Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 158
5548067

	BETWEEN	JOHN EDMINSTIN Applicant
	A N D	SANFORD LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Andrew and Lee Goffin, Counsel for the Applicant Richard McIlraith and Kylie Dunn, Counsel for the Respondent
Submissions Received:	23 September 2015 on behalf of the Applicant 14 October 2015 on behalf of the Respondent
Date of Determination:	23 October 2015

DETERMINATION NO 2 OF THE AUTHORITY
APPLICATION FOR REMOVAL TO THE EMPLOYMENT COURT

A **The application for removal of this matter to the Employment Court is declined.**

B **Costs are reserved.**

C **An Authority officer will be in contact with counsel shortly to schedule a telephone conference with the Authority to arrange dates for an investigation meeting.**

Application for removal

[1] The applicant applies to the Authority for an order pursuant to s.178 of the Employment Relations Act 2000 (the Act) removing the whole of the proceedings to the Employment Court.

[2] The grounds relied on for removal are:

a. That important questions of law are likely to arise in the proceedings (s.178 (2)(a) of the Act);

b. Jurisdictional difficulties (s.178 (2)(d) of the Act); and

c. All of the circumstances (s.178 (2)(d) of the Act).

[3] The respondent opposes the application to remove the proceedings to the Employment Court.

[4] By agreement the matter is to be determined on the papers.

Section 178 of the Employment Relations Act 2000

[5] The Authority may, on the application of any party to a matter, order the removal of the matter or any part of it to the Employment Court pursuant to section 178(2) which provides:

> *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.*

Important question of law

[6] In *Hanlon v International Educational Foundation (NZ) Inc*[1] Chief Judge Goddard considered when a question of law is important and stated amongst other matters:

> *…The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter would be important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about the decision of it or a material part of it.*

[7] I will set out the nature of the matter before the Authority and consider the importance of any question of law in relation to it.

[8] The applicant in an amended application seeks an order for compliance with a settlement agreement entered into under s.149 of the Act and dated 24 February 2015. The order is sought in respect of clause 6 of the Record of Settlement which provides:

> *The applicant may collect his "marks" off the Toiler on February 27, 2015 after making appropriate arrangements with the respondent.*

[9] For completeness the *Toiler* is a fishing boat owned by the respondent which is involved in fishing in Foveaux Strait. I prohibit from publication all the other agreed terms of settlement in the record of settlement.

[10] The applicant contends that marks referred to in clause 6 are his marks being skipper's marks and his personal property and that the respondent has no right to retain copies of them and use them and that in doing so is not complying and is in breach of clause 6. The marks it is stated in the statement of problem consist of GPS coordinates and grid references which identify to within one metre the location of oyster beds in the Foveaux Strait that yield the best quality oysters.

[11] The applicant says that clause 6 is to be interpreted in the context of the longstanding custom and practice within the Foveaux Strait oyster fishery that skipper's marks are the personal, confidential property of the employee skipper.

[12] Other orders are applied for by the applicant as follows:

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[1] [1995] 1 ERNZ 1 at 7

a. That the respondent delete all records of the applicant's marks from its GPS and computer systems and from any other locations and mediums on which the marks might be stored;

b. That any computer and IT experts may examine the GPS and computer system on board the *Toiler* for the purpose of deleting or ensuring the deletion of the applicant's marks from the GPS and computer systems on board the *Toiler*,

c. That the respondent cease forthwith from using or relying upon the applicant's marks in any way and in particular for locating oysters and any other fishery related purpose within the Bluff Oyster Fishery;

d. The respondent to pay compensation and/or an account of profits, to the applicant for the unauthorised and illegal use of his marks since 1 March 2015 and any corresponding diminution in their value;

e. Penalties for a breach of the employment agreement and the Act.

[13] The respondent opposes the application for a compliance order, damages and penalties and says that it has complied with clause 6 of the settlement agreement. It says that the marks are developed and stored electronically on systems bought and maintained by it and under clause 15 of his employment agreement all information the applicant became aware of from his employment is the property of the respondent.

[14] The respondent says that it allowed the applicant access to his marks in accordance with the settlement agreement and at no stage agreed to delete the marks from its GPS system. It says that the compliance order sought by the applicant goes beyond compliance with the settlement agreement which it says has occurred and requires additional things to be done which are not contemplated by the settlement agreement. Further the respondent says that the Authority has no jurisdiction to award compensation or order an account of profits for a breach of the settlement agreement or alleged unauthorised and illegal use of marks. The respondent says that the Authority has no jurisdiction to award a penalty for breach of the Act.

[15] Counsel in submissions lodged in support of and in opposition to removal to the Employment Court have identified that the interpretation of clause 6 of the settlement agreement is in issue between the parties.

[16] The applicant does not accept that the matters in issue are a routine matter of interpretation and says that the following questions of law are likely to arise and either be decisive of the case or strongly influential in bringing about a decision or a material part of it:

a. The nature of the intellectual property rights attaching to skipper's marks. The applicant says that they are valuable intellectual property which the law will protect and this will require consideration of historical records and agreements.

b. The relevance of the longstanding custom and practice within the Foveaux Strait oyster fishery that skipper's marks are personal, confidential information of the skipper.

c. Whether clause 15 of the employment contact has any application to the issue of skipper's marks or to the interpretation of clause 6 of the Settlement Agreement of 24 February 2015.

[17] Further, the applicant says that the above issues are of interest and relevant not just to this matter between the applicant and the respondent, but to other skippers in the Foveaux Strait oyster fishery fleet.

[18] The respondent says the applicant's claim is that there has been a breach of the settlement agreement. To succeed with that claim, an obligation must first be established which has been breached.

[19] The respondent says that the principles of contractual interpretation are well settled and do not give rise to an important question of law which would be determinative of the case. The respondent does not accept that the issues are of relevance to other skippers in the Foveaux Strait oyster fishery fleet because the matter is about the settlement agreement which only binds the applicant and respondent. The respondent does not accept that the matter is about ownership of marks but whether it agreed to delete all copies of the marks when it signed the

settlement agreement. The respondent says that ownership is a contextual matter at most.

Conclusion on important question of law

[20] The principles of contractual interpretation are well settled. The approach to interpretation by the Authority is an objective one to ascertain what the meaning of clause 6 would convey to a reasonable person in the field who has all the background knowledge available at the time the settlement agreement was entered into. Agreements are interpreted with reference to the words and the language the parties used. Extrinsic material may be used to clarify the meaning of an agreement, whether or not the terms used are ambiguous.[2]

[21] The matters involving assessment of historical documents and records and custom and practice in respect of a claim of ownership are part of the contractual context against which the meaning of the words in clause 6 can be *cross-checked.*[3]

[22] The outcome of this matter may be of interest to other skippers in the Foveaux Strait oyster fishery fleet but the interpretation is of a clause in a settlement agreement between the applicant and the respondent and is not about interpretation of a document such as a collective agreement with wider application.

[23] The importance of a question of law has to be measured in the case in which it arises. This matter involves the interpretation of a clause in a settlement agreement. It is that interpretation that will be more likely to be influential in bringing a resolution to this matter and not the determination of an important question or questions of law. I do not find that the ground for removal on the basis an important question of law arises is made out.

Jurisdictional difficulties

[24] The applicant seeks orders for compliance and penalties. It did seem to me on reading (f) of the application for compliance that the penalty claimed for breach of the

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[2] *Chief Executive Officer of the Department of Corrections v Corrections Assoc of New Zealand Inc* [2005] ERNZ 984 (EmpC) at [15] ;*Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317 and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

[3] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149

employment agreement may not have been the intention of the applicant but that can be dealt with as the matter progresses.

[25] The applicant also seeks compensation and/or an account of profits for breach of the settlement agreement. The applicant says that he is of modest means and would like to have all proceedings dealt with in one forum and also limit the costs of having two separate hearings. The applicant accepts, although does not concede, that there may be difficulty with the jurisdiction of the Employment Court in relation to his claim for an order of an account of profits - *South Tranz Ltd v. Strait Freight Ltd.*[4]

[26] The applicant says that if it becomes necessary for him to have to bring his claim for compensation and/or an account of profits in the District Court, then he would want to do so with as little duplication as possible. He submits that an Employment Court judgment on the issue of compliance would be preferable because the District Court would clearly be bound by the findings of the Employment Court on liability, but the position is less clear if a liability finding is made by the Employment Relations Authority which is an inferior tribunal below the District Court.

[27] The respondent says that the removal of this matter to the Employment Court will not *cure* the applicant's jurisdictional issue as the Employment Court has the same jurisdiction as the Authority following removal of a matter. Further, that it is now settled law that neither the Authority nor the Employment Court has jurisdiction to award damages for a breach of a settlement agreement – *South Tranz Ltd* and *JP Morgan Chase Bank NA v. Lewis.*[5]

[28] The respondent submits this is not a case where there is an overlapping jurisdiction requiring the applicant to litigate twice.

[29] The respondent does not accept that a judgment from the Employment Court being of more assistance in any subsequent litigation is a factor in favour of removal and submits, in respect of an allegation that further orders may be required to ensure the respondent's compliance with the settlement agreement, that no orders have been applied for and would be resisted.

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[4] [2007] ERNZ 704
[5] [2015] NZCA 255

Conclusion on jurisdictional difficulties

[30] I accept the respondent's submission that this is not a case where there is overlapping jurisdiction between the Authority and the Employment Court which requires the applicant to litigate twice. Neither the Employment Court nor the Authority have jurisdiction to award damages for breach of a settlement agreement.

[31] I am not persuaded that a ground for removal is made out on the basis there is an advantage to the applicant in obtaining a judgment from the Employment Court for further proceedings in the District Court. It is unclear what proceedings in the District Court would be but I accept the respondent's submission that they would have to be proceedings of a different nature to those the Authority has jurisdiction to make determinations about.

[32] I am not satisfied that the ground for removal for jurisdictional difficulties is made out.

The Authority's discretion to remove to the Court

[33] The Authority has a broad discretion to consider all the circumstances in determining whether to remove the proceedings to the Employment Court in s.178 (2) (d) of the Act. It is not enough that one party simply wants to go to the Employment Court and the Authority must have careful regard to the circumstances in each case.

[34] The applicant says in submission that when he came to implement clause 6 of the settlement agreement in March 2015, he was given a memory stick with data from the Sea Plot computer and a GPS plotter card which, it was said, contained data from the Koden GPS. The applicant's marks were stored on the computer and the Koden on the *Toiler*.

[35] The applicant submits that he has not been able to retrieve any data at all from the GPS plotter card despite involving a number of computer experts. The applicant says it may now be necessary for him to seek, on an interim basis, orders requiring the respondent provide him with access to both the Koden and the Sea Plot in order to properly prepare his evidence. He submits that the more prescriptive powers of the Employment Court in relation to disclosure are a factor favouring removal.

[36] In some circumstances the prescriptive powers for disclosure may be a factor favouring removal but the Authority may also call as part of its investigation for further information from the parties or any other person under s.160 (1) (a) of the Act. I am not satisfied in this case the more prescriptive powers and procedures of the Employment Court with respect to disclosure is a factor favouring removal.

[37] It is submitted that the applicant is of limited means. The investigative approach by the Authority can result in reduced hearing time and therefore less costs. The case although very important to both parties is not on its face complicated and the Authority is well placed to investigate and determine the matter. Either party on a challenge to a determination of the Authority may elect to have a hearing de novo in the Employment Court. If the matter is removed to the Employment Court without the Authority investigating it then a level of appeal is removed.

[38] The one matter I pause on is the ability of the Authority to give priority to dates for investigation that this matter requires. During a telephone conference with the Authority, counsel for the applicant thought that two to three days for investigation may be required. I can assure the parties that the Authority will do its best to prioritise this matter and I am confident that it can give reasonably prompt dates albeit in the New Year.

[39] I am not satisfied that a good reason for removal exists so that I should exercise my discretion and remove to the Employment Court notwithstanding no other grounds in s.178 (2) of the Act are made out.

[40] The application for removal of the matter to the Employment Court is declined.

Costs

[41] I reserve the issue of costs.

Next Step

[42] An Authority officer will be in contact with the parties shortly to arrange a telephone conference with the Authority to set an investigation meeting date.

Helen Doyle
Member of the Employment Relations Authority