IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO. 1748/2022**

BETWEEN **MARTHALINA JOANNA NOOARE TUAINE**

Plaintiff

AND **BANK OF THE COOK ISLANDS**

Respondent

On the Papers

Counsel: Mr N George for Plaintiff
Mr B Marshall for Respondent

Judgment: 11 July 2024

JUDGMENT OF KEANE, CJ

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[1] On 27 January 2021, Marthallina Tuaine, a teller at the Atiu branch of the Bank of the Cook Islands, was dismissed with immediate effect on the ground that she had stolen from a customer's account $18,090.

[2] At about that date also Ms Tuaine was charged with three thefts as a servant from a single deposit account: $6,000 on 11 December 2020; $7,210 on 24 December 2020; and $4,880 on 12 January 2021. On 31 August 2022, after a three day trial before Grice J and a jury, she was found not guilty.

[3] On 11 November 2022, Ms Tuaine brought this claim against BCI, seeking:

i) $4,000 damages, in round terms, for wrongful and unfair dismissal without three months' notice;

ii) $400,000 exemplary damages; and

iii) $250,000 for dismissal for offences she had not committed; $150,000 for groundless dismissal.

[4] On 16 November 2022, BCI filed a notice of intention to defend, and on 25 January 2023, requested extensive further and better particulars of the claim; in particular, as to the causes of action in law founding each damages claim.

[5] On 8 February 2023, in her response, Ms Tuaine identified as her causes of action:

i) false and unjustified complaint;

ii) malicious prosecution;

iii) unjustified dismissal;

iv) defamation;

v) breach of duty; and

vi) negligence.

[6] On 3 March 2023, when BCI was seeking security costs, calling for a preliminary inquiry into the claim's merit, I questioned to what extent Ms Tuaine's acquittal was likely to assist her in this civil claim (an issue to which I will return).

[7] On 14 April 2023, BCI said it intended instead to apply to strike out the claim and, in Ms Tuaine's reply dated 20 April 2023, her counsel contended BCI was unanswerably derelict in:

> … failing to conduct audits in the bank, rushing to charge and prosecute the plaintiff without conducting a proper investigation, accepting the advice and accusation of Mrs TP, the ultimate theft offender at the conclusion of the trial as revealed by the jury.

[8] On 19 May 2023, BCI applied to strike out the claim, submitting that the pleadings disclose no reasonably arguable course of action. On 6 June 2023,

Ms Tuaine replied, "I regret that I have not been able to return to this application any earlier".

[9] In this decision I will assume Ms Tuaine's six causes of action reduce to four:

i) malicious prosecution (subsuming false and unjustified complaint);

ii) defamation;

iii) negligence (subsuming breach of duty); and

iv) wrongful dismissal.

I will also survey the damages claims.

STRIKE OUT PRINCIPLES

[10] Rule 131 of the Code of Civil Procedure enables this Court to strike out proceedings where, 'no reasonable cause of action is disclosed' and, as Hugh Williams J said in *Tuake v Toeta and Registrar of the Land Court*[1], drawing on the primary New Zealand cases, the principles are well settled.

[11] As he said, and BCI accepts, it must establish that the causes of action in the statement of claim are 'so clearly untenable … as a matter of law or incontrovertible fact … (they) cannot possibly succeed':

> The jurisdiction is exercised sparingly and only in clear cases … . The hurdle to striking out proceedings is deliberately set high so as not to impinge on citizens' rights of access to the Court.

[12] On a strike out application the Courts 'do not and cannot embark on any consideration of disputed factual issues'; and, if a statement of claim can be

1 *Tuake v Toeta and Registrar of the Land Court,* HC Cook Islands, 13 September 2010, Plt. No. 11/2010, [5]-[7].

'satisfactorily amended, the Courts will almost always follow that course and give … an opportunity to amend'.

[13] Where, however, as here, they rest on fact allegation foreshadowed at a prior criminal trial, whether they may be 'clearly untenable … as a matter of … incontrovertible fact' becomes more pointed. As was said in an English appellate decision, absent that singular feature, and simply as a matter of principle:[2]

> … it is not sufficient to look and see whether the pleading technically discloses a cause of action … the Court should look to see what will happen at trial. If the case is so weak that it has no reasonable prospect of success, it should be stopped before great expense is incurred.

PRIOR CRIMINAL TRIAL

[14] At trial the Crown case, in essence, as stated in opening, was this:

> This case involves the theft of $18,090. The Crown case is that the money was withdrawn from a BCI bank account by Ms Tuaine, who was at the time employed by the bank and worked in the Atiu branch. …
>
> … BCI operates a small branch in Atiu. In December 2020 and January 2021, the Atiu branch had two employees. The supervisor of the branch, TP, and the defendant … Ms Tuaine was employed by BCI in 2016 as a bank teller. Her role included serving BCI customers, processing deposits and withdrawals, at other bank transactions, and updating customers' bank books.
>
> On Monday, 18 January 2021, TM went to the BCI Atiu brunch to make a deposit. The deposit was into the Teenu meeting house project account. This account was opened in 2016 by the Teenu village community in Atiu, to save for the renovation of their local meeting house. Mrs M is the wife of the treasurer of the Teenu community. His name is UM. She would regularly make deposits into the account after fundraising events
>
> … the treasurer and the other signatories of the account had previously agreed that no withdrawals were to be made from the account. TM was served at the BCI branch by MK. Ms K was just filling in at the time, as the defendant (Ms Tuaine) was in Rarotonga on annual leave, and the bank supervisor Ms P, was on sick leave.

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2 *Walker v Jones* [2000] 4 All ER 412, 450 (CA).

> Ms K was updating the account bankbook with the deposit, when she noticed that three withdrawals had recently been processed from the account. But those withdrawals were not noted in the bankbook.
>
> On 11 December 2020, $6,000 in cash had been withdrawn. On 24 December 2020, $7,210 had been withdrawn. On 12 January 2021 $4,880 had been withdrawn. Those three withdrawals came to a total of $18,090. Ms M was not aware of any money being withdrawn out of the account. She went home and discussed it with Mr M. He was also unaware of the withdrawals, so he informed the supervisor of the branch. She then notified BCI and a formal complaint was made.
>
> The Police commenced an investigation into the withdrawals, and it was confirmed that the withdrawals were done at the bank. That the defendant was at work on the three days the withdrawals were made. And that her unique staff log in was used to process all three withdrawals. Two withdrawals slips were also located. The slip for the 24 December 2020 withdrawal contained forged signatures for all three signatories. The slip for the 12 January withdrawal was blank, aside from a date and an amount. The slip for the first withdrawal on 11 December 2020 was also found.
>
> Ms P later spoke with Ms Tuaine about the withdrawals. The defendant admitted to all three withdrawals and said that she had spent the money on food, and paying off her Kaio. On 15 February 2021, the defendant was arrested and interviewed by the Police. She refused to make a statement as is her right.

[15] In Ms Tuaine's opening address her counsel, as is usual, stated her defence in essence. He said this:

> … the three charges of theft [are] the result of bad management by this branch of the BCI in Atiu; bad management and dishonest management.
>
> There are two main characters relating to these charges and they are, firstly, the defendant, … . And the second character is her boss, supervisor, the Atiu branch manager, TP. Her boss, P, holds all the keys to the bank, and she takes it home when the bank closes every day.
>
> … every day [to which these charges relate], not only was the defendant working she … P was also working. The thrust of our defence is that the defendant was set up by her boss. It was her boss that stole this money.

[16] At the end of the Crown case Ms Tuaine's counsel contended she had no case to answer; and that, as Grice J said in her ruling:

> TP's evidence was flawed and it was her word against that of Ms Tuaine, 'So it's … one on one. And … in such circumstances, the matter should not go to the jury.

Grice J dismissed this application, holding:

> … I conclude that there is ample evidence upon which a jury could properly convict in this case, that is a matter of the jury. In this case there has not been a witness who has been so discredited or shown to be so unreliable it would be unjust … for a jury to convict.

[17] Ms Tuaine elected to give evidence. She denied the thefts and ever freely admitting to them. She contended TP had complete control of her and access to her 'unique staff log'. The jury, after closing addresses consistent with those in opening, found Ms Tuaine not guilty.

MALICIOUS PROSECUTION

[18] The tort, malicious prosecution, has five stringent elements designed to strike a balance between two public interests in tension:

i) safeguarding citizens from unjustifiable prosecution; and

ii) encouraging citizens to report crime.

BCI must have co-prosecuted Ms Tuaine.

[19] The three charges against Ms Tuaine were laid by the Police, not BCI, but BCI may be deemed a co-prosecutor if sufficiently instrumental in the prosecution:[3]

> … the Police will generally be treated as the prosecutor and no action for malicious prosecution will lie against the person on whose information the Police have acted. … (But) A person may be regarded as the prosecutor if, … he puts the Police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the Police by supplying false information in the absence of which the Police would not have proceeded; or if he withholds information in the knowledge of which the Police would not prosecute.

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[3] *Commercial Union Assurance Co of New Zealand v Lamont* [1989] 3 NZLR 187 (CA), McMullin J.

Statement of claim

[20] Ms Tuaine's statement of claim dated 11 November 2022, in paras 32-33, speaks thus to this threshold element:

> In January 2021, as a result of a complaint of cash being unlawfully withdrawn from the Teenui Village Special Projects Account, a Police investigation was conducted.
>
> The plaintiff was arrested and charged with 3 charges of theft from the BCI in Atiu on 25 January 2021 …

[21] In its request for further and better particulars, dated 25 January 2023, BCI did not request any information relating to either paragraph; and so, on this application, the issue is whether those pleadings are capable of being amplified.

[22] To assess that in a real sense, I will set them against the trial evidence as a whole, though most of it will be more relevant to the other elements of this tort or the other causes of action.

Trial evidence

[23] At trial, TM, the first witness, said that on 15 January 2021, when she made a deposit to the Teenui Village Special Project account at BCI, Atiu, the teller, MK, told her there had been three recent withdrawals.

[24] TM was unaware of those withdrawals (though she had the bankbook); and returned home to tell her husband, PM, the village treasurer responsible for the BCI special project fund.

[25] PM said that withdrawals required the signatures of three trustees; that any withdrawal had to be approved at a village meeting; that village policy was that there should be no withdrawals, and that he was unaware of any.

[26] When his wife told him of the three withdrawals, PM said, he was extremely angry and he went to speak to the BCI Atiu branch supervisor. When cross-examined, he said the signatures on the withdrawal slips must have been false.

[27] The branch supervisor, TP, a BCI officer for 43 years, said that on 15 January 2021, when TM made the deposit and discovered the withdrawals, MK was in temporary charge. She, herself, was not present and Ms Tuaine was in New Zealand.

[28] TP said that, when MK alerted her to the withdrawals, she found that though the withdrawals had not been recorded in the Special Project bank book, they had been recorded electronically.

[29] TP said she advised BCI head office on a date she could not remember; and, when re-examined, also said she had checked the account because head office had rung her to tell her to.

[30] TP could not recall when she spoke to Ms Tuaine, but did recall closing the branch so they could speak undisturbed. Eventually, she said, Ms Tuaine retrieved from her home two withdrawal slip batches meant for BCI head office, and admitted to having spent the funds.

[31] TP said that the withdrawal slips were stamped and carried Ms Tuaine's initials; and that these withdrawals, as recorded in the Transaction Journal, carried Ms Tuaine's unique identifier, 154.

[32] When cross-examined, TP confirmed she and Ms Tuaine had a zoom meeting with the BCI manager for the outer islands, Jimmy Glassie. She denied she had forced Ms Tuaine to accept responsibility.

[33] When re-examined, TP said that Ms Tuaine admitted on the zoom call that she had spent the funds on food and alcohol, and perhaps to show that she was well-off.

[34] Mr Glassie was not a witness. The only remaining BCI witness was NT, the senior risk compliance officer, who had only been employed by BCI for four months by the date of trial.

[35] The final witness, JG, the Police officer in charge, is the only witness who spoke to this first critical element. BCI, he said, prompted the investigation by making a complaint to his superior, and by identifying Ms Tuaine as a potential suspect.

[36] On 15 February 2021, JG said he executed a search warrant at Ms Tuaine's Atiu home without finding anything; and was present when she was to be interviewed that morning at the Atiu Police station. After advice, she declined to make a statement.

Conclusions

[37] On the evidence of this final witness, JG, this first element, critical to malicious prosecution, is capable of being securely amplified and proved at trial, absent any inconsistent evidence not given at the criminal trial.

[38] BCI put the Police in possession of information virtually compelling Ms Tuaine's prosecution. Conversely, and this matters more shortly, there is nothing to suggest BCI supplied the Police false or deceptively incomplete information.

BCI's co-prosecution must have failed

[39] There can be no issue as to the second element of this tort.[4] Ms Tuaine's prosecution, which on the evidence BCI prompted by its complaint, failed. Ms Tuaine was found not guilty of all three charges; and that is sufficiently pleaded.

BCI must have acted without reasonable and probable cause

[40] The third element of the tort is, by contrast, highly significant to this application. Ms Tuaine must allege facts, consistent with those conceded or established at trial, capable of showing to the civil standard that BCI acted without reasonable and probable cause.

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4 *Van Heeren v Coope*r [1999] 1 NZLR 731 (CA).

The classic test

[41] To act with reasonable and probable cause is, according to the long established test, to act with the following level of conviction:[5]

> [A]n honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[42] This test is partly subjective and partly objective. BCI must have acted out of an honest belief that there was cause to prosecute (the subjective aspect); and a reasonable person in BCI's position must have thought there was that cause (the objective aspect).

[43] The subjective aspect does not require BCI to have believed Ms Tuaine was guilty. It requires BCI to have believed there was good cause to prosecute. The objective aspect requires that to be set against what BCI knew at the time, and whether it acted with reasonable care and judgment.

[44] The level of conviction to be imputed to BCI in these two senses is that exhibited by whichever of its employees acted on its behalf in conveying the complaint to the Police, but subject to this: the employee must have been acting within the scope of his or her authority.

[45] This constraint has its origin in the principles governing the responsibility of employers acting by their employees or agents. So, where an employee may have tortiously acted without the requisite level of conviction, a question of fact and degree will arise:[6]

> … whether (the) tortious act is so much within the scope of (his or her) employment as to allow a court to determine that the act was the performance of a duty generally authorised but tortiously carried out.

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5 *Hicks v Faulkner* (1878) 8 QBD 167 (QB), 171.

6 'A to Z of New Zealand Law' (Online Ed) WESTLAW, Thomson Reuters, 59.17.2.3(3).

[46] Where, by contrast, an employee acts criminally, and conceals it by attributing the offence to a co-employee, that cannot be within the scope of his or her authority, especially where the employer is a victim. It cannot, to my mind, be imputed to the employer.

Statement of claim

[47] In her statement of claim, as at trial, Ms Tuaine alleges TP assumed her identity to make the three unlawful withdrawals attributed to her:

i) TP, contrary to BCI policy, knew and used her confidential electronic password, '154 Tuaine';

ii) TP forged her initials when impressing the BCI stamp on the withdrawal slips;

iii) TP had access to her cash box, having instructed her to leave it unlocked; and

iv) TP mostly had the key to the branch safe and must have abstracted the cash there.

[48] Implicitly, Ms Tuaine alleges, it is irrelevant she herself had access to cash deposits, withdrawal and deposit slips and other relevant documents, when taking them weekly to the airport in a secure parcel for BCI head office.

[49] Finally, as at trial, Ms Tuaine alleges that on 25 January 2021, when she was charged with the three offences, she was instantly dismissed by TP and the BCI outer islands manager, JG.

[50] In answer to a related question in BCI's request for further and better particulars, Ms Tuaine agreed that:

i) On 27 January 2021 she took part in a workplace video conference with JG, MM, and TP;

ii) On that day, after that conference, BCI wrote her a letter terminating her employment;

iii) On 28 January 2021 she signed that letter acknowledging receipt; and

iv) Her employment was terminated with immediate effect on 27 January 2021.

[51] At this point the trial evidence and the statement of claim, as amplified, diverge. As to this event, TP's evidence at trial was very abstract. JG was not called. The letter was not produced. Nor, so far as I am aware, has it been produced since.

Conclusions

[52] In her statement of claim Ms Tuaine advances her causes of action against BCI on the same broad basis that she advanced her defence to the charges at trial.

[53] Ms Tuaine alleges in a wide ranging way that TP was serially dishonest, controlled her completely, had access to her password and cash box, and assumed her identity to make the three withdrawals attributed to her.

[54] In this Ms Tuaine faces two immediate difficulties; the first of which is that on the face of the record she was the teller who acted on the withdrawals. There is nothing implicating TP. The second is that she does not and cannot allege she ever raised her concerns about TP with BCI. Her complaints first surfaced at trial.

[55] Most strikingly, and on the face of it implausibly, Ms Tuaine alleges, as at trial, that in some 15 instances she discovered cash missing from her cashbox, $900 on average; and complained to TP without result. Why did she complain to TP, whom she alleges was the only other person with access to her cashbox, and serially dishonest? Why did she never complain to BCI head office? That apart, BCI would, presumably, be able to call evidence as to whether any such shortfalls ever surfaced.

[56] Such difficulties as these are as basic as they are for reasons I gave, when BCI was about to apply for an order for security for costs, to which I now return.

[57] At her criminal trial, Ms Tuaine could readily discredit TP when she enjoyed the presumption of innocence. The Crown carried the burden of proof, and all she needed was a reasonable doubt. At any civil trial she would have to sheet home such allegations to establish even a circumstantial case to the civil standard, in the face of the bank records implicating her.

[58] More fatally, what she alleges against TP could not assist her against BCI. If she were to establish TP acted criminally, that would be outside the scope of TP's terms of employment, and to the detriment of BCI, which might well have had to indemnify the depositor. Nothing TP did criminally could be imputed to BCI.

[59] At a civil trial, conversely, BCI would be entitled to rely on its records showing Ms Tuaine to be the teller; on JG, its outer island manager, as to any she made on 27 January 2021 during their video meeting, but later I understand retracted; and on BCI's letter that day terminating her contract of employment.

[60] On the pleadings as they are, therefore, or are capable of becoming by any amendment consistent with the evidence at Ms Tuaine's criminal trial, the only inference open to the civil standard is that when BCI complained to the Police it had reasonable and probable cause. There is nothing to the contrary.

[61] At Ms Tuaine's criminal trial, moreover, and even though she was acquitted, Grice J rejected her counsel's submission that there was no case to answer: and that there was 'ample evidence' on which the jury might, if it chose, find guilt.

[62] On these bases alone I find that this cause of action is clearly untenable; a conclusion, which also obtains when I consider the two remaining elements of this tort.

BCI must have acted with malice

[63] To have acted with 'malice' the third element of this tort, BCI's motive, need not be spiteful. It need only be 'any motive other than that of simply instituting a

prosecution for the purpose of bringing a criminal to justice'.[7]

[64] For the reasons I have just given, as to why Ms Tuaine cannot begin to establish BCI complained without reasonable and proper cause, I am satisfied equally she cannot begin to establish that BCI acted with malice.

[65] The incontestable facts are that on 21 January 2021, the unauthorised withdrawals were discovered; the village treasurer complained to BCI; BCI records showed Ms Tuaine to be the teller; she apparently admitted to taking the funds; BCI complained to the Police, who charged her; and BCI dismissed her.

[66] On those facts all that BCI did was to disclose to the Police evidence of a likely offence by one of its employees. On those facts, far from acting with malice, BCI acted with institutional integrity.

BCI must have caused Ms Tuaine damage

[67] Finally, by co-prosecuting Ms Tuaine, BCI must have caused her damage, such as damage to her reputation,[8] causing her to lose her employment and future income, and putting her to the cost of defending herself.

[68] On my analysis BCI cannot be answerable for these forms of damage. But if I am wrong, it could well be and I will comment on the forms of award open later in this decision.

DEFAMATION

[69] My conclusion, that Ms Tuaine's cause of action in malicious prosecution is untenable, is equally fatal to her cause of action in defamation, as to which BCI can claim absolute privilege:[9]

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7 *Commercial Union Assurance Co of New Zealand v Lamont* [1989] 3 NZLR 187 (CA), Richardson J.

8 The charges co-prosecuted must be inherently defamatory: *Wiffen v Bailey and Romford Urban District Council* [1915] 1 KB 600 (CA).

9 'A to Z of New Zealand Law' (Online Ed) WESTLAW, Thomson Reuters, 59.17.2.2.

> Instituting a criminal prosecution will tend to lower the reputation of the accused person in the eyes of the public and thus will be defamatory of that person. Yet any action and defamation [can] be met by the defence of absolute privilege. … Seemingly, …, the conduct, words and documents involved in bringing a criminal prosecution are all included.

[70] Absolute privilege is not a defence to malicious prosecution because the essence of that tort lies in a malicious abuse of process, not on the making of any related statement like a complaint. Absent such an abuse the defence is absolute.[10]

NEGLIGENCE

[71] Ms Tuaine's cause of action in negligence is equally untenable because a co-prosecutor, as I have held BCI to be, does not owe a duty of care to a likely defendant.[11] Such a duty has been held incompatible with the bar set by malicious prosecution: a want of reasonable and probable cause and malice.

[72] Ms Tuaine alleges, more broadly, that in failing, for instance, to conduct audits BCI is in breach of its duty of care to its shareholders. But whether or not it may be is beside the point. What counts is whether it owes any specific duty to her and, as a matter of law, it does not.

WRONGFUL DISMISSAL

[73] Ms Tuaine's final cause of action, wrongful dismissal, stands independently of her three preceding causes of action and, BCI contends, is untenable as a matter of law, because:

i) there is no tort of wrongful dismissal; and

ii) there is no ability to pursue such a claim under the Employment Relations Act 2012.

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10 *Taylor v Serious Fraud Office* [1999] 2 AC 177 (HL), 215, 219.

11 *Jain v Trent Strategic Health Authority* [2009] 1 AC 853 (HL), [29]-[35]; *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 (CA); *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

[74] Both propositions must be set against, and turn on, this Court's jurisdiction under the Cook Islands Constitution and under common law; the first directly, the second indirectly. I begin there.

Jurisdiction and applicable law

[75] Article 47(1) establishes this Court as a 'Court of record … for the administration of justice throughout [these] islands: and Art 47(2) says:

> Except as provided in this Constitution or by law, the High Court shall have all such jurisdiction … as may be necessary to administer the law in force in the Cook Islands.

[76] Article 82 (1) declares, furthermore, the High Court thus established 'to be the same Court as the High Court of the Cook Islands established by the Cook Islands Act 1915'.[12]

[77] Article 1(1) defines 'Law' to mean 'any law for the time being in force in the Cook Islands; and includes this Constitution and any enactment'; and 'Existing Law' means 'any law in force in the Cook Islands before Constitution Day'.

[78] Article 77(a) provides that the law existing at Constitution Day is to continue, subject to the Constitution, 'until repealed, and subject to any amendment; and Art 77 (b) states:

> All rights, obligations, and liabilities arising under the existing law shall continue to exist on and after Constitution Day, and shall be recognised, exercised, and enforced accordingly.

[79] That law included New Zealand common law because since 1901 the Cook Islands had been part of New Zealand.[13] And so the issue whether wrongful dismissal constitutes a cause of action capable of remedy in this Court turns firstly, if not finally, on that law as it then was.

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12 Cook Islands Act 1915, ss 101, 114, 115 principally: see also the concurrent jurisdiction originally exercised by the Supreme Court of New Zealand, s 153.

13 Cook Islands Act 1915, Preamble: Order in Council, dated 13 May 1901, and taking effect on 11 June 1901, under the Colonial Boundaries Act 1895,

Action in contract

[80] In New Zealand at common law there always was, and there still is as I understand it, an action for wrongful dismissal answerable in damages, which has been expressed thus:[14]

> As the common law presumes that employment contracts can be terminated by either employee or employer on giving reasonable notice, and that summary dismissal (without notice) can only be justified by good cause (e.g. misconduct) wrongful dismissal occurs where there is dismissal without proper notice or summary dismissal without cause or where it involves contravention of a statutory provision.

[81] This cause of action has been held not to be subsumed by the statutory personal grievance procedure later created; the effect of which was to offer concurrent remedies within the exclusive jurisdiction of the New Zealand Employment Court.[15]

[82] An award of damages under this cause of action has also been held not to be confined to salary payable for the period of notice due under the contract of employment, and may compensate undue mental distress, humiliation and the like.[16]

[83] Whether in New Zealand these conclusions still hold, or have been displaced by statute is irrelevant. They appear consistent with the common law as it must have been on Constitution Day. The issue is rather how they reconcile with our own statute.

Employment Relations Act 2012

[84] In the Cook Islands, as it seems to me, the common law action survives the 2012 Act, and lies still within the jurisdiction of this Court.

[85] First, the Act does not, at least expressly, purport to create an exclusive regime under which such disputes are to be decided. Section 5, which sets out the Act's

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14 'Aspects of Damages: employment contracts and the rule in *Addis v Gramaphone Co*', New Zealand Law Commission', Report No 18, March 1991, para 17.
15 *Ogilvy Mather (New Zealand) Ltd v Turner* [1994] 1 NZLR 641 (CA).
16 *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74.

objects, is less than absolute. The most material of those objects, in s 5(f), is illustrative:

> To establish a framework for resolution of employment disputes encouraging, so far as is consistent with the interests of Justice, speedy and low cost dispute resolution in order to minimise the possible adverse effects of such disputes.

[86] Second, collective and individual agreements must specify 'procedures for resolution of employment disputes'.[17] And both may contain, 'any other terms and conditions agreed to by the parties'.[18] The parties are left with a choice of forum.

[87] Third, Part 6, governing disputes, is prescriptive, as are the provisions as to termination and notice,[19] but at no point does the Act purport to extinguish the common law action; and that has to be decisive. In *Ogilvy Mather* McKay J said this:[20]

> There is nothing in the Act to suggest that Parliament intended, by mere implication, to take away the employee's previous right to full compensation for loss suffered as a result of the employer's breach of contract. That would be a major inroad into contractual rights, and should not be read into an Act which emphasises the freedom of the parties to negotiate their own individual contracts. There is no restriction on the employer's right to recover full damages for any breach by the employee, and I can see no justification for reading down the wide jurisdiction conferred on the [Employment] Court … so as to restrict the recovery of damages by the employee for breach by the employer.

[88] That conclusion seems to me to hold even more strongly under the 2012 Act, which does no more than create opportunities to mediate and arbitrate, and does not purport to limit the jurisdiction of this Court.

Incomplete context

[89] On the pleadings and submissions as they are, I am unable to resolve whether this last cause of action is also untenable or might be capable of surviving on an amended pleading.

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17 ERA 2012, ss 17(2)(g), 24(1)(g).
18 ERA 2012, ss17(3), 24(2).
19 ERA 2012, ss 43 – 50.
20 *Ogilvy Mather (New Zealand) Ltd v Turner* [1994] 1 NZLR 641 (CA).

[90] BCI, assuming, incorrectly, that the absence of a cause of action in tort has to be decisive, makes no submission as any in contract. Nor has it put in evidence, so far as I am aware, of Ms Tuaine's terms of contract or her letter of dismissal.

[91] BCI will need to file all this information, with a related submission, and Ms Tuaine will need to have the opportunity to reply, before I resolve this final aspect of BCI's application.

DAMAGES

[92] To be complete, and even though in this decision I largely extinguish them, I need last to comment briefly on Ms Tuaine's damages claims, their nature (largely exemplary), and their quantum.

[93] An award of pecuniary damages for income lost as a result of summary dismissal is open to Ms Tuaine under the *Addis Gramophone* principle, if she is able to show that she was wrongly dismissed. As to that there can be no issue.

[94] An award of general damages to compensate her for injury to her reputation, distress and the like, is also open in principle as illustrated by *Whelan v Waitaki Meats Ltd*.[21] But quantum is contingent on the case.

[95] There, $50,000 general damages was awarded to compensate a chief executive who had served the company without blemish for 23 years, but was dismissed on four days' notice without specific cause. That is not this case.

[96] Exemplary damages require more extreme conduct still on the part of the employer. In summary:[22]

> Exemplary (or punitive) damages are awarded to punish a defendant who is guilty of outrageous wrongdoing, deter that person and others … , and register the Courts condemnation of that behaviour. Exemplary damages are not intended to compensate the plaintiff …, they are like a state-imposed fine …

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21 At fn [16].

22 'A to Z of New Zealand Law' (Online Ed) WESTLAW, Thomson Reuters, 59.24.3.3(1).

[97] The quantum of exemplary damages, which Ms Tuaine seeks under her various causes of action remains an issue in itself. The sums claimed are out of all proportion to other awards in such cases.

ORDERS

[98] I strike out as untenable Ms Tuaine's causes of action in malicious prosecution, defamation and negligence. I will decide whether her wrongful dismissal cause of action is also tenable, once I am equipped to do so.

[99] As to that cause of action BCI is to file and serve the materials and submissions specified in para [90] by 22 July 2024, and Ms Tuaine is to respond by 5 August 2024.

P J Keane, CJ