

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 109  
EMPC 467/2023**

IN THE MATTER OF      an application for special leave to remove  
proceedings to the Employment Court

BETWEEN                LDJ  
Applicant

AND                        EZC  
Respondent

Hearing:                1 May 2024  
(Heard at Auckland)

Appearances:        MC Donovan, counsel for applicant  
MW O'Brien and J Plunket, counsel for respondent

Judgment:            19 June 2024

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**JUDGMENT OF JUDGE KATHRYN BECK**

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**Background**

[1]      The applicant (LDJ) has applied for special leave to remove an employment relationship problem from the Employment Relations Authority to the Court for hearing and determination. It is contended that three important questions of law are likely to arise other than incidentally. Leave is required under s 178 of the Employment Relations Act 2000 (the Act) because the Authority previously declined to remove the matter.<sup>1</sup>

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<sup>1</sup>      *LDJ v EZC* [2023] NZERA 738 (Member Fuiava).

[2] The applicant in these proceedings claims that while employed by the respondent over a fourteen-and-a-half-month period, they suffered from extreme stress and burnout which has resulted in adverse and ongoing physical and psychological problems. They have since been diagnosed with post-traumatic stress disorder attributable to occupational stress and suffer from severe depression and anxiety.

[3] After their employment ended, they raised a personal grievance and sought three months' lost wages. After negotiation, they were offered and accepted a sum of \$20,000 in settlement of their claims. The settlement agreement was signed by the applicant and the respondent's human resources director, but was not certified by an MBIE-employed mediator under s 149 of the Act.

[4] The applicant's position is that when they signed the settlement agreement, they did not have the requisite mental capacity to do so. It is submitted that the settlement agreement needed to comply with s 108B of the Protection of Personal and Property Rights Act 1988 (PPPR Act) because it needed to be approved by a court for it to be valid, in light of the applicant's incapacity. The respondent's position is that the applicant did not lack mental capacity, that the settlement agreement did not need to comply with the PPPR Act, and that it is a full and final settlement of all matters between them.

[5] Accordingly, the questions of law which are said to be important concern the status of employment settlement agreements that are not certified under s 149 of the Act and that have been signed by individuals who are not mentally competent to sign. In particular, the questions of law revolve around whether the requirements in s 108B of the PPPR Act apply to such settlement agreements.

[6] The three questions which are said by the applicant to be important questions of law are:

- (a) Question One – Does s 108B of the PPPR Act apply in relation to employment settlement agreements that are not certified under s 149 of the Act?

- (b) Question Two – If so, is the effect of s 108B of the PPPR Act that the settlement agreement entered into by the parties is not binding on the applicant?
- (c) Question Three – Does the power to act in equity and good conscience (under s 157(3) or s 189(1) of the Act) confer on the Authority or the Court power to approve (or not approve) a settlement agreement not certified under the Act and that does not comply with s 108B of the PPPR Act?

[7] In relation to Question Three, this question was not part of the original application in the Authority and has arisen as a result of some comments made by the Authority Member in the determination.<sup>2</sup>

[8] As a result of the discussion during the hearing between the Court and counsel, it became apparent that the more appropriate question was: Is the Employment Relations Authority a court for the purposes of s 108C of the PPPR Act?

### **Legal framework for special leave application**

[9] The removal provisions of s 178 state:

#### **178 Removal to court generally**

- (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
- (2) The Authority may order the removal of the matter, or any part of it, to the court if—
  - (a) an important question of law is likely to arise in the matter other than incidentally; or
  - (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
  - (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

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<sup>2</sup> *LDJ v EZC*, above n 1, at [37].

- ...
- (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).
  - (4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.
- ...

[10] In summary, the application to the Court is one for special leave, which is governed by the criteria of s 178(2)(a)–(c). This case focuses on the criterion in s 178(2)(a), which relates to important questions of law. Therefore, there are two separate issues for the Court to consider. First, it is necessary to identify a question of law likely to arise in the case other than incidentally. Second, it is necessary to measure the importance of that question.<sup>3</sup>

[11] In considering whether a question of law arises other than incidentally to a case, it will be sufficient if the resolution of the question may have an effect on the outcome of the case if it were to fall for determination.<sup>4</sup> That includes where the question arises as an element of a party’s pleadings that will need to be established for the claim or defence to succeed, including a claim or defence brought in the alternative. This can be illustrated by the Oxford English Dictionary’s primary definition of “incidental”: “Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part”; thus the question must relate to some essential part of the pleadings for it to be not incidental.<sup>5</sup>

[12] It is not necessary for the applicant to prove that the question of law will fall for determination in the case; it is only necessary to prove that it is “likely to arise”. As the Court is not in a position to consider the merits of a claim when considering a removal application, it will ordinarily be satisfied that a question of law is likely to

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<sup>3</sup> *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC) at 7.

<sup>4</sup> *Clerk of the House of Representatives v Witcombe* [2006] ERNZ 196 (EmpC) at [32].

<sup>5</sup> Michael Proffitt (ed) “incidental” (July 2023) Oxford English Dictionary <[www.oed.com](http://www.oed.com)> at [1.a].

arise other than incidentally where that question is included as part of the pleadings and where, if it falls for determination, it may have an effect on the outcome.

[13] Turning to the second issue, a question of law under s 178(2)(a) does not need to be complex, tricky or novel to warrant being called important, although that will normally be sufficient.<sup>6</sup> It may be important if the answer is likely to have a broad effect or could assume significance in employment law generally. It is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case, or some important aspect of it, or is strongly influential in bringing about a decision in the case, or a material part of it.<sup>7</sup>

[14] In assessing the s 178 criteria, there is no presumption in favour of or against removal.<sup>8</sup> Further, while there is no discretion to order removal, the Court retains a discretion to decline an application for special leave.<sup>9</sup> Exercising this discretion may require an assessment of the context or any other matter relevant to the statutory ground relied on in order to determine whether special leave should be declined.

[15] Finally, no inference may be drawn as to the prospects of success of either party from the outcome of an application for special leave.

## Issues

[16] The issues for the Court are:

- (a) Are the question(s) likely to arise other than incidentally?
- (b) Are the question(s) important?

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<sup>6</sup> *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].

<sup>7</sup> *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 (EmpC) at [35].

<sup>8</sup> *Johnston*, above n 6, at [21]. See also recent discussion in *Jackson v Aorere College Board of Trustees* [2021] NZEmpC 109 at [5]–[6] and *QDY v Counties Manukau District Health Board* [2022] NZEmpC 117, [2022] ERNZ 434 at [20] noting the care that is required in interpreting and applying the obiter statements made by the Court of Appeal in *Labour Inspector v Gill Pizza Ltd* [2020] NZCA 192, [2021] ERNZ 237 at [48].

<sup>9</sup> *Johnston*, above n 6, at [30]–[33].

(c) If so, is this an appropriate case for removal?

## **Submissions**

[17] The applicant submits that Question One is an important question of law because it remains unresolved after the Supreme Court's decision in *TUV v Chief of New Zealand Defence Force*.<sup>10</sup> That case resolved that s 108B does not apply to settlement agreements which have been certified by a mediator, but the applicant submits that the Supreme Court did not and could not resolve that issue in relation to settlement agreements that have not been certified by a mediator.<sup>11</sup> Additionally, it is submitted that because the resolution of that issue will help define the threshold that the applicant must meet to have the settlement agreement set aside, the question arises other than incidentally and is important.

[18] In respect of Question Two, the applicant submits that if s 108B does apply to the circumstances in the present case, the Court will need to consider how it applies.

[19] In respect of Question Three, the applicant submits that the extent of the Authority's and the Court's powers under the equity and good conscience jurisdiction will be a live issue in this case and could be determinative.

[20] The applicant also submits that given the extent to which both parties have needed to argue for their positions, the answer to the questions posed cannot be as straightforward as suggested by the respondent.

[21] Generally, the applicant submits that the issues in this case are not purely factual and that there are complex legal issues that will need to be determined before the case can be resolved. Given the complexity of the issues at hand, they note that there is a high likelihood that any determination of the Authority would be challenged, but say it is not determinative that the parties will lose an appeal right. Finally, they submit that the health circumstances of the applicant are consistent with an expedited hearing in the Court.

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<sup>10</sup> *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78.

<sup>11</sup> At [63]–[70].

[22] The respondent submits that Question One is not an important question of law because the Supreme Court has definitively determined the issue in *TUV* and that even if s 108B of the PPPR Act applied, the question would be moot because that Court clearly indicated that for a settlement agreement to be set aside, the other party would have to have been aware of the claimant's incapacity at the time of the signing, following *O'Connor v Hart*.<sup>12</sup>

[23] The respondent argues that Question Two is an overtly factual question and that any legal issues arising in relation to it are not sufficiently complex to warrant removal.

[24] It is submitted that Question Three was not raised previously, is not likely to arise in the proceedings other than incidentally, and is inconsequential.

[25] A central concern of the respondent's submissions is that the questions raised will not arise other than incidentally because if the decision maker finds that the applicant was competent to sign the agreement, other issues around s 108B of the PPPR Act will fall away. It is submitted that, without knowing whether the applicant was competent, it cannot be said that it is likely the present facts will engage the questions raised other than incidentally.

[26] Finally, it is submitted that even if these are important questions of law, they can be resolved better by the Authority because of the nature of the factual disputes arising, which are intrinsic to the dispute, and because the parties will lose a right of challenge if the proceedings are removed. It is also noted that continuing with proceedings in the Authority can help parties obtain insights that can lead to compromise and that given the sensitivities of this particular case, the Authority's less adversarial approach will be more appropriate.

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<sup>12</sup> *O'Connor v Hart* [1985] 1 NZLR 159 (PC).

## Analysis

[27] On reviewing the three questions at issue, it is apparent that Question One is pivotal to all three.<sup>13</sup>

[28] Question Two is only relevant if Question One is answered in the affirmative. To that extent, it is dependent on or derivative of Question One. Accordingly, if Question One meets the test for removal, then Question Two is also likely to do so.

[29] Again, Question Three (as originally posed or amended) is only relevant if the answer to Question One is in the affirmative.

[30] This analysis, therefore, focuses on Question One which is: Does s 108B of the PPPR Act apply in relation to employment settlement agreements that are not certified under s 149 of the Act?

*Is Question One likely to arise other than incidentally?*

[31] There are a number of factors to consider when looking at whether a question arises other than incidentally, as already noted above at [11]–[12].

[32] Section 108B of the PPPR Act states:

**108B Approval of court required to settle claims of specified persons**

- (1) This section applies where money or damages are claimed by or on behalf of a specified person, whether alone or in conjunction with another person.
- (2) If the claim is not the subject of proceedings before a court, an agreement for the compromise or settlement of the claim entered into by the specified person, or on his or her behalf by a person who, in the opinion of a court, is a fit and proper person to do so, is binding on the specified person if the agreement, or a release of the claim, is in writing and is approved by the court under section 108C.
- (3) If the claim has not been compromised or settled in accordance with subsection (2), and has become the subject of proceedings before a court, a settlement, compromise, or payment, or acceptance of money paid into court, whenever entered into or made, is valid so far as it relates to the specified person's claim only with the approval of the court under section 108C.

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<sup>13</sup> See above at [6].

[33] The Supreme Court described this provision as a “compromise rule” and noted: “It protects incapacitated parties from being bound by agreements to settle certain claims unless the agreement has been approved by the court.”<sup>14</sup>

[34] This can either happen at the time the agreement is entered into,<sup>15</sup> or once it becomes the subject of dispute.<sup>16</sup>

[35] Section 108C of the PPPR Act states:

**108C Applications for approval of court**

- (1) An application for the approval of a court under this section may be made by or on behalf of a specified person, or by any other party to the agreement or proceedings.
- (2) On an application for its approval under this section, the court, in its discretion, may—
  - (a) refuse the application; or
  - (b) grant its approval unconditionally; or
  - (c) grant its approval subject to any conditions and directions that it thinks fit, including conditions and directions as to—
    - (i) the terms of the agreement, compromise, or settlement; or
    - (ii) the amount, payment, security, application, or protection of the money paid, or to be paid; or
    - (iii) any other relevant matter.

[36] A “specified person” is “a person who is incapable of managing his or her own affairs.”<sup>17</sup>

[37] In this instance, it is apparent the resolution of Question One may well have an effect on the outcome of the case.

[38] LDJ claims that they did not have the necessary capacity to enter into the settlement agreement at the time and that it should be either set aside or declared invalid. They say the test to be applied in these circumstances depends on the legal framework for analysis – the PPPR Act or the common law test in *O’Connor v Hart*.<sup>18</sup> Question One is therefore likely to arise and is essential to the proceeding.

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<sup>14</sup> *TUV v Chief of New Zealand Defence Force*, above n 10, at [31].

<sup>15</sup> Protection of Personal Property Rights Act 1988, s 108B(2).

<sup>16</sup> Sections 108B(3) and 108C(1).

<sup>17</sup> Section 108A.

<sup>18</sup> *O’Connor v Hart*, above n 12.

[39] I agree. I do not accept the respondent's submission that the analysis in relation to LDJ's capacity or competence at the time of the agreement, which will largely be a factual analysis, detracts from the essential nature of the legal question. The facts must ultimately be assessed within a legal context. Question One asks what that context should be.

[40] It may be that LDJ runs an argument relying on *O'Connor v Hart* and s 108B of the PPPR Act, either together or in the alternative. However, even if alternative claims are brought, that would not undermine the essential nature of the question. The question would still be likely to arise other than incidentally, given that it is included in the pleadings, will be argued at the hearing, and may have an effect on the outcome if it falls for determination.

[41] The issues arising under Questions Two and Three (now reframed) will also be essential to the pleadings if the answer to Question One is in the affirmative. Accordingly, while it may not yet be certain that these questions will arise, they are likely to do so in that context.

[42] It is correct that Question Two requires an analysis of fact and law. However, this does not detract from the potentially pivotal nature of the legal question because, as above, the legal question will provide the framework for the factual analysis. For example, what is the test for determining whether LDJ is a specified person under the PPPR Act? If they are a specified person (and so the settlement is only valid with the approval of the Court under s 108C), what are the factors to be considered when determining whether to grant such approval?

[43] These are all questions that are likely to arise if Question One is resolved in favour of the applicant.

[44] Whether the Authority is a court for the purposes of pt 9A of the PPPR Act (Question Three) is of course only relevant if the PPPR Act has been found to apply. If it does apply, then the issue of jurisdiction is necessarily other than incidental.

[45] Accordingly, I find that the identified questions of law in this case are likely to arise other than incidentally and could have an effect on the outcome of the case.

*Are the questions important?*

[46] As already noted above, the question(s) do not need to be complex, tricky or novel to warrant being called important, although that will normally be sufficient.

[47] The applicant says Question One is a novel question of law. They argue it was not answered by the Supreme Court in *TUV* and submit that decision only applies to settlements reached under s 149 of the Act.<sup>19</sup> They argue that if the question of whether s 108B applied, given the scheme of the Employment Relations Act in relation to s 149 settlements, was deemed important enough to go all the way to the Supreme Court, then this question must also be regarded as being important.

[48] The applicant submits that the answer is likely to have a broad effect and could assume significance in employment law generally beyond the impact on these particular parties.

[49] The respondent submits that the question of law is no longer important because *TUV* has already determined the issue. It says that the Supreme Court found that *O'Connor v Hart* applies in the employment jurisdiction, and to employment settlements more broadly, not simply those under s 149 of the Act. It relies on para [64] of the judgment which it says refers to agreements in general as opposed to solely those under s 149.

[50] The applicant disagrees. They rely on para [63] which refers to s 149 agreements, and para [65] which refers to the approach reflected in s 149 and its consistency with the supported decision making model found in the Convention on the Rights of Persons with Disabilities, to support their argument that the Supreme Court decision can only be said to apply to s 149 agreements.

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<sup>19</sup> *TUV v Chief of New Zealand Defence Force*, above n 10.

[51] It is not the purpose of this judgment to resolve that argument. It is sufficient to say that it is reasonably arguable that the point has not been resolved. This is particularly so given that Winkelmann CJ and O'Regan J, who were the minority in the Supreme Court, considered that the majority approach displaced pt 9A of the PPPR Act from the employment context if the s 149 process had been followed, but not otherwise.<sup>20</sup>

[52] I consider this is a potentially novel and important question of law. Its answer is likely to have a broad effect and could assume significance in employment law generally in relation to settlement agreements that are not made under s 149. Further, while I consider that the resolution of the question will have an impact beyond the particular parties, I also consider that the question is likely to be decisive of an important aspect of the case and may be strongly influential in a material part of the decision in this proceeding.

[53] I find the questions of law in this case are important and will likely be strongly influential in bringing about a decision in a material part of the case.

*Is removal appropriate?*

[54] In assessing the s 178 criteria, there is no presumption in favour of or against removal. The respondent argues that even if the requirements are met, caution should be exercised against removal. It says the procedures in the Authority are more appropriate to deal with the proceeding.

[55] It advances its argument on three main fronts:

- (a) The way in which the Authority operates is more conducive to dealing with the vulnerabilities of the applicant;
- (b) the questions are predicated on an inherently factual investigation which should be undertaken in the Authority in the first instance; and

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<sup>20</sup> At [120].

(c) it would lose a right of appeal.

[56] The respondent is correct that the Authority is a low level informal investigative body, which can make accommodations for vulnerable witnesses or parties. However, the Court is equally able to make necessary accommodations in relation to dealing with sensitive evidence and vulnerable parties and/or witnesses. Protocols to deal with such issues are well established and the Court is well placed to deal with them.

[57] I agree that the Authority is designed to undertake intensely factual investigations. However, that does not imply that the Court is not also well placed to undertake such hearings and it does so on a daily basis. Further, Parliament specifically contemplates, by creating a mechanism for removal, that there will be situations where it is appropriate for the Court to be the arbiter of fact in the first instance.

[58] In relation to the loss of an automatic right of appeal through the loss of the right to challenge, I accept that is a factor. However, it is a matter that affects both parties equally and is a neutral factor for the purposes of this assessment. Further, it is an outcome that is specifically contemplated by the Act in cases where the questions of law are such that it is appropriate to remove them.

[59] I consider that removal of proceedings is appropriate in all the circumstances.

## **Outcome**

[60] The questions of law set out at [6] above – in particular, Question One – are important questions likely to arise in the matter other than incidentally.

[61] I consider it is appropriate that the proceedings be removed to the Court, and I make an order accordingly.

[62] The applicant should file and serve a statement of claim within 14 days of the date of this judgment.

[63] Costs are reserved. In the event the parties are unable to agree on costs, the applicant will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the respondent having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck  
Judge

Judgment signed at 9 am on 19 June 2024