IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 146
EMPC 127/2024

IN THE MATTER OF	an application for special leave to remove proceedings to the Court
BETWEEN	SERENITY PILGRIM, ANNA ROSE PILGRIM, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE Applicants
AND	THE OVERSEEING SHEPHERD, HOWARD TEMPLE, ALTERNATIVELY STEPHEN STANDFAST Respondent

EMPC 128/2024

IN THE MATTER OF	an application for special leave to remove proceedings to the Court
BETWEEN	HOSEA COURAGE, DANIEL PILGRIM AND LEVI COURAGE Applicants
AND	THE OVERSEEING SHEPHERD, HOWARD TEMPLE, ALTERNATIVELY STEPHEN STANDFAST Respondent

Hearing:	25 July 2024
Appearances:	BP Henry and S Patterson, counsel and A Kilic, advocate for applicants P Skelton KC and C Pearce, counsel for respondent R Kirkness, counsel to assist the Court
Judgment:	7 August 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The applicants have filed claims in the Employment Relations Authority (the Authority) seeking lost wages, penalties and other entitlements said to be owing to them during the time they were employees at the Gloriavale Christian Community (Gloriavale). The claims relate to differing timeframes, but some date back over 20 years.

[2] The applicants applied to the Authority to remove their claims to the Court for hearing. The Authority declined the applications for reasons set out in its determinations.[1] The applicants then applied for special leave to remove both proceedings to the Court. The applications for special leave were initially opposed but the ground has since shifted, for reasons I will come to.

The power to remove: Authority and Court

[3] It is not strictly necessary to consider the basis on which the Authority declined to exercise its power to remove the *Pilgrim* and *Courage* matters to the Court because the Court exercises a slightly different (narrower) power to grant leave. Nevertheless, I touch on the Authority's approach because it was referred to during submissions, most particularly in respect of the way in which the Authority expressed the test for removal in its determinations.

[4] The statutory power to remove is conferred on the Authority under s 178 of the Employment Relations Act 2000 (the Act). The Court's power to grant special leave is contained within s 178(3) of the Act. Section 178 materially provides that:

> **178 Removal to court generally**
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> (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.

[1] *Pilgrim v Overseeing Shepherd* [2024] NZERA 197 (Member Beck) and *Courage v Overseeing Shepherd* [2024] NZERA 200 (Member Beck).

(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

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

(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).

[5] As s 178 makes clear, the Authority may remove a matter to the Court where satisfied it is appropriate to do so, having regard to the matters specified in s 178(2)(a)-(c). It also has a residual discretion to grant leave where it is of the opinion that in all the circumstances the Court should determine the matter. As s 178 also makes clear, the Court has a more limited power; it may only grant special leave to remove a matter where it is satisfied that an important question of law is likely to arise in the matter other than incidentally; or 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 the Court already has before it proceedings which are between the same parties, and which involve the same or similar or related issues. Unlike the Authority, the Court does not have a residual discretion to grant leave.[2] The Court's residual discretion is limited to declining leave, notwithstanding a finding that one or more grounds in s 178(2)(a)-(c) have been made out.

[6] In the present case the Authority expressed the test for removal to the Court as follows:[3]

> [14] The Authority's 'first stop' role as an adjudicative body and exclusive jurisdiction for employment relationship disputes, has been affirmed by the

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2 Employment Relations Act 2000, s 178(3); *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [50]-[51].

3 *Pilgrim*, above n 1. Emphasis added. See too *Courage*, above n 1.

> Supreme Court in both *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* and *FMV v TZB*.
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> [15] In short, an application for removal to the Court is governed by applying factors detailed in s 178(2)(a)-(d) of the Act. But this must be assessed in the context that the Authority is a unique, specialist, investigatory body that was set up to be the first step in investigating and resolving employment relationship problems. This first step is low level, less technical in terms of process, led by the Authority through its investigation mandate and, should in almost every case, be taken and completed before judicial intervention by a higher court.
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> [16] *What all of this means for a removal application is best summarised by the Court of Appeal*'s *view in Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd where it stated that "… removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority."*

[7] A review of removal determinations issued by the Authority following *Gill Pizza* suggests that the Court of Appeal's obiter comment may have become embedded as the starting point for the exercise of the statutory discretion to grant leave under s 178. In this regard it is perhaps notable that the rate of proceedings being removed to the Court appears to have dropped since the judgment was delivered.[4]

[8] Counsel appointed to assist the Court in these proceedings, Mr Kirkness, submitted that it was wrong to interpret the Court of Appeal's comments in *Labour Inspector v Gill Pizza Ltd* as purporting to set out a threshold test that must be met before removal would be granted.[5] As he observed, the comments were obiter and elevating them in the way in which the Authority appears to have done confers weight on them which was likely not intended. The Court of Appeal was not, as he noted, being asked to determine the scope and application of s 178 and its reference to the provision was made in the context of a discussion focused on status claims under s 6 of the Act.

[9] The same point was made by this Court in *Jackson v Aorere College Board of Trustees*:[6]

> [6] Mr Jackson's claim has not been fully investigated by the Authority. Does that mean, following *Gill Pizza*, that the application for leave to remove the

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4 The historic rate of removal applications being granted is approximately 50 per cent. Following the *Gill Pizza* judgment the rate appears to be closer to 30 per cent.

5 *Labour Inspector v Gill Pizza* [2020] NZCA 192, [2021] ERNZ 237. Emphasis added.

6 *Jackson v Aorere College Board of Trustees* [2021] NZEmpC 109. Emphasis added.

> proceedings must be approached with particular caution? *I do not think that this sensibly follows from the Court of Appeal's reference to the powers of removal in s 178(2), given that s 178(1) provides that removal is limited to cases which have not been investigated by the Authority – removal obviates the need for the usual process of investigation at first instance*…

[10] In summary, *Gill Pizza* is best interpretated as reinforcing the basic point under the Act that the ordinary run of cases is to be determined at first instance in the Authority, but there will always be cases which are appropriately removed to the Court. The obiter observations in *Gill Pizza* should not be interpreted as applying an additional gloss to s 178.

[11] The correct approach to s 178 has been articulated by judgments of this Court and is well established.[7] It is that approach that the Authority is bound to apply. The well-established approach simply requires the Authority (on a removal application) and the Court (on a special leave application) to apply the criteria set out in s 178(2) to assess whether, in the particular circumstances, any of those criteria are met and if so whether (for the Court) special leave should nevertheless be declined; and (for the Authority) whether leave should nevertheless be ordered or declined.

Analysis

[12] The Authority declined to remove the two proceedings to the Court. It was not persuaded that there was a difficult issue of law involved and considered that it was well placed to undertake the inquiries necessary to resolve the issues identified in the applicants' claims. This was an approach that the respondent supported in opposing the removal applications in the Authority.

[13] As I have said, while the respondent initially opposed the grant of special leave, by the time of the hearing it was accepted that important issues of law *did* arise other than incidentally, relating to the application or otherwise of the six-year time limit for pursuing claims contained within s 142 of the Act. That acknowledgment was prompted by helpful submissions filed by Mr Kirkness. He identified five potential legal arguments which might be advanced in the circumstances of the applicants'

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[7] See for example *Johnston*, above n 2; *QDY v Counties Manukau District Health Board* [2022] NZEmpC 117, [2022] ERNZ 434.

substantive claims, some of which date back over 20 years. The answer, as he said, would have a material impact on the outcome of each of the applicant's claims. The five potential legal arguments Mr Kirkness identified are that:

(a) the conventional approach to accrual applies for the purposes of s 142 of the Act with no exceptions;

(b) there are no exceptions, but this is a case where an element of the claim did not exist until some later date, by analogy with *Invercargill City Council v Hamlin*;[8]

(c) as a matter of interpretation, it is possible to imply by analogy the Limitation Act 1950 exceptions (for example, age);

(d) either s 219 or s 221 of the Act or both apply to s 142, whether generally or for more limited purposes by analogy to established limitations exceptions; and

(e) a doctrine of reasonable discoverability applies to s 142.

[14] It is neither necessary nor appropriate to consider the relative strengths of each of those potential options at this stage. Suffice to say that I am satisfied that an important question of law will inevitably arise on the applicants' claims, and I agree with counsel that the Court is better placed to answer the question. The issue then becomes what should happen to the residual aspects of the applicants' claims.

[15] Mr Skelton KC, for respondent, submitted that the preferable course was to grant the applications for special leave in part, restricted to the time bar issues, and leave the remainder of the matters in the Authority. That was not a submission that found favour with the applicants, and Mr Kirkness identified a number of potential issues with it.

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8 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

[16] First, I accept that, while the Court may grant special leave on a limited basis, the Court must be satisfied that it is appropriate to do so. It may be that the time bar issues are most efficiently dealt with together with the residual matters, as the factual matters may inform the legal inquiry required. I also consider it relevant that the applicants (and respondent) have been in a lengthy litigation process and it is desirable that they are able to exit that process without unnecessary delay. Further, the process (including the giving of evidence) has plainly been personally challenging for many of those involved. They would likely be required to give fresh evidence in the Authority in respect of the claims, some of which has already been given in the Court.

[17] There is, as the Authority noted, a paucity of documentary material, such as time and wage records, and I have no difficulty accepting that the Authority is well used to dealing with such matters. However, the Court is also equipped to undertake the task, and routinely does so where (for example) a de novo challenge is pursued against an Authority determination.

[18] I see some force in Mr Skelton's concern that part of the underlying rationale for statutory time bars is to create certainty and that if the time bar issues were to be dealt with along with the residual issues the respondent may have to take steps to locate over 20 years' worth of records. I do not see the answer to that concern as being to remove the time bar issues to the Court and leave the remainder of the claims in the Authority. And, as I have said, it may be desirable (if not necessary) to deal with the time bar issues in tandem with the evidence relating to the substantive claims.

[19] Further, the accepted absence of material which might otherwise be expected to exist in the context of claims such as these may minimise the difficulties which might be expected to arise in terms of the burden of going through 20 years' worth of records. Further, some of the material that is in existence was put in evidence in the initial hearings in the Court.

[20] I agree with Mr Henry, counsel for the applicants, that there are issues with splitting the matters between the Court and the Authority as opposed to a split that might occur within the Court itself. In this regard, it may be that there is merit in

hearing the time bar issues as a preliminary matter. That can however be addressed at a case management conference.

Conclusion

[21] I am satisfied that an important question of law arises in this matter other than incidentally and that it is appropriate to grant special leave to remove the two proceedings currently in the Authority to the Court. Orders are made accordingly.

[22] The applicants must file statements of claim in the Court within 28 days of the date of this judgment; the respondent will have the usual time to file any statement of defence. Once these pleadings have been filed and served a case management conference is to be scheduled. Memoranda should be filed at least three working days prior to the conference. I anticipate Mr Kirkness continuing in his role as counsel to assist, and he should be copied into all documentation filed.

[23] The applicants are entitled to costs on these applications. If they cannot be agreed I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 11.50 am on 7 August 2024