IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 207/10
5295008

	BETWEEN	MICHAEL DAY Applicant
	AND	LYTTELTON PORT COMPANY LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Tim McGinn, Counsel for the Applicant Anne Toohey, Counsel for the Respondent
Investigation Meeting:	11 November 2010 at Christchurch
Submissions received:	At the investigation meeting
Determination:	15 November 2010

DETERMINATION OF THE AUTHORITY

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[1] On 7 February 2010 Mr Day's employment with the Lyttelton Port Company came to an end by reason of redundancy. A dispute has now arisen about the level of redundancy compensation he is entitled to. Pleadings in respect to that dispute were filed in the Authority on 6 July 2010 along with an application that the employment relationship problem be removed to the Employment Court under sections 178(2)(a) and (d) of the Employment Relations Act 2000.

[2] The removal application was initially opposed by the respondent, but in preparing for an investigation meeting to discuss the interlocutory application they have had cause to revise that view. The respondent now supports the application, albeit for different reasons to those argued by the applicant.

[3] Mr Day has been in the respondent's employ since 1976. Over the ensuing years his terms and conditions of employment have been set by a number of awards, contracts and agreements. Central to the substantive dispute is which of those currently specifies his entitlement to redundancy compensation. In particular, the parties are concentrating on a redundancy agreement concluded in 1987 between Mr Day's union and a body known as the New Zealand Harbour Boards' Industrial Union of Employers and a subsequent Individual Employment Contract Mr Day signed in 1992.

[4] In the event it is found that the 1992 contract (or its 1993 successor which contained an identical redundancy provision) covers Mr Day's entitlement to redundancy compensation, there will be additional claims concerning the manner in which his agreement was obtained. Mr Day will claim he signed the contract in reliance of a misrepresentation from the respondent and/or was compelled to do so by the respondent's harsh and oppressive behaviour (refer section 57 of the now repealed Employment Contracts Act 1991).

[5] In support of the application, Mr McGinn contends:

> *"1. An important question of law is likely to arise in the matter other than incidentally, namely complex issues of interpretation intermingled with issues misrepresentation and unfair bargaining [sic];*
>
> *2. One or more of the parties engaged on the same or similar terms to the applicant are likely to be affected by the determination of the applicant's employment status;*
>
> *3. It is inevitable, due to the extent of the issues at stake between the parties that an outcome in the Authority is likely to be challenged in the Court;*
>
> *4. In all the circumstances the Court should determine the matter."*

[6] I must say that the arguments tendered in support of this application would most likely have failed to convince me to remove the substantive matter. In respect to the first point, Mr McGinn contends there are a multitude of issues which, when combined, create a complex situation. Complexity is not, in itself, a reason for removal and the Authority is often faced with such challenges. I also doubt the existence of a new question of law. This is essentially a dispute requiring an interpretation of various contractual provisions. Making such decisions is a core part of the Authority's jurisdiction and I note Mr McGinn's ability to cite a number of

existing decisions which would assist in determining each of the issues which, when combined, make for the complexity he correctly contends is present. With respect to point two, the respondent states, and I accept, that the precedent value is minimal with few others likely to be in a similar situation and the third point is simply not a ground for removal. The fourth argument is a holistic one reflecting s.178(2)(d) of the Act.

[7] Ms Toohey supports the application for two reasons. The first relates to the claim of misrepresentation and the issue of whether or not the claim is precluded by provisions contained in both the Contractual Remedies Act 1979 and the Limitation Act 1950. This argument has some merit given that the cause of action arose in 1992 and the then extant body and Authority's predecessor, the Employment Tribunal, had been held not to have jurisdiction to apply the provision of the Contractual Remedies Act 1979 (see *Rhodes v LSS Holding Ltd (t/a The Fat Ladies Arms Tavern)* [1999] 1 ERNZ 501)).

[8] Section 162 of the present Act means that this restriction does not apply to the Authority but a question of law may well arise given that the cause of action arose under the previous legislative regime and the Authority, if acting, would be doing so as the Tribunal (see sections 248(2) and 252(b)) of the Employment Relations Act.

[9] Any doubt is, however, removed when Ms Toohey's second argument is considered. Mr Day's reference to *"misrepresentation and unfair bargaining"* and the fact that the claims relate to events that occurred in 1992 gave her cause to think of the relevant provision in the then extant Act, the Employment Contracts Act 1991. Her attention turned to section 57, "Harsh and oppressive contracts". Whilst that section is not specifically identified in the original pleadings, it is now clear that such an argument will be run to counter a finding that the 1992 (or 1993) agreement covers Mr Day's redundancy entitlement.

[10] Section 248(2) of the present Act states that where a cause of action arose prior to the enactment of the Employment Relations Act and no proceedings had been initiated as is occurring here, the matter shall be dealt with as if the previous legislation (the Employment Contracts Act 1991) remained. Both sections 57(1) and

104(1)(k) of the 1991 Act make it clear that the Court had an exclusive jurisdiction in respect to claims brought under section 57.

[11] It may be that the 1987 redundancy agreement applies and that the s.57 argument is irrelevant but that does not mean that the argument will not be run. It will be and the Authority does not have jurisdiction to consider it if that becomes necessary.

[12] There is no sense in commencing a hearing the Authority may not be able to conclude and determine. It puts the parties to what may be potentially unnecessary expense and simply does not make sense. As the Court observed in *Hanlon v International Education Foundation (NZ) Inc* (unreported) 10 January 1995, Goddard CJ, WEC1/95 such cases *"…should be considered in all* [their] *aspects in one forum and since the Tribunal* [now read Authority] *does not have the jurisdiction to consider all facets of the case but the Court does, the Court can more conveniently be that forum"*.

[13] I therefore order, pursuant to s.178(2) of the Act, the removal (in its entirety) of the employment relationship problem between Michael Day and the Lyttelton Port Company Limited (5295008) to the Employment Court for it to hear and determine without the Authority investigating the matter.

Mike Loftus
Member of the Employment Relations Authority