidence is critical to whether or not she suffered harm as a result of the alleged breaches.

WINKELMANN CJ:

So why didn't you apply to stay the High Court proceedings on the grounds that she didn't have capacity?

MR CLARKE:

Well, it may need to, if in fact your decision is that it goes back to the High Court, that will be a live issue, as will limitation.

WINKELMANN CJ:

Because it just seems to me unattractive that the High Court would take note of – I mean, I think they'd have to be satisfied that the Employment Relations Authority was right. There just seems something wrong about it to me.

MR CLARKE:

Oh, I think there needs to be fresh evidence, because we're now talking about a decision that's several years old.

WINKELMANN CJ:

No, I mean just to regard this as an abuse of process.

MR CLARKE:

Well, sorry, I haven't quite developed this. But my point is up till effectively December 2017 she was actively challenging the Authority member's determination on two grounds: one is he'd got it wrong essentially, burden of proof and so forth, and secondly, absolutely refuse to provide the medical evidence.

MR HARRISON QC:

Well, that's not correct, and I've sat here and my learned friend is going into a lot of evidence from the bar. If he wants to refer to the state of the record then he can refer to the two affidavits filed in opposition by my client, which are to a quite different effect. In particular – and I may as well mention the is now – the dispute was not over provision of medical evidence. Medical evidence from the psychiatrist that she was competent and fit was provided. What the

respondent wanted was all of her medical records, and at that particular stage she wasn't prepared to provide all of her medical records.

MR CLARKE:
In fact it was the –

WILLIAM YOUNG J:
I thought that she provided a slightly dated report, and that was the concern of the Employment Relations Authority?

MR CLARKE:
It was the Authority member's request for the information, not ours. But he had concerns about two affidavits that had been filed by Dr Ashok Malur and whether they were able to be relied on safely. But the point is, that I'm trying to make, is essentially that she reached a point of stalemate with the Authority member and then served the proceedings in December, 20th December 2017. So it's only that point where she reached that stalemate that she served the proceedings. They were struck out by Justice Brewer in May 2018 and a month later she then filed an amended statement of problem with the Authority which, as my learned friend mentioned earlier, was not accepted for lodgement but what it shows is she still had an intention to proceed with her Employment Relations Authority proceeding.

GLAZEBROOK J:
But the High Court had been struck out so what could she do? Does she just roll over, the High Court struck out and I roll over on the Employment Relations Authority proceedings as well?

MR CLARKE:
No, the point is that she can comply with the Authority member's direction.

GLAZEBROOK J:
Well she could, personally I'm not sure that –

MR CLARKE:

Or appeal it. She's still got rights of challenge to the Employment Court.

WINKELMANN CJ:

So anyway you say she's swapping between this and she's suiting her own needs and she is subverting the effect of the stay.

MR CLARKE:

Yes, and as recently as July 2019 she said that she was content for no action to be taken in the Authority and at that stage it was I think we were heading towards the Court of Appeal.

WINKELMANN CJ:

Right, so are those your points on that?

MR CLARKE:

Yes, essentially and they are contained in my written submissions, Ma'am.

On the suppression order the background essentially for the suppression order was that in fact the Authority of its own volition, on its own motion made a suppression order prohibiting the publication of the names of the parties and the contents of the evidence. That's pursuant to a statutory power that the Authority member has under section 161(e) and also schedule 2 clause 10 of the Act and as Your Honours will see from the determination the Authority was particularly concerned to protect the appellant whom it considered to be vulnerable.

The next point it was dealt with in the High Court was actually by Justice Davison and that was –

WINKELMANN CJ:

Well is it the case that if it was concerned (inaudible 15:12:10) the appellant would you, I mean is there any reason why you can't consent to it being lifted.

MR CLARKE:

In those proceedings our client could.

WINKELMANN CJ:

In the ERA?

MR CLARKE:

Yes.

WINKELMANN CJ:

So that could solve the whole thing?

MR CLARKE:

Yes they could but there's been no attempt to go back to the ERA to deal with the suppression order, that's the short point.

WINKELMANN CJ:

Yes. Well it might be that it could be dealt with on a consent basis because if the appellant goes back to the ERA to deal with the consent order it could be met with a response that the proceedings are stayed but were you to consent to the suppression order being lifted notwithstanding the proceedings being stayed that could resolve the whole thing, couldn't it?

MR CLARKE:

Yes, I mean, and our client is that in the course of if the proceeding continues that it's likely to be lifted so the question that's before the Court whether Justice Brewer was correct and whether the Court of Appeal was correct but this should be dealt with in the Authority.

GLAZEBROOK J:

Well it may or may not be because if we say the High Court has jurisdiction then the reason that I think Justice Brewer thought that he needed to defer to the Employment Relations Authority was because that is where the proceedings would be and that therefore that is where any order for

suppression should be dealt with but if in fact the High Court did have jurisdiction it would seem odd that the High Court, assuming it doesn't have the power to lift the suppression granted by the Employment Relations Authority should be bound to follow the order of what is quite clearly, in fact not even a Court but a Tribunal, a lesser type of Tribunal.

MR CLARKE:

Yes, well Justice Davison had to exercise his discretion in relation to it and he was satisfied that the principles in *Erceg* were met. Also it was consented to at that stage as an interim suppression order by counsel for Ms G.

GLAZEBROOK J:

I can understand that the High Court might decide to impose one also but to say that it has to decide and therefore then it has to defer to what a lesser Tribunal has done when it has jurisdiction I would say exceedingly odd.

MR CLARKE:

I wouldn't use the language that it has to defer, I agree with Your Honour.

GLAZEBROOK J:

All right, so it can but you say it was appropriate in this case.

WILLIAM YOUNG J:

Would it be possible to report the High Court judgment without breaching the Employment Relations Authority non-publication order while it persists?

MR CLARKE:

It's an interesting point as to whether a High Court Judge could be in breach –

WILLIAM YOUNG J:

Well there’s no right of appeal from the Employment Relations Authority to the High Court.

MR CLARKE:

No.

WINKELMANN CJ:

I suppose were it to be the position that you would not consent but you have said you would and, were we to allow the appeal, that it could be dealt with on the basis that we could indicate your consent and invite the Authority to reconsider.

MR CLARKE:

Yes, I don't have my client's instructions on that but I imagine I can get those instructions and, as I said, my client is accepting that at some point that the suppression order would be lifted in the course of the proceedings. So the point really is that Justice Davison and Brewer were correct in extending comity in regard to the Authority and not dismantling the Authority member's order. But it's certainly capable of being resolved, absolutely.

WINKELMANN CJ:

Yes. Well, I'm glad about that, given the difficulty with the interpretation of the provision.

MR CLARKE:

Your Honours, those are largely my points but I'm happy to try to answer any questions you have.

WINKELMANN CJ:

No, thank you very much, Mr Clarke, you've been very helpful.

MR HARRISON QC:

If Your Honours please, I have a few matters.

Just that the matter of the suppression order, I know nothing about any involvement of Justice Davison, but I just draw to attention that when opposing the application which I thought simply came before Justice Brewer, which was for strike-out, and at page 51 of the case an order that the names of the parties and the evidence adduced in support of the strike-out application not be published, we can see that at page 67 of the case, para 9,

in her reply affidavit the appellant says, “I will abide the determination of the High Court on TZB’s application for a suppression order in respect of the evidence filed by it, specifically the ERA documentation. But I oppose its application to have the names of the parties prohibited from publication.” So she was quite plainly at that stage happy to have her name published.

Can I just deal with matters concerning the legislative history for a moment? What to make of the change from clause 7 as a separate very broad and strangely worded exclusive jurisdiction clause related to “proceedings that come within the scope of this Act”, which is the expression used, and the apparent attempt to limit that is difficult to say, except for one takeaway, if I may put it that way, which is what Justice Williams drew to attention, that in clause 172 dealing with the Authority’s jurisdiction as originally introduced, what became (r) and was (q) and what tendered by my learned friend received the addition of the express exclusion of claims founded on tort, and that must be significant for present purposes.

The other thing about the legislative history that I wanted to mention is that the speech from the Honourable Margaret Wilson that was handed up, said to have been given on 9 August 2000, we should note is a speech subsequent to her speech, her original speech introducing the Act. We can see that the original speech introducing the original Bill is in the materials provided by the respondent at tab 5, and that was a speech in March 2000. So the speech in August 2000 must have been on a subsequent reading, which is to say the Minister is not addressing clause 7, but presumably the Bill as reported back with the changes we know about. The other, the passage I would like to refer to in that speech appears, the 12 August one, appears in the second page, third paragraph, where the Minister is responding to opposition criticisms of the breadth of coverage of the Act, and she says, it’s the paragraph that begins, “The provisions in this part had been carefully thought through.”

WILLIAMS J:
Sorry, I've just found – you’re talking about the extract from the speech that was handed up by Mr Clarke?

MR HARRISON QC:

Yes, two pages of a speech on –

WILLIAMS J:

Sorry, can you just point me to –

GLAZEBROOK J:

Are you in tab 5 now?

WILLIAMS J:

No.

GLAZEBROOK J:

Have you moved on to the other one?

WINKELMANN CJ:

He's on the hand up from Mr Clarke.

MR HARRISON QC:

The hand up. It's a two page extract from the Minister's speech which has a date of 9 August 2000 at the bottom. So on the second page of that, the third paragraph begins, "The provisions in this part," and further into that the Minister is saying that this is one of the radical changes to try and provide a new method to be able to resolve problems that arise in the workplace et cetera. Then, "The marrying, if one likes, of the new disputes resolution's ways with the old ways of the common law through the adversarial system does provide a comprehensive set of arrangements that will enable the resolution, in everyone's best interests, of the infinite variety of matters that come before the parties." So it's a marriage of the old ways and the new, not a substitution for the old ways of the new ways.

There's also just an interesting discussion of the legislative history including that very speech in the *BDM Grange* case, which is in my bundle, of course, at tab 11, and you will actually see –

GLAZEBROOK J:

I don't think we have tab…

MR HARRISON QC:

That's my electronic bundle at page 184, and at the very bottom of page 184, page 359 of the report, we can see that same passage as I have just read out, "The marrying," one from the Minister, and then there's a discussion of a few other statements by the Minister and then at 51 the Court says, "We do not deduce from that policy that the jurisdiction of the Authority (and the right of rehearing by the Employment Court) was intended to extend beyond claims arising directly within the employment relationship into causes of action such as claims in tort and in equity," and there's a reference to the language. 52, "The ERA is generally directed towards conduct that arises directly from the obligations imposed either by the Authority itself or under an employment contract. It is tightly focused on the relationship itself." Then there's other reasoning which follows which I rely on but I won't go through. So that's a little bit on the legislative history.

Now my learned friend was making, it seemed to me, a plea for a bright line and complaining that there will be cases that are much more complex than this, but his submission seemed to be, well I noted at one stage as a regards tort he says, "Tort is out if it does not come out of the employment relationship." I don't know that come out of the employment relationship is capable of providing a bright line, and I would submit not. I would also submit that capacity, looking at the capacity in which someone sues or is sued is likewise not a bright line. So on the respondent's argument really what we have is an interpretation of section 161(r), which doesn't read other than an action founded on tort. It reads, other than some but not all actions founded on tort. So rather than one possible bright line is if it's a tort cause of action that's pleaded, then it's outside the exclusive jurisdiction. That's a bright line and I'd be content with that.

The *BDM Grange* bright line is broader than that but also workable, it seems to me that the *BDM Grange* bright line is, is the cause of action pleaded a

common law cause of action other than one suing on the employment agreement. So all, other than a cause of action suing on the employment agreement, which is expressly within the Authority's jurisdiction, if it's a common, formulated as a common law cause of action, not one of those created by the Act itself, then it's in the ordinary courts, and that then enables claims for breach of copyright, breach of fiduciary duty, breach of non-contractual breach of confidence et cetera, theft, whatever, to fall on the other side of the common law bright line.

WILLIAMS J:
Even if they necessarily arise from the employment relationship.

MR HARRISON QC:
Yes, even if the context in which the tort or other cause of action is committed is an employment relationship context, yes, and that's in effect what the –

WILLIAMS J:
Well I didn't say "context". Adopting the stronger word of necessity and the heart of the claim and so on in the earlier, in the cases that have tried to make sense of this provision. You say that those additional common law causes of action are excluded whether or not they necessarily arise out of the employment relationship?

MR HARRISON QC:
Yes, and that, I submit, is the *BDM Grange* approach, and it flows from the fundamental problem that you don't remove common law rights of action and rights of access with the ordinary courts other than by way of express language, and it provides a bright line. It provides a duplication, a possibility of duplication of proceedings but that can be managed by Courts using abuse of process and similar remedies to ensure that two sets of proceedings do not oppress. That can be managed. It doesn't have to be managed through jurisdiction.

O'REGAN J:

It does seem to compromise the objective of the legislation of simplicity getting away from the adversarial system, getting away from legal advisors having to be involved and so on.

MR HARRISON QC:

It leaves a duplication of jurisdiction, but in reality the advantages of proceeding in the Authority and using the mediation for low-level claims mean that the impact in practice is going to be limited, and if Parliament doesn't like that then it can always amend the legislation to expressly abolish causes of action rather than doing what did. So that's just a few thoughts, with respect, on drawing boundaries and bright lines.

The argument is also of course that the Authority and the Employment Court are the specialist Courts with the expertise here. Well, one rejoinder is of course that the High Court is the specialist Court for torts and other common law causes of action. And in *BDM Grange* – I'm not sure I can find the passage, I may be able to – the Judges there noted about the enhanced conferral of an employment agreement jurisdiction on the Employment Relations Authority that the – yes, this is at page 187 of the bundle from para 57 on. The Judges in that case note, at 58, "A striking contrast between section 99 circumscribing the tort jurisdiction and the extensive power under section 162 in the contract jurisdiction," and then they set out section 162. 59, "The obvious purpose of section 162 is to extend the powers of the Authority," but limited, and then 60, and this is my point, "The fact that Parliament has gone to the trouble of extending the Authority's powers in relation to contractual claims suggests that, had it intended to extend the Authority's jurisdiction to claims in tort, it would have made similar provision for such claims, for example, conferring the powers available un the Contributory Negligence Act 1947, Law Reform Act 1936 and Defamation Act 1922. On its plain wording section 162 marks the contrast between the Era's extensive contract jurisdiction and the very narrow jurisdiction in tort." So the Court there is saying the Authority has been given the tools in relation to contract

but hasn't been given the tools in relation to tort. Hence my submission that the ordinary Courts are the experts in tort and tort causes of action remain.

My learned friend mentioned *Letang v Cooper* a couple of times, and he hasn't provided a copy and it's a very long time since I last read it. My recollection is that it's a limitation case, something to do with –

WILLIAM YOUNG J:
It was a claim that was out of time in negligence but was brought in trespass.

MR HARRISON QC:
Trespass, yes, I was going to say, that's precisely my recollection. In that context it may be that the English Judges defined "cause of action" as a set of facts. I don't accept that that is the appropriate approach to the sections of the Act, and I just cross-refer Your Honours to what I say about this issue…

WINKELMANN CJ:
Well, it also is inconsistent with the Act itself, which talks about a legal form of the cause of action, tort.

MR HARRISON QC:
Yes, quite. But may I just mention, for completeness, my para 67 of my written submissions notes about the meaning of "action", which appears in subparagraph (r) three times and in footnote 68 I go on to look at how the Act uses action in some provisions and cause of action in others and *JP Morgan Chase* also addresses the issue at para 89 which is at page 162 of the electronic bundle if I've got it right. No, that's not right. yes, footnote 38 and Their Honours in *JP Morgan* say, "It seems that action here is used in the sense in which it is synonymous with proceedings notwithstanding that proceedings is also used elsewhere." So just for completeness I am referring to that and I don't accept the *Letang v Cooper* type approach. I think my learned friend now concedes, despite the way he's argued it in his written submissions that it is open to plead the factual allegations which the appellant is raising as a tort. So it can give rise to a tort, he complains that it should

have been pleaded as a contract and I dealt with in an intervention the issue around the stay in the Employment Relations Authority.

The affidavit evidence in the case on appeal is before the Court directly in two affidavits sworn in opposition to the strikeout application and this is the best evidence we have. These are her own affidavit at page 63 of the case on appeal where she contends that – this is page 66 – that her psychiatrist was confirming her capacity to proceed but that – this is (d) on page 66 – the respondent continued to challenge her capacity and kept changing its position from requiring specialist medical advice affidavit, comprehensive medical report and affidavit to, I would insert, "To wanting my full medical file released," and at the mother's affidavit deals with the same issue at page 72(d) where she says that the consultant psychiatrist confirmed the matters set out in that subparagraph (a), "Ms G has the capacity to instruct," and, (b), "to understand the issues," and then further down, (e), at the bottom, "However the defendant has been persistently requiring detailed medical notes to be released." So what ended up as a blockage to progress was the appellant's refusal to provide at that stage, which is pre-mediation, it's not discovery in the substantive proceedings in either jurisdiction, all of her detailed medical notes, that's the evidence before the Court, not the statements from the bar that my learned friend has been providing. I think I'm very nearly finished on that topic and others.

There's perhaps one other matters about the jurisdiction issue, two others matters about the jurisdiction issue, that I want to respond to very briefly in the respondent's written submissions. Both at para 1.2 of the written submissions and at para 6.50, it's said that there is an essential character test resolved by the Court of Appeal in *JP Morgan.* I don't accept, with respect, that *JP Morgan* lays down an essential character test, nor was that test applied by the Court of Appeal in this case. I have not found an essential character test as such in *J P Morgan*. Moving forward to the other paragraph 6.50, which makes a similar claim – and that's at page 19 – it's asserted, "In deciding the jurisdictional boundary, the Courts have focussed on what the essence or substance of the claim falls within the exclusive jurisdiction rather than the

form of the cause of action," and then there's a reference to the "essential character" test. Now the only point at which I've found a reference to "essential character" – and I could be wrong here – is not in *JP Morgan* but in *BDM Grange* at paragraph 66, which is page 189 of my bundle, and it said – second sentence in – "We express our essential agreement at greater length with the analysis of Justice Panckhurst that "relating to" in the definition of "employment relationship problem" must be read in a limited way to mean any cause of action, the essential character of which is to be found entirely within the employment relationship itself. This would not encompass claims arising from tortious conduct, even if arising between an employer and employee, since the relationship merely provides the factual setting for the cause of action; the duty arises independently." Now obviously I'm perfectly happy with that formulation of an essential character test but it's not this –

WINKELMANN CJ:
What paragraph is that of *BDM*?

MR HARRISON QC:
Paragraph 66, page 189 of my bundle. That's the only mention of an essential character I have come across, but of course that's not the essential character test that the respondent is attempting to argue for.

And it's also useful to go to Justice Panckhurst's decision in *Pain Management*, which has received that approval, as we've noted. That's at tab 7, it starts at page 68 of my learned friend's bundle. If we go to page 74, His Honour gives some views at para 22, which I think are taken up by the Court of Appeal. But what I want to refer to is the following paragraph 23, where in the last sentence Her Honour says, "Put the another way where the rights or interests came by the plaintiff do not derive from a contract of service, the general jurisdiction of this Court is unlikely to be ousted," and then he goes on to look at the causes of action, and in 24, 25 his bright line is if it's in tort it's not within the exclusive jurisdiction, and he goes through in that way, so it's *BDM Grange* and *Pain Management*, both support my argument rather than my learned friend.

I think that's everything that I wanted to address in my learned friend's submissions unless I can be of further assistance?

WINKELMANN CJ:

Thank you Mr Harrison. Thank you counsel for your submissions. We will take time to consider them and let you have a judgment in due course.

COURT ADJOURNS: 3.46 PM