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IN THE DISTRICT COURT
AT WELLINGTON

CIV-2016-085-000411
[2017] NZDC 5013

BETWEEN	BLAIR GIBBS Plaintiff
AND	JOHNSON ESTATE LIMITED Defendant

Hearing: 22 February 2017

Appearances: Ms J Maslin-Caradus for Plaintiff
Mr M F Quigg for the Defendant

Judgment: 13 March 2017

RESERVED JUDGMENT OF JUDGE S M HARROP
As to plaintiff's application to set aside defendant's appearance protesting jurisdiction

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Introduction

[1] The defendant ("JEL") operates Spy Valley Wines in Marlborough. The plaintiff, Mr Gibbs, married a daughter of JEL's director Mr Johnson in March 1998 and commenced employment with JEL, ultimately becoming General Manager of Spy Valley Wines under an employment agreement dated 27 June 2006.

[2] Mr Gibbs and his wife separated on 31 March 2015 following which an agreement was reached in June about the terms of cessation of Mr Gibbs' employment on 30 June 2015.

[3] Mr Gibbs acknowledges that that agreement was partially complied with by JEL but claims that it is in breach of the balance of its obligations. In his statement of claim dated 15 June 2016 Mr Gibbs seeks judgment for $75,000 together with interest and costs. On 1 August 2016 JEL filed an appearance under protest to

jurisdiction on the basis that pursuant to s 161 of the Employment Relations Act 2000 the Employment Relations Authority has exclusive jurisdiction to deal with this claim.

[4] On 2 December 2016 Mr Gibbs applied under Rule 5.51(5) to set aside the appearance.

[5] The opposed application came before me on 22 February 2017. Under Rule 5.51(6) I must, if satisfied that this Court has jurisdiction to hear and determine the proceeding, set aside JEL's appearance, as Mr Gibbs contends should occur. Alternatively, if satisfied that this Court has no jurisdiction to hear and determine it I must dismiss both the application and the proceeding, this being what JEL contends should occur.

The Essential Facts

[6] Aside from the dispute as to whether Mr Gibbs has any valid claim against JEL, and that as to the appropriate forum for the determination of his claim, there is no dispute about the background material facts and it is not necessary to refer to all of them.

[7] The 2006 individual employment agreement between the parties is relatively standard as to its terms and need not be referred to in detail. However clause 10 provided for termination of Mr Gibbs' employment:

> "Both parties agree to a working period of 1 months notice in writing should either party wish to terminate the employment agreement. No provision is made nor implied for any additional payment (other than wages owed) should economic circumstances (i.e. the availability of work) require the employer to give notice (i.e. redundancy)."

[8] In addition to termination by notice, clause 10.1 permitted JEL to terminate the agreement summarily and without notice for serious misconduct. Otherwise the agreement was, as stated in clause 1.1, of ongoing and indefinite duration. That clause contemplated the variation or updating of the agreement by further agreement between the parties at any time.

[9] Further, clause 12 contains a detailed confidentiality provision.

[10] Following discussion between Mr Gibbs and Mr Johnson on behalf of JEL their agreement as to the basis for the termination of Mr Gibbs' employment on 30 June 2015 was set out in a letter addressed to Mr Gibbs dated 5 June 2015. It was signed by Mr Johnson on 5 June and by Mr Gibbs on 8 June 2015. On this basis I will refer to it as the 8 June agreement.

[11] The letter provided:

> Blair,
>
> As discussed and agreed yesterday I summarise our mutual understanding of the employment arrangement
>
> - You resign at an appropriate time and cease your employment on 30 June 2015.
> - You will retain the vehicle permanently. You will be paid on or about 30 June 2015 a lump sum payment (less tax) equivalent to 6 months salary, together with any outstanding salary or accrued annual leave due to you as at the date.
> - You will maintain the confidentiality of all Spy Valley matters and continue to be proud and positive of your own and positive of your own and all staffs' efforts with development of Spy Valley.
> - You are able to seek alternative employment from 1 July 2015
> - As a further private and confidential arrangement S.V. will continue to pay you sums equal to your salary as if you were still employed during the period from 1 January 2016 to 30 June 2016. These additional payments are to further enable you to get resettled and conditional on [personal/family related conditions deleted]. I will be the sole arbitrator of this but I do undertake not to revoke this without justifiable cause and also undertake to discuss this with you as regards converting the periodic payment to a lump sum payment by the end of Feb 2016.
>
> This is a full and final settlement of all employment claims you may have and no other legal disputes will be taken by you on these matters.

[12] Mr Gibbs duly resigned and ceased employment on 30 June 2015 and JEL paid him the appropriate lump sum payment referred to in the second bullet point.

[13] However, Mr Gibbs claims that JEL has wrongly and in breach of the agreement contained in the last bullet point failed to make any further payments. He says he has complied with his side of that bargain, met the conditions which he was

required to meet, but that JEL has without justifiable cause failed or refused to make any additional payment to him.

The Protest to Jurisdiction

[14] JEL contends that the Employment Relations Authority has, pursuant to s161(3) of the Employment Relations Act 2000 exclusive jurisdiction to deal with Mr Gibbs' claim. It relies on three particular grounds within s 161(1) which, so far as relevant, provides:

> "The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including –
>
> (a) disputes about the interpretation, application, or operation of an employment agreement
>
> (b) matters related to a breach of an employment agreement …
>
> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or relate to the interpretation of this Act (other than an action founded on tort) …"

[15] At the hearing Mr Quigg while not expressly conceding that paragraph (r) did not apply, indicated that he would not pursue his argument based on that clause and instead focussed on paragraphs (a) and (b).

[16] Mr Quigg's essential point on behalf of JEL is that the existence of the employment relationship between the parties is a necessary component of Mr Gibbs' cause of action. That alleges a breach of the settlement agreement which he submits constituted a variation of the 2006 employment agreement. Further, Mr Quigg submits that the claim for breach of contract is "a problem arising from or related to the employment relationship".

[17] Mr Gibbs' essential argument as developed by Ms Maslin-Caradus is that the settlement agreement replaced the employment agreement; the dispute is about whether a term of the settlement agreement has been complied with, not whether a term of the employment agreement has been complied with. While the two agreements co-existed between 8 and 30 June 2015 they did not apply at the same

time. If there was a dispute about Mr Gibbs' discharge of his obligations as an employee during the balance of June 2015 that would be determined under the employment agreement because he was then still an employee but any dispute as to compliance by either party with the settlement agreement would be determined under that agreement. Disputes about the former would be within the exclusive jurisdiction of the Employment Relations Authority but the Authority had no jurisdiction to deal with a dispute about compliance with the settlement agreement, such as the present claim. While the employment relationship and the 2006 agreement formed essential background without which the settlement agreement would not have arisen and would not have made sense, that did not mean that the settlement agreement should be seen as a variation of that agreement. Rather it was a stand-alone agreement which could be sued on independently.

[18] Ms Maslin-Caradus submitted that the facts of this case are on all fours with the leading case of *JP Morgan Chase Bank NA v Lewis*[1] and that on the application of that Authority by which of course I am bound, I must determine that this Court has jurisdiction to deal with Mr Gibbs claim and that the Authority does not. Mr Quigg however submits that the facts of this case are distinguishable from those in *JP Morgan.*

The JP Morgan Case

[19] Mr Lewis was employed as CEO of JP Morgan. They entered into a settlement agreement under which Mr Lewis agreed to resign the following day in return for certain payments. The settlement agreement contained a non-disparagement clause. Mr Lewis claimed that JP Morgan breached it when following his resignation the Bank failed to confirm to a prospective employer that he had been its CEO.

[20] The Court of Appeal held that the Employment Relations Authority did not have jurisdiction to deal with the dispute under s 161(a) or (b) of the Act. The Court's essential reasons were set out at paragraphs [65] to [74] of its judgment which are reproduced in full here:

[1] [2015] NZCA 255

"[65] Applying these statements of the law in the present case we think it is clear that the settlement agreement was a new agreement, intended by the parties to replace the employment agreement and operate as a stand-alone statement of their obligations to each other after Mr Lewis ceased to be employed by the bank. We say that for a number of reasons.

[66] First, the settlement agreement set out the terms on which the relationship of employer and employee was to terminate. While it is true that this altered the termination provisions of the employment agreement, it did so for the very purpose of bringing Mr Lewis' employment to an end. We think it would be artificial to describe the settlement agreement as a variation of the employment agreement in these circumstances.

[67] Secondly, the settlement agreement contained provisions that were plainly intended not to operate as terms of employment, but as terms that were to apply once the employment relationship was ended. For example, the bank's payment obligations under cl 2 arose within a period calculated from the Termination Date; and other obligations on both sides would have effect after the cessation of employment. While cl 5 of the settlement agreement adopted cl 7 of Appendix B of the employment agreement dealing with return of the bank's property, the obligation was clearly one intended to apply on the termination of employment; the mere adoption cannot be relied on to demonstrate that there was a variation of the original employment agreement. The same may be said of the restraint of trade and confidentiality provisions (cls 4 and 6), while the provision of "outplacement support" (cl 3) was again an obligation that would arise after termination.

[68] In fact the provisions of the employment agreement that were specifically referred to in the settlement agreement are readily able to be categorised as simply incorporated by reference: they are in the category referred to in the last sentence of the passage quoted above from Lord Dunedin's judgment in *Morris v Baron*. Once Mr Lewis left the bank's employ, their contractual force would rest on the settlement agreement, not the employment agreement.

[69] These provisions may be contrasted with cl 2(f) of the settlement agreement requiring the bank to pay Mr Lewis' "entitlements including salary up to and including the Termination Date". What those entitlements were was left to be calculated under the employment agreement, and use of the word "entitlements" is consistent with the original provisions under the employment agreement continuing to apply up to termination. In other words, it would be the employment agreement that gave rise to and defined the entitlements, and the settlement agreement made it plain those entitlements would continue to apply.

[70] Thirdly, there is no doubt that the settlement agreement can be "sued upon" alone. In fact, the substance of the claim that Mr Lewis now seeks to advance is of a breach of the settlement agreement and the obligation it contained that there would be no disparagement of Mr Lewis by JP Morgan. While reference is also made to implied terms

of the employment agreement to keep accurate records and not to deny he was the bank's CEO, it is not the breach of those obligations which gives substance to Mr Lewis' claim; rather, it is the fact that the bank did not advise third parties of Mr Lewis' role as the chief executive of its New Zealand branch, thereby putting itself in breach of cl 9 of the settlement agreement (the non-disparagement clause). Any loss arose from that failure.

[71] In any event, the attempt to rely on implied terms in the employment agreement would face the insuperable difficulty that cl 18 of the settlement agreement provided that it constituted the entire agreement between the parties and that it superseded all and any prior agreements.

[72] Finally, once the settlement agreement was executed, it could not be said that it was possible for both agreements to be performed. This follows from the fact that the employment agreement envisaged Mr Lewis' ongoing employment; the settlement agreement put that prospect to an end. Plainly, he was no longer obliged to continue in JP Morgan's employment and it had been agreed that he would not do so. It would be entirely artificial to describe the situation as one involving the ongoing performance of both contracts.

[73] Clearly, Mr O'Brien was correct to submit that the employment agreement would continue in effect until the point at which, on the day after the settlement agreement was executed, the parties had agreed Mr Lewis' employment would cease. However, the whole point of the settlement agreement was to bring his employment to an end and the provisions of the settlement agreement were only to take effect at and from that point.

[74] Consequently, considered in terms of the relevant contractual principles, we are in no doubt that the settlement agreement should be regarded as replacing the employment agreement and as governing, on its own, the relationship between the parties after the cessation of Mr Lewis' employment. Since the settlement agreement cannot be regarded as an "employment agreement" for the purposes of the definition in s 5 of the Act, the Authority did not have jurisdiction to deal with the dispute under s 161(1)(a) or (b) of the Act.'

[21] The Court of Appeal also considered that the Authority did not have jurisdiction under the catchall provision in s 161(1)(r): "any other action arising from or related to the employment relationship".

[22] The Court said at [92]:

"[92] It will be apparent from the discussion of question (c) that we do not consider the matter before the Authority was one that either arose from or was related to the employment relationship. In essence it was a claim under the settlement agreement, and concerned the alleged breach of post-employment obligations. Of course the claim

> would not have arisen but for the fact that Mr Lewis was once the bank's employee, but the claim is founded on the settlement agreement. That is necessarily so, not only because the settlement agreement now constitutes the entire agreement between the parties, but also because other claims, "arising out of or in connection with the subject matter" were specifically barred by cl 16 of the settlement agreement."

[23] The Court of Appeal then discussed the High Court judgment in the *Hibernian Catholic Benefit Society v Hagai*[2] a case where the Society sued Ms Hagai to recover money stolen by her in the course of her employment. The High Court had held that theft of an employer's money while at work fell within the general wording of "an employment relationship problem" but also within three of the "heads" in s 161(1) including paragraphs (b) and (r).

[24] As to this the Court of Appeal said at [95]:

> "[95] We do not agree with this reasoning. It effectively treats all issues that arise between employer and employee as exclusively within the Authority's jurisdiction because of the existence of that relationship. We do not think that can have been Parliament's intention when it passed the Act. In accordance with the definition in s 5 an "employee relationship problem", must relate to or arise out of an employment relationship. We consider this means that the problem must be one that directly and essentially concerns the employment relationship."

[25] Further at [97] the Court said:

> "[97] ... While Ms Hagai was clearly in breach of her employment contract, the essence of the Society's claim was her dishonest theft of the money. This was not an employment-related problem, although it would undoubtedly have justified her dismissal. While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai's conduct was such as would have made her liable to the plaintiff *without* any such relationship. In other words, the existence of the employment relationship was not a necessary component of many of the causes of action that could have been asserted against her. That indicates that the essence of the claim was not employment related, and should not have been regarded as within the Authority's jurisdiction."

[26] At [99] the Court noted that its approach was "consonant with the statutory purpose in creating the Authority and the Employment Court as bodies have

[2] [2014] NZHC 24

specialist expertise and understanding, equipping them to deal with employment related problems."

[27] Finally, at [101] the Court added:

> "A claim such as that brought against Ms Hagai would gain nothing from being advanced in the Authority: no employment relations expertise is required to deal with a claim seeking the recovery of stolen money, and there is no prospect that, to the extent that the facts disclose an employment relationship problem, it could be resolved. Further, the result of the judgment was to deny the plaintiff access to the special procedure provided for summary judgments in the High Court, in respect of a substantial sum plainly owing ... There is nothing in the Act that justifies ousting the jurisdiction of the ordinary courts in such a case. In the result we consider the case was wrongly decided ..."

[28] Mr Quigg emphasised the Court of Appeal's conclusion at [71] to [73] that the settlement agreement constituted the entire agreement between the parties and that it superseded all and any prior agreements consequently; once that agreement was signed it was not possible for both the employment agreement and the settlement agreement to be performed. He submitted that unlike the *JP Morgan* case the current case could be described as involving the ongoing performance of two contracts namely the employment agreement and the settlement agreement. He noted that unlike the settlement agreement in *JP Morgan* the settlement agreement here did not contain a clause that provided that the agreement constituted the entire agreement between the parties. Rather the agreement envisaged Mr Gibbs' ongoing employment for a further 22 days and that therefore the proper way to regard the settlement agreement was as a variation of the employment agreement.

[29] He submitted the employment agreement continued after the settlement agreement to define the rights and obligations of the parties because the settlement agreement had only varied the terms and conditions of employment relating to termination and confidentiality. It also varied the employment agreement, he submitted, to reinforce and include the additional terms set out in the second and fifth bullet points of the settlement agreement. All the other terms of the existing employment agreement remained in force until 30 June 2015 when they ceased to apply, apart from those that continued to apply post-employment as set out in either the employment agreement or the settlement agreement. The two documents had to

be read together both for the ongoing employment period up to 30 June 2015 and post-30 June 2015.

[30] Mr Quigg noted that while it would be superficially attractive, it would be wrong to focus on the fact that the current dispute centres on the enforcement of a provision that clearly relates to a post-employment obligation, particularly one more tenuously linked to the employment relationship than other post-employment obligations. He submitted that the question of jurisdiction is an absolute one and that the law, including the *JP Morgan* decision, is clear that when confronted with a variation to an employment agreement and not a settlement agreement which clearly replaces the employment agreement with post-employment terms, s 161 of the Act affords the Authority with exclusive jurisdiction.

Discussion and Decision

[31] There is a potentially material difference between the facts of the present case and those of *JP Morgan*, that of timing. The settlement agreement in *JP Morgan* was to take effect the day after it was signed whereas in this case it was some 22 days later. Whether this is truly a material distinction for jurisdictional purposes I will discuss below.

[32] The other potentially material distinction is that in *JP Morgan* there was a clear provision that the settlement agreement was from its signing the "entire agreement" between the parties.

[33] I accept Ms Maslin-Caradus' submission that neither of these differences amounts to a material distinction. In my view there is nothing inconsistent about the conclusion that the settlement agreement brought the employment agreement to an end, as it purported to do, rather than varied, despite the co-existence of the two agreements during the balance of June. The two agreements do not clash and they apply to clearly distinct periods of time. The fact that there was a deferral in the application of the terms of the settlement agreement is in my view irrelevant to the replace/vary argument. It simply means that rather than the replacement occurring

immediately it was to occur at a later date. That however gives rise to no confusion about which agreement applied when and in what circumstances.

[34] The present dispute is one which has nothing to do with the employment agreement but rather is entirely a dispute about whether an aspect of the settlement agreement has been complied with. As the Court of Appeal observed, when one analyses the cause of action here the employment relationship is merely background. What will determine whether or not the claim succeeds has nothing to do with the conduct of the employer or the employee under the employment agreement but rather whether, well after the employment agreement was terminated, Mr Gibbs has met the conditions which would entitle him to the further payments and, therefore, whether there is any justification for JEL not to have made those payments. The conditions related to [personal/family related conditions deleted]. I do not agree with Mr Quigg that the tenuousness of this link to the earlier employment obligation is superficially attractive but misleading on the question of jurisdiction; rather its tenuousness highlights the point that this dispute is not materially related to the employment agreement at all.

[35] As to the question of whether the settlement agreement was an "entire agreement", I also accept Ms Maslin-Caradus' submission that the concluding words:

> "This is a full and final settlement of all employment claims you may have and no other legal disputes will be taken by you on these matters".

are akin to the entire agreement clause in *JP Morgan.* The objective purpose, as was the case in *JP Morgan,* was to confirm the end of the employment relationship and the inability of either party to go back to the 2006 agreement as the basis of any claim. The point made by the Court of Appeal at [71] that any attempt to rely on implied terms in the employment agreement would face the insuperable difficulty of the entire agreement clause applies with equal force here.

[36] In *JP Morgan* the Court of Appeal approved the observations of the Employment Court in *Musa v Whanganui District Health Board*[3] at [79]:

> "… But the settlement agreement was a separate contract, an accord and satisfaction as the law sometimes terms it. Not only was it not an employment agreement but in some respects it was the antithesis of an employment agreement. It is an agreement that provided for the end of employment on terms …. The terms said to have been breached … were not terms that were limited to the balance of the employment period. What became known at the hearing as the non-disparagement clause applied not only to the remaining four months of Mr Musa's employment but, potentially, indefinitely."

[37] As a result the Court of Appeal concluded that the settlement agreement in *JP Morgan* was to be regarded as a stand-alone agreement and not properly categorised whether in whole or in part as an employment agreement.

[38] Ultimately I consider it is simply a matter of common sense to conclude that while the employment agreement continued until 30 June 2015 (after which if it continued to exist at all, as Mr Quigg contends it did, it could not be relied on by either party because of the full and final settlement in the provision in the settlement agreement), the settlement agreement was from 1 July 2015 the only agreement in force and able to be resorted to by the parties.

[39] I therefore reject Mr Quigg's fundamental submission that the settlement agreement should be regarded as a variation of the employment agreement. I uphold Ms Maslin-Caradus' submission that in material terms the *JP Morgan* case is indistinguishable and must be applied so that I must and do conclude that s 161(1)(a) and (b) do not apply here to provide the Authority with exclusive jurisdiction.

[40] As to the possible application of clause (r), as I have noted Mr Quigg did not pursue this argument. Had he done so I would have rejected it for the same reasons as the Court of Appeal did. In short, the issue in this claim is not, as is required, one that "directly and essentially concerns the employment relationship". The employment relationship is merely background to the claim but nothing about it is a material element of the cause of action for breach of contract. As Ms Maslin-Caradus put it at the end of her submissions: "… *Mr Gibbs' claim is not*

[3] [2010] ERNZ 236

an employment claim. Although his claim would never have arisen but for the fact he was once Spy Valley's employee, his claim is founded on the Settlement Agreement and matters within it concerning [personal/family related conditions deleted]. *These are matters unrelated to his employment with Spy Valley*." I agree.

[41] For completeness I also accept Ms Maslin-Caradus submission that the determination of the issues in this case, namely whether Mr Gibbs did, [personal/family related conditions deleted]. and whether he is contractually entitled to the additional payments are issues on which no employment law expertise is required. As she submits, quite simply they are not employment matters.

Conclusion

[42] For these reasons pursuant to Rule 5.51(6)(a) I am satisfied that this Court has jurisdiction to hear and determine the proceeding and accordingly I set aside the JEL's Appearance under protest to jurisdiction.

[43] Having succeeded, Mr Gibbs is entitled to costs against JEL in respect of this opposed application. If the parties cannot agree on quantum, I reserve leave to file submissions, Mr Gibbs by 27 March 2017, JEL by 10 April 2017.

[44] JEL is to file its statement of defence to the statement of claim dated 15 June 2016 by 3 April 2017. Registrar is then to arrange a first Case Management Conference pursuant to Rule 7.2 on the first date suitable to counsel after 3 April 2017.

S M Harrop
District Court Judge