

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 99/10
5291551

BETWEEN MACKLEY WILLIAM SCOTT
FERGUSON
First Applicant

JAMES ROBERT BURRELL
FERGUSON
Second Applicant

A N D FERGUSON BROTHERS
LIMITED
Respondent

AND BETWEEN FERGUSON BROTHERS
LIMITED
Applicant

A N D MACKLEY WILLIAM SCOTT
FERGUSON
First Respondent

JAMES ROBERT BURRELL
FERGUSON
Second Respondent

MACKLEY RAYMOND
FERGUSON
Third Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew Shaw, Counsel for Mackley William Scott
Ferguson and James Robert Burrell Ferguson
Kerry Smith, Counsel for Mackley Raymond Ferguson
Gareth Abdinor, Counsel for Ferguson Brothers Limited

Investigation Meeting: 20 April 2010 at Christchurch

Determination: 28 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination involves an opposed application for removal of two sets of proceedings to the Employment Court for the Court to hear and determine those proceedings without the Authority investigating and determining them. I will briefly summarise the matters before considering the grounds advanced in favour of and against removal.

[2] It is first useful to explain the parties and the relationships in a summary form. Mackley Ferguson is the father of Mackley William Scott Ferguson and James Ferguson. I will refer to them as MF (or the father), MWSF and JF (or jointly the sons) respectively.

[3] Ferguson Brothers Limited (FBL) was incorporated in August 2007 to acquire the business of Road Contracting and Quarrying known as Ferguson Brothers or by similar names. All three men became employees of FBL as part of FBL's purchase of the business. The two sons (MWSF and JF) are directors and shareholders in a company which at relevant times owned a minority interest in FBL. One son was a director and the father the managing director of FBL at relevant times.

[4] There are two proceedings, although they are linked in that the second proceedings are at least partly FBL's counterclaim to the first proceedings. In the first of the proceedings before the Authority the sons are each claiming arrears of wages, unjustified disadvantage grievances, penalties for breach of good faith and ancillary remedies against FBL. The sons say that in September 2008 they entered into employment agreements with their father as FBL's managing director that included redundancy compensation (the September Agreements). These agreements differ materially from the terms that applied in August 2007 when FBL purchased the businesses.

[5] Late last year both sons were dismissed by FBL for redundancy. FBL has not paid them any redundancy compensation because it says that the truly applicable employment agreements do not provide for redundancy compensation. For various reasons arising from the employment relationship as well as a shareholding agreement, FBL attacks the *bona fides* of the September agreements. By way of summary I will refer to this application as the arrears claim.

[6] The second proceedings were lodged by the company. FBL is claiming recovery of salaries and expenses paid to the sons by FBL under employment agreements entered into by them and their father on different dates following the purchase of the business (including the September agreements), allegedly in breach of the sons' and the father's duties arising under their respective employment relationships and the same shareholder agreement. There is also a claim for penalties for breach of good faith against both sons. The final aspect of these proceedings is FBL's common law claims for damages against the father for losses said to have been caused by his breach of his employment relationship with FBL and a penalty for his breach of good faith. For convenience sake I will refer to these proceedings as the overpayment/damages claim.

[7] FBL as the respondent in the arrears claim and the applicant in the overpayment/damages claim seeks to have both proceedings removed to the Employment Court. The sons as applicants in the arrears claim and the sons and the father as respondents in the overpayment/damages claim oppose the removal application.

Grounds

[8] The first ground advanced is that an important question of law is likely to arise other than incidentally during the proceedings. That question is whether the Authority has jurisdiction to order the recovery of money paid by the employer to employees under a mistake. That is only in issue in FBL's overpayment/damages claim.

[9] I am referred to *NZ Fire Service Commission v. Warner and Ors* 4 November 2009, P Stapp (member), WA171/09, a case where the Authority referred a question of law to the Employment Court. Inquiries reveal that the Employment Court heard this matter in December 2009 and a judgment is pending. In that case the employer overpaid various employees who subsequently refused to repay these overpayments. In response to the employer's proceedings to recover the overpayment the employees (or at least some of them) raised issues about the Authority's jurisdiction to order repayment. The Authority referred the following question of law to the Court:

Does the Employment Relations Authority have jurisdiction to order employees to pay their employer overpayments of wages and/or under the Judicature Act 1908 and/or section 161 and/or section 162 of the Employment Relations Act?

[10] In response, I am referred to *Mighty River Power Ltd v. Erana Palmer* 27 May 2009, A Dumbleton (member), AA194/08. There, the Authority had no difficulty with jurisdiction to order a former employee to repay an overpayment of wages arising from a mistake. There are a number of cases to similar effect at the level of the Authority, but I must accept that the issue will not be fully resolved until the Employment Court issues its judgment in the *Warner* case.

[11] Having said that, the present case is principally about the factual dispute over identifying applicable terms of employment. Jurisdiction to order recovery against former employees (the sons) only becomes an issue if it is established that there was an overpayment. By comparison, in *Warner* the fact of overpayment was not disputed.

[12] There is a fall back position for FBL. The submission is that the matter could be adjourned until after the Employment Court has released its judgment in *Warner*. It is not necessary to formally adjourn this matter. The current workload of the Authority means that the matter probably will not have a meeting date before September this year.

[13] The claims involve reasonably large amounts of money. There is a submission that referral to the Employment Court would provide certainty and closure. In response, it is argued for the sons and the father (especially) that cases that turn largely on fact finding, such as these, should not readily be removed to the Employment Court so as to deny parties the opportunity of a *de novo* challenge.

[14] FBL refers to some other aspects that it says make removal appropriate. FBL will seek orders for discovery and forensic examination of the sons' and the father's computers as part of testing the *bona fides* of the written employment agreements. In response, the sons and the father say that the computers used to create documents were FBL's computers which remain with the company or are computers no longer under their control. They will also consent (subject to conditions) to forensic examination of their own personal computers even though they were purchased later in time. As was acknowledged during the investigation meeting, this resolves FBL's point that the proceedings need formal discovery processes in accordance with Employment Court regulations rather than the less structured exchange of relevant material usual in the Authority.

[15] There are High Court proceedings by FBL against the father and his brother who were vendors (or principals of the vendor) of the business purchased by FBL in August 2007. Statements of defence are yet to be filed. It is difficult to see how the High Court proceedings make any difference to the current question before the Authority. Exactly the same jurisdiction divide would exist between the issues to be resolved in the civil proceedings and those to be resolved in proceedings under the Employment Relations Act 2000 whether these latter proceedings were in the Authority or the Court.

[16] The final point is that there are said to be complex commercial aspects to the claim. However, counsel for FBL elected not to pursue this argument in any greater detail. Counsel for the sons and counsel for the father argue that the commercial aspects to the claim relate to the sale and purchase arrangements rather than the employment disputes. In the absence of further argument from FBL, I accept the submissions for the sons and for the father.

Conclusions

[17] In *Hanlon v. International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 the Employment Court said:

It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. 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 will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[18] The best that can be said here is that the question of law about the Authority's jurisdiction to order recovery of wages paid to an employee under mistake will be important only if FBL is successful in establishing what it says about the employment agreements between it (through the father) and the sons. On that basis there may be grounds to remove that part of the matter in due course, but not at this point. There is also every prospect that the matter will be resolved by the pending judgment of the Employment Court. Accordingly, I do not accept that FBL has established power to have the whole matter removed under s.178(2)(a) of the Employment Relations Act 2000.

[19] I have given thought to whether the circumstances are such as to bring the proceedings within s.178(2)(d). There is an element of complexity in that the sons were employees as well as principals of a minority shareholder of the employer; that the father was managing director of the employer as well as a vendor (or a principal of the vendor) of the business; and that the relationships and duties may be wider than ordinary employment relationships. However, fundamentally, the proceedings are a factual inquiry to determine applicable terms of employment. The Authority's current workload means that the matter could be heard in the Court earlier, but not necessarily determined any earlier. The point about discovery has been resolved.

[20] On balance, I am not satisfied that the proceedings should be removed.

Conclusion

[21] The application for removal is declined.

[22] I understand that there is agreement to participate in mediation. Counsel should take appropriate steps and then advise the Authority if the matter remains unresolved after mediation. A telephone conference will then be arranged to progress the investigation.

[23] Counsel for the father raised the possibility of the proceedings against him being stayed while the other matters are investigated. If necessary, that can be considered as part of the telephone conference.

[24] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority