

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 207  
5360571

BETWEEN MARGOT GAZELEY  
Applicant  
AND OCEANIA GROUP (NZ)  
LIMITED  
Respondent

Member of Authority: Philip Cheyne  
Representatives: Anjela Sharma, Counsel for Applicant  
Kylie Dunn, Counsel for Respondent  
Submissions Received 12 December 2011 from the Applicant  
15 December 2011 from the Respondent  
Determination: 20 December 2011

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Oceania Group (NZ) Limited operates Woodlands Rest Home in Motueka. Margot Gazeley worked there as facility manager but was dismissed on 30 September 2011. In a determination dated 18 November 2011 the Authority declined Mrs Gazeley's application for interim reinstatement. Mrs Gazeley's personal grievance remains to be investigated. There is now an application for the Authority to remove that problem to the Employment Court for the Court to hear and determine the matter without the Authority investigating it. This determination resolves the issue of removal.

[2] It was agreed that the Authority would investigate and determine the removal application by considering the application, Mrs Gazeley's affidavit in support, counsel's memorandum in support, Oceania Group's notice of opposition and the written submissions provided by both parties. I must also have regard to the original statement of problem and statement in reply as well as the materials provided as part

of the Authority's investigation and determination of the interim reinstatement application.

[3] I note that Mrs Gazeley has lodged a challenge to the whole of the Authority's determination declining her interim reinstatement.

### **The application**

[4] The removal application was lodged with the Authority on 4 November 2011. The Authority was not asked to abridge time for a reply. By that time a date for the investigation meeting to consider Mrs Gazeley's interim reinstatement application had been set for 15 November 2011. It was not suggested that the removal application should have been dealt with before the Authority determined the interim reinstatement claim. Following the determination of the interim reinstatement claim there was a phone conference where the process of the investigation into the removal application was discussed and agreed.

[5] The application seems to identify two grounds for removal. It is said that Mrs Gazeley will suffer continued irreparable damage to her reputation, employment prospects and lost earnings if the matter is not removed on the grounds of urgency. That appears to be a reference to s.178(2)(b) of the Employment Relations Act 2000. The application also refers to s.178(2)(d) of the Act.

[6] In her affidavit Mrs Gazeley mentions the financial difficulties that will result from her being out of work and the dim prospects for employment in her field with other employers in the region in light of the circumstances and publicity about her dismissal. She observes that these effects will be greater the longer it takes for her personal grievance to be investigated and determined.

[7] Counsel's memorandum repeats and amplifies the points made by Mrs Gazeley in her affidavit. To support the point that delay in the investigation and determination of this matter is outside Mrs Gazeley's control the memorandum says:

*During the teleconference of 26 October 2011, the respondent requested that the substantive issues be determined on an urgent basis. That request was declined by the Authority on the basis that the current workload in the Authority which is attributed to the Christchurch earthquake, (22 February 2011) did not permit the matter to be heard urgently.*

*It was also indicated by the Authority that it was unable to hand the matter for determination to another member outside the Christchurch region.*

### **The reply**

[8] A notice of opposition was lodged on 17 November 2011. Oceania Group's position is that the matter is not of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Employment Court. The notice also refers to Oceania Group's willingness and ability to attend a substantive investigation with urgency and observes that Mrs Gazeley's interim reinstatement application was being dealt with on an urgent basis. Oceania Group asks that the Authority investigate and determine the substantive matter.

### **Submissions**

[9] Counsel for Mrs Gazeley refers me to *Angus v Ports of Auckland Limited* [2011] NZERA Auckland 401 and *McKean v Ports of Auckland Limited* [2011] NZERA Auckland 422 to support the view that there is a wider public interest in obtaining certainty in relation to the effect of the 1 April 2011 amendments to the test for justification and the remedy of reinstatement.

[10] *Angus* and *McKean* involved interim and permanent reinstatement claims. Both matters were removed to the Court by the Authority of its own motion to enable the Employment Court at an early stage to consider the changes to s.103A and s.125 of the Employment Relations Act 2000. This occurred prior to the Authority in those cases investigating the interim reinstatement applications and was without opposition from the parties, except that in *Angus* the applicant opposed the removal of the interim reinstatement application. The Authority relied on both s.178(2)(a) and s.178(2)(d) of the Act.

[11] On 2 December 2011 the Employment Court issued a judgment of the Full Court giving guidance to trial Judges, members of the Authority and others with respect to the application of s.103A and s.125 of the Act: see *Angus and Anor v Ports of Auckland Limited* [2011] NZEmpC 160. Counsel's submission that these matters are to be heard in February 2012 is a reference to the individual cases set to be heard by trial Judges.

[12] Without reference to s.178(2)(c) counsel submits that it is appropriate for the Employment Court to hear both the interim reinstatement application and the substantive personal grievance.

[13] Counsel refers to both *Angus* and *McKean* as cases involving important questions arising other than incidentally in support of a submission that the present case should also be removed under s.178(2)(a) of the Act. I note that this in addition to the grounds mentioned in the removal application. The cases are also referred to as examples of removal under s.178(2)(d) where the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[14] Without abandoning reliance on s.178(2)(b) these other two grounds are described as forming the *more robust argument*. As to the urgency ground, I am told that the Court has indicated the possibility of a hearing in mid March 2012.

[15] Helpfully, counsel for Oceania Group has dealt with each head of s.178(2) in turn.

[16] I agree with counsel's submissions setting out what is required for a case to fall within s.178(2)(a). Counsel refers me to *Angus and Anor v Ports of Auckland Limited* [2011] NZEmpC 160 as the answer to the question of law arising in those cases which persuaded the Authority to remove them to the Court. It is submitted that there is no important question of law in the present case.

[17] As to s.178(2)(b) I am told that the Court has indicated that it would be unlikely for a substantive decision to issue before the middle of 2012. Counsel takes issue with the matter being properly regarded as urgent in light of the Authority's determination on the interim reinstatement application. Counsel submits that to qualify for removal under this head the matter must also be in the public interest that it be removed immediately to the Court. A comparison is made between the present case involving one person's personal grievance and *NZ Amalgamated Engineering and Related Trades IUOW v Carter Holt Harvey Limited* [2002] 1 ERNZ 74 where the Employment Court found that a situation involving substantial numbers of employees in a major industry with consequences beyond the immediate parties meet

the requirements of s.178(2)(b). Counsel's submission is that the present case falls outside the section's requirements.

[18] S.178(2)(c) permits removal where the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. Counsel submits that a challenge to an Authority determination being filed in the Employment Court is not within these words, the proceedings now before the Court being in effect the same proceedings as were before the Authority.

[19] Finally, addressing the Authority's discretion to remove a matter that falls outside s.178(2)(a) – (c), counsel says that the matter is a personal grievance without any legal complexity and that Oceania Group should not be put to the extra expense of defending the matter in Court as opposed to the Authority.

## **Conclusions**

[20] It is convenient to address each subsection in turn.

[21] I agree with counsel for Oceania Group that there is no important question of law in the present case. The Authority now has the benefit of the Full Court's judgment in *The Ports of Auckland Limited* case. The present case is a fairly typical personal grievance in which the predominant work will be investigating and determining the facts and applying the law as now explained. S.178(2)(a) is not available as a ground for removal.

[22] It is important to bear in mind the full text of s.178(2)(b). Removal is permitted if:

*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* (emphasis added)

[23] The submissions for Mrs Gazeley have focussed on urgency from her personal perspective. She wants to have her personal grievance determined as soon as possible because of the effects of being kept out of her job. It was the function of the interim reinstatement determination to weigh the potential harm to her by being kept out of her job against the potential harm to the respondent of having to reinstate her in the

meantime. The Court is now in a position to remedy any wrong assessment by the Authority. As counsel points out, there is no particular public interest arising from Mrs Gazeley's understandable desire to progress her substantive claim so as to bring the proceedings within s.178(2)(b).

[24] There seems also to have been some confusion about the Authority's ability to progress the matter urgently. The proceedings including the affidavits were properly lodged with the Authority by 20 October 2011. During the phone conference on 26 October 2011 counsel for the respondent asked if the Authority could schedule the substantive investigation on an urgent basis instead of investigating the interim reinstatement claim. Sometimes the Authority is able to accommodate that approach. That was not an option in the present case because of workflow demands affecting the Authority. Accordingly arrangements were agreed, taking account of counsels' and the Authority's commitments, to progress the interim reinstatement application. The interim matter was investigated on 15 November 2011 and a determination was released on 18 November 2011. Mrs Gazeley's application for interim reinstatement was accorded urgency and was investigated on the basis of an agreed timetable. Her substantive personal grievance can be scheduled for an investigation meeting as a matter of priority because of the claim for permanent reinstatement. However, the Authority cannot just ignore everything else that is set down or which requires attention. In addition, the circumstances in which the Christchurch Authority members work are a significant impediment to the timely completion of determinations. Added to that there is a backlog of determinations on files that were trapped in the Authority's premises and inaccessible for some months. The backlog is being reduced. As I understand it, the Employment Court in Christchurch is similarly affected. That no doubt reflects the information from counsel that the Court probably would not be able to issue a judgment before mid 2012 if the substantive matter was removed.

[25] Overall the case is not of such a nature and of such urgency that it is in the public interest that it be removed to the Court.

[26] Counsel's submission is that s.178(2)(c) contemplates proceedings other than a challenge to an interim reinstatement determination being before the Court to permit removal of the underlying personal grievance proceedings.

[27] The words of the subsection must be construed in accordance with the objects of the Act which include reducing the need for judicial intervention; and the objects of Part 10 of the Act which include recognising that judicial intervention at the lowest level needs to be that of a specialist body not inhibited by strict procedural requirements (the Authority), ensuring that Authority investigations are generally concluded before a higher Court exercises jurisdiction and recognising that difficult issues of law will need to be determined by higher Courts. None of this convinces me that the words of s.178(2)(c) can be limited in the blanket way argued for by counsel.

[28] The word *already* must mean as at the time that the Authority determines the application for removal rather than as at the time of the application for removal. That approach better accords with the absence of strict procedural requirements and other provisions in the Act requiring a focus on substance over form. In the present case the Court proceedings were filed on 5 December 2011 so the matter satisfies that criteria. The Court proceedings are between the same parties. The question is whether the Court proceedings involve *the same or similar or related issues*.

[29] What remains for the Authority to determine is the substantive personal grievance. The Court proceedings, being a challenge to the Authority's determination on the interim reinstatement claim, do not involve the same issues as the Authority's proceedings, nor do they involve similar issues. The issues for the Authority are the question of justification for the dismissal and, absent justification, the question of remedies for an established grievance. There will no doubt be a number of factual issues to resolve along the way. The issues before the Court are whether there is an arguable case of unjustified dismissal, whether there is an arguable case for interim reinstatement, where lies the balance of convenience until the substantive hearing, and the overall justice of the case.

[30] Put at its strongest, it cannot be said that the issues before the Court are unrelated to the issues remaining for the Authority. That reflects the very different focus in the proceedings but recognises that the Court will need assess to an arguable standard the personal grievance and the reinstatement claims. I conclude that Mrs Gazley's removal application just comes within s.178(2)(c).

**Residual discretion**

[31] When grounds are established for removal the Authority may still decline to do so. Here I am persuaded that I should not remove the matter. The best way of giving effect to the objects of the Act in the circumstances of this case is to decline removal. The Court appears to be in no better position than the Authority to deal with the matter in a timely way. There is no particular legal complexity in the case. There is no good reason to deprive the respondent of the opportunity to defend its decision to dismiss Ms Gazeley before the Authority. Removal would result in no less judicial intervention since the Court would have to deal with the substantive issues at a later hearing, just as does the Authority.

**S.178(2)(d)**

[32] If the Authority was of the opinion that in all the circumstances the Court should determine the matter, I would have removed it relying on s.178(2)(c). It is not necessary to say more under this heading.

**Conclusion**

[33] The application for removal is declined for the reasons explained above.

[34] Costs are reserved.

[35] The Authority will arrange a phone conference shortly to progress arrangements.

Philip Cheyne  
Member of the Employment Relations Authority