

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 147
ARC 58/12**

IN THE MATTER OF an application for urgency
AND IN THE MATTER OF an application for special leave to remove

BETWEEN NISHA ALIM
 Plaintiff

AND LSG SKY CHEFS NEW ZEALAND
 LIMITED
 Defendant

Hearing: 30 August 2012
 (Heard at Auckland)

Counsel: Tony Drake and Rosemary Childs, counsel for plaintiff
 Jo Douglas, counsel for defendant

Judgment: 31 August 2012

JUDGMENT OF JUDGE B S TRAVIS

[1] On 30 August 2012 the plaintiff filed and served an application for special leave to remove a matter to the Employment Court from the Employment Relations Authority (the Authority). The application was accompanied by an application for urgency.

[2] The defendant filed a notice of opposition to the application for special leave and a memorandum of counsel. The application for urgency was dealt with in a telephone chambers hearing. I declined the application for urgency and these are my reasons for so doing.

Factual Background

[3] The application for urgency and the application for special leave were not accompanied by any affidavit evidence. However, it appeared that the following was common ground, and will, for present purposes, serve as the factual background to the application for urgency.

[4] The plaintiff is a party to proceedings before the Authority. The plaintiff has apparently applied under s 178 of the Employment Relations Act 2000 (the Act) to the Authority for an order removing the matter to the Court to hear and determine it without the Authority investigating it.

[5] This application for removal may have been filed in the Authority approximately two weeks ago. Mr Drake, for the plaintiff, informed the Court that he had only recently been instructed in these proceedings.

[6] The Authority had set down an initial investigation meeting to hear the plaintiff's evidence for Monday 3 September 2012. The Authority has apparently issued directions on 28 August 2012 that it would continue with that initial investigation meeting before considering and determining the removal application. The Court was not provided with a copy of those directions.

[7] In support of its application for urgency, it is stated that the plaintiff wishes to resolve this matter in a cost-effective manner. It is said that if the matter was accorded urgency and removed to the Court before 3 September, it would avoid the need for an investigation meeting in the Authority and obviate the need for the plaintiff to give evidence twice about the same matters, as it is said to be highly likely that there will be a challenge to this Court. It is said that important questions of law need to be determined ahead of considering evidential and factual issues.

[8] The particular matter that is relied upon as the question of law for removal is what the phrase "immediately before" means where it appears in s 69I(2) of the Act where it states:

If an employee elects to transfer to the new employer, then to the extent that the employee's work is to be performed by the new employer, the employee—

—

...

(b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date...

[9] The plaintiff has stated that whether the changed or increased terms and conditions of her employment “immediately before” her transfer are required to be applied by the defendant, who is her new employer, is an important question of law which needs resolution before the investigation.

[10] The defendant says that this is not an issue which will arise in the case and the purported question of law is not required to be determined by the Authority. Ms Douglas, for the defendant, submitted that the plaintiff's claims can be determined on factual issues about her correct terms and conditions of employment, not primarily on questions of law.

[11] It is apparently going to be alleged by the defendant that the plaintiff's previous employer, Pacific Flight Catering Ltd (PFC), provided inaccurate records in relation to the plaintiff's leave balances and even her occupation – claiming that she was a supervisor when in fact she was working as a catering assistant. Reference was made to High Court proceedings, where it is alleged that PFC's witnesses have made admissions that the leave records were inflated and incorrect and, without the knowledge of the relevant employees, their hourly rates were increased shortly before they were due to transfer to the defendant. These matters are all clearly in issue and some may well be resolved by a pending High Court decision.

Questions of urgency

[12] Because the directions of the Authority were issued on 28 August this application for special leave has been filed only two working days before the investigation is to take place. The hearing of the application for special leave would have to take place either on the Thursday or Friday prior to the investigation when the parties would be better served preparing for that investigation. The grounds for

urgency did not suggest any irreparable harm and, as Ms Douglas submitted, a challenge is not inevitable.

[13] Further, urgency should not be granted if there was little or no prospect of the substantive application for special leave succeeding. Section 178(3) of the Act provides:

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

[14] As I understand it from counsel, not having seen the directions themselves, it appears clear that the Authority has not declined the application to remove the matter to the Court but has indicated that it will deal with the application after it has heard the plaintiff's evidence in the investigation meeting. Unless the Authority has declined an application, there are no grounds for applying directly to the Court for special leave. The Court does not have any originating jurisdiction to remove proceedings from the Authority.

[15] Mr Drake endeavoured to argue that by deferring its determination of the application for removal, the Authority had declined to determine the application and therefore there would be grounds for applying for special leave. On the way in which the directions have been described to the Court, that argument does not appear to be open, and, at best, the directions might be categorised as an adjournment of the application for removal.

[16] If, as appears to be the position, the application for removal has merely been adjourned or deferred, that then runs into the further difficulty of s 178(6) which states:

(6) This section does not apply—
(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

- (b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

[17] This sub-section is substantially the same as 179(5) which has been the subject of a number of decisions of this Court. In *X v Bay of Plenty District Health Board*,¹ I followed two Court of Appeal decisions, *Winstone Pulp International Ltd v Attorney-General*² and *Bevan-Smith v Reed Publishing (NZ) Ltd*³ and the approach adopted by Judge Couch in *Oldco PTI (New Zealand) Ltd v Houston*.⁴ I stated:

[35] ... Following *Oldco*, supported, as it is by the line of Court of Appeal decisions either interim stays or determinations adjourning investigations, which do not have substantive consequences, are to be regarded as matters of procedure and caught by s 179(5). This is because, to use Judge Couch's words, they relate to "the manner in which the employment relationship problem between the parties is resolved" and do not have substantive effects on the rights and obligations of the parties (at para 50). For these reasons I considered this particular challenge was barred by s 179(5).

[18] Mr Drake sought the opportunity to take further instructions and to file affidavits in support of the application for urgency. I declined those applications because of the shortness of time and the prejudice this would cause to the defendant. As Ms Douglas submitted, it would be unfair to the defendant to have this application continuing to be held over whilst it was in the last stages of preparation for the imminent investigation meeting. Further, I could not see, and neither could Mr Drake inform me, what factual matters might be adduced by affidavit evidence which would alter the preliminary conclusions I had reached on the provisions of s 178.

[19] For these reasons I declined the application for urgency and reserved costs.

[20] Although I did not deal with the application for special leave, I indicated that the substantive application could not be heard prior to the commencement of the Authority's investigation on 3 September 2012. For the reasons I have indicated above, it does not appear that the Court will have the jurisdiction to deal with it, as

¹ [2007] ERNZ 781.

² (1999) 13 PRNZ 593.

³ (2006) 18 PRNZ 310.

⁴ [2006] ERNZ 221.

the plaintiff's application for removal has not been declined by the Authority. In any event, it could not proceed without an evidentiary basis to establish that important questions of law are "likely to arise" in terms of s 178(2)(a) of the Act: see *NZ Tramways and Public Passenger Transport Employees Union v Wellington City Transport Ltd.*⁵

[21] The plaintiff should advise the Court as to whether, in the circumstances, the application for special leave to remove is being pursued.

B S Travis
Judge

Judgment signed at 12.30pm on 31 August 2012

⁵ [2011] NZEmpC 78 at [25].