IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 141
5395135

	BETWEEN	Kristine Robyn Bartlett Applicant
	AND	Terranova Homes and Care Limited Respondent

Member of Authority:	P R Stapp
Representatives:	P Cranney, Counsel for the Applicant R Towner, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received by:	19 October 2012
Determination:	16 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application from the applicant for removal to the Employment Court. The removal is based on an employment relationship problem that the applicant wishes resolved. The problem relates to two alleged breaches:

(a) The Equal Pay Act 1972 (the 1972 Act);

(b) The good employer obligation imposed by Schedule 1B Employment Relations Act 2000 (the Act).

[2] The respondent's statement in reply denies the claims and submits to the Authority that the applicant's application is frivolous and vexatious.

[3] The applicant relies for a removal on the grounds that important questions of law are likely to arise other than incidentally, namely:

(a) The proper interpretation and application of the Equal Pay Act 1972 to female workers in the residential aged care sector including the proper application of the factors referred to in s.3(1)(b) of the 1972 Act to the residential aged care sector;

(b) Whether the good employer obligation referred to in Schedule 1 B of the Act applies to employers in the residential aged care sector;

(c) If the answer to the question in para.(b) is yes, whether that obligation requires the employer in the sector to:

(i) pay higher wages; and

(ii) identify and address wage discrimination which contains an element or differentiation based on the sex of employees.

[4] In addition the applicant submits that the case is of such a nature and such urgency that it is in the public interest that it be removed immediately to the Court. In this regard the applicant relies on the contents of the Human Rights Commission Report (a copy of which has been attached to the statement of problem).

[5] Further, the Court already has before it proceedings which are in substance between the same parties (the applicant's union and the respondent) and which involve the same or similar or related issues (a memorandum of the Employment Court that has been filed with the application).

[6] The respondent opposes the removal as it says:

(a) That there are no important questions of law that arise out of the matter;

(b) That there is no urgency to the matter which requires an immediate removal; and

(c) That the proceeding before the Employment Court involves different parties, relies on different facts and seeks different remedies.

The facts

[7] The applicant is an employee of Terranova. She has been employed as a healthcare assistant also known as a caregiver. She performs work which is exclusively or predominantly performed by female employees. She is a member of the Service and Food Workers Union Nga Ringa Tota, according to the union's papers filed in the Employment Court if this is the case that the papers refer to.

[8] Terranova is a duly incorporated company which involves five rest home facilities in New Zealand. This includes Riverleigh Rest Home in Wellington. Ms Bartlett is paid $14.46 (gross) per hour. Her wage has been determined based on the respondent's assessment of her competence as a caregiver. It is alleged that she is paid less than the rate of remuneration that would be paid to male employees with the same, or substantially similar , skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort. The details of this are to still be produced. The applicant says she is not receiving equal pay within the meaning of the 1972 Act. In addition she is claiming the recovery of wages, but as yet has not provided the detail of her claim.

[9] The claims that Terranova has not acted as a good employer relate to schedule 1 B of the Employment Relations Act, and thus this will require interpretation of what the breach is and what evidence is relied upon.

[10] Terranova currently employs six male caregivers out of the total of 117 care givers across five rest homes. It claims that none of the female employees are paid less than the rate that would be paid to male employees upon the assessment criteria. Again no details have been provided to support the assertion.

Determination

The relevant section in the Employment Relations Act 2000 for removal to the Court is:

> ***178 Removal to Court***
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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.*

> *(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.*
>
> *...*

[11] I hold that s 178 (2) (a) of the Act to remove the matter to the Employment Court can be satisfied. My reasons are:

(i) That the issue is about the assessment of competence as a caregiver for pay as it relates to the respondent.

(ii) That there may be some basis for comparisons between male and female pay given the applicant is female, there are males employed.

(iii) That arising out of the above there will be questions of law likely to arise other than incidentally under the Equal Pay Act 1972 and the good employer obligation imposed by Schedule 1B of the Employment Relations Act 2000.

[12] I am satisfied that there is some factual basis provided for the claim having regard to the statement of problem and the submissions before me. There is no evidence that the claim relates to social and political reasons for the applicant to pursue it as the claim relates to the applicant and her employer. Even so, there are important questions of law that are likely to arise other than incidentally based on an employment relationship between the applicant and the respondent giving rise to an employment relationship problem.

[13] The question of law applying would seem to relate to whether the Equal Pay Act 1972 applies given the preponderance of female employees compared to the

number of male employees in the undertaking and their pay arrangements as they relate to the applicant in her employment.

[14] There is clearly a matter before the Employment Court at least with the same respondent. Mr Towner is correct that the applicants in the matter filed in the Authority and the matter in the Employment Court are different. There is a link between the two applicants in as much as the applicant in the Court is the union for the applicant in the Authority. But because they are different the provision in the Act relating to this for removal has not been met, where the parties have to be the same.

[15] Moreover, I have no detailed knowledge of the matter in the Court other than what has been included in a very broad statement of claim attached to the statement of problem. However, the Court has expressed the view that *"...it would not be surprising if the Authority directed their removal"* in referring to the matter in the Authority and having regard to the matter before it.

[16] I have been provided with very little information about urgency and the public interest to remove the matter on this alone and/or in conjunction with the above. There is nevertheless an important public interest in the matter since it will relate to pay setting and pay fixing and the industry having regard to schedule 1 B. It is also likely to impact on other employers and employees in the sector. These are factors to support removal as an important question of law is likely to arise other than incidentally.

[17] The application rests on there being an important question of law likely to arise other than incidentally. I hold that has been satisfied. In doing so, I hold that the matter is not frivolous and vexatious. In support of the finding I disagree that there is no factual foundation for the matter given the statement of problem and the matters raised in the response in the statement in reply. Much substantive comment has been provided in response to the claims from the applicant to suggest that there are a number of arguable issues in the need of a hearing.

[18] Also such proceedings do involve costs, and since any costs can be claimed it is not enough for the respondent to rely on not having to fund litigation as a reason to decline removal.

[19] Urgency is not an imperative (applicant's submission).

[20] I have considered mediation as I must under the Act. I have decided that as the removal application has taken precedence and that there are proceedings in the Court with the same respondent, and a union involved as another party that mediation would not be constructive unless all the matters were drawn together. Thus it seems appropriate to leave this for the Court.

[21] In considering matters relating to the residual power to remove the matter I am satisfied that having regard to what appears to be a related matter in the Court and that the Court seems to be expecting the removal I should remove it in its entirety for the Court to hear without the Authority conducting an investigation.

[22] I remove the matter to the Employment Court to hear and determine without an investigation in the Authority accordingly.

Costs

[23] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority