IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 407
5378771

	BETWEEN	GREGORY DOUGLAS HALL Applicant
	A N D	WESTPAC NEW ZEALAND LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Tony Drake, Counsel for Applicant Parvez Akbar, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	05 October 2012 from Applicant 12 October 2012 from Respondent 19 October 2012 from Applicant
Date of Determination:	16 November 2012

DETERMINATION OF THE AUTHORITY

A Mr Hall's application to remove this matter to the Employment Court under s.178(2)(a) of the Employment Relations Act 2000 is declined.

Employment relationship problem

[1] Mr Hall applies to remove matter lodged under AEA5378771 to the Employment Court at Auckland for hearing and determination at first instance. Mr Hall's application is made pursuant to s.178(2)(a) of the Employment Relations Act 2000 (the Act) on the grounds that important questions of law are likely to arise in the matter other than incidentally.

Questions of law

[2] Mr Hall identifies the following questions which he says are all important questions of law which meet the test in s.178(2)(a) of the Act:

> *1 Was there implied into the contract of employment a term pursuant to which the applicant had a right to work and, if so, were the actions of the respondent's repudiation of the contract such as to allow cancellation of it?*
>
> *2 Was it lawful and justifiable, pursuant to the Career Break and Time Out Policy:*
>
> > *(i) For the period of 12 months' unpaid leave to be extended;*
> >
> > *(ii) For the applicant's entitlement to remuneration under the contract of employment to be suspended as from:*
> >
> > > *(A) 5 January 2012; or*
> > >
> > > *(B) 29 February 2012;*
> >
> > *(iii) For the redundancy policy and the redundancy provisions in the contract of employment to be treated as not having come into effect or having to be observed;*
>
> *3 Are exemplary damages available to be awarded to the applicant?*

[3] Westpac New Zealand Limited (Westpac) submits the questions posed by Mr Hall are not the questions which will need to be determined in respect of the substantive matter. It also says the questions identified do not give rise to any important questions of law other than incidentally and that the questions identified by Mr Hall are also not relevant to or decisive of his claims.

Substantive claims

[4] Mr Hall in his Amended Statement of Problem identifies the following claims he wants resolved:

> (a) Breaches of contract;

(b) Unjustifiable dismissal;

(c) Unjustifiable action causing disadvantage;

(d) Action for recovery of penalties in respect of breaches of:

(i) The applicant's employment agreement;

(ii) The Act; and

(iii) The Wages Protection Act 1983.

Factual background

[5] Mr Hall was formerly employed by Westpac as Director, Relationships. In accordance with the provisions of the Career Break and Time Out Policy (the CB Policy) the parties agreed that Mr Hall would take 12 months' leave of absence under the CB policy. He commenced this approved leave on 05 January 2011 which was due to expire on 05 January 2012.

[6] Mr Hall says that earlier in 2010, prior to him commencing his career break, Westpac reorganised some of the roles within his department as a result of his decision to take leave under the CB Policy. He claims the role changes within his department had been completed well before he commenced his career break leave.

[7] Mr Hall alleges Westpac did not remain in regular contact with him while he was on leave which he says breached the CB Policy. Mr Hall says the only contact between the parties occurred when he initiated it in the latter months of 2011.

[8] When Mr Hall met with Westpac on 22 December 2011, it presented him with a letter dated 21 December 2011 which offered him:

> […] *the opportunity of further extending your career break as per the letter of 25 March 2010 until 28 February 2011 to enable us to work with you to seek a suitable role upon your return.*

[9] Mr Hall says he reluctantly signed the letter because he did not believe he had much choice but to agree to the proposal. Although Mr Hall asked that the payment of his salary and other entitlements recommence from 05 January 2011 that did not occur. Mr Hall did not return to work after 28 February 2011 but remained employed by Westpac.

[10] On 10 April 2012, Mr Hall raised a personal grievance claim with Westpac alleging it had caused his employment to be affected to his disadvantage and claiming it had not complied with the CB Policy, which he considered to be a term of his employment agreement. He also claimed Westpac's actions breached his employment agreement.

[11] The parties attended mediation on 23 May 2012 but did not resolve the issues between them. Mr Hall says his situation had become intolerable and by letter dated 23 May 2012 he advised Westpac he considered he had been constructively dismissed so was resigning with immediate effect.

[12] Mr Hall says Westpac has standard redundancy provisions in its employment agreements with staff. He says Westpac advised him it did not regard his situation as a redundancy so there was no discussion with him at any stage about possible redundancy or redeployment opportunities.

[13] Mr Hall says he was prevented from returning to his employment with Westpac when his career break leave ended on 05 January 2012 and that Westpac failed to offer him any employment at the end of his 12 month career break.

Issues to be determined

[14] The following issues in relation to the removal application require determination:

(a) Are any of the questions identified by Mr Hall questions of law which are likely to arise in the matter other than incidentally?

(b) If so, then are any of the questions important questions of law in terms of the requirements of s.178(2)(a) of the Act?

(c) If so, are there any relevant factors that would make removal undesirable despite the test in s.178(2)(a) of the Act having been met?

Are any of the questions identified by Mr Hall questions of law which are likely to arise in the matter other than incidentally?

> *Question 1: Was there implied into the contract of employment a term pursuant to which the applicant had a right to work and, if so, were the actions of the respondent a repudiation of the contract such as to allow cancellation of it?*

[15] Westpac submits that the implied term of the right to work is not an issue of law that needs to be determined in the present case.

[16] I do not accept that the question posed by Mr Hall will need to be determined. Mr Hall's right to return to work firstly at the conclusion of his career break and secondly upon the expiry of the signed extension to his career break are issues that will need to be determined.

[17] Mr Hall in his Amended Statement of Problem did not claim repudiation and cancellation but instead raised a constructive dismissal claim. The Authority therefore needs to determine whether Westpac breached his employment agreement and if so whether it was reasonably foreseeable that Mr Hall would resign as a result of any such breach.

[18] The key issue to be determined is whether Mr Hall's resignation was a voluntary act or the result of a breach of duty by Westpac so I consider the real question to be determined is who, in law, is responsible for the ending of Mr Hall's employment?

[19] I therefore find that question 1 is only likely to arise incidentally if at all, so it does not met the test in s.178(2)(a) of the Act.

> *Question 2: Was it lawful and justifiable, pursuant to the CB Policy:*
>
> *(a) For the period of 12 months' unpaid leave to be extended;*
>
> *(b) For the applicant's entitlement to remuneration under the contract of employment to be suspended as from:*
>
> *(i) 5 January 2012; or*
>
> *(ii) 29 February 2012;*
>
> *(c) For the redundancy policy and the redundancy provisions in the contract of employment to be treated as not having come into effect or having to be observed?*

[20] This is not solely a question of law. The question as stated is a mixed question of law, fact, and interpretation of the relevant contractual terms applicable policies/provisions and of the justification test in s.103A of the Act.

[21] I am not convinced that the questions stated above will need to be determined by the Authority. The Authority will need to determine whether Westpac's acts or omissions in relation to Mr Hall's career break leave amounted in law to a breach of contract and/or whether its actions and how it acted was justified in light of the s.103A justification test in the Act.

[22] Other questions to be determined will include whether Mr Hall's career break was extended by agreement; whether he was entitled to be paid if he had not actually returned to work at the conclusion of his 12 months' career breach leave; and whether the redundancy policy and contractual redundancy provisions applied to Mr Hall's situation.

[23] I consider that question 2 involves predominantly factual questions rather than questions of law that arise other than incidentally so I find question 2 does not meet the requirements of s.178(a) of the Act.

Question 3: Are exemplary damages able to be awarded to the applicant?

[24] Westpac submits that this is not an issue that requires determination because the High Court decision in *BDM Grange Ltd v. Parker* [1] made it clear that neither the Employment Court nor the Authority has jurisdiction to award exemplary damages.

[25] Westpac also relies on the Court of Appeal decision in *Paper Reclaim Ltd v. Aotearoa International Ltd* [2] as authority that exemplary damages cannot be awarded in respect of a breach of contract in New Zealand.

[26] Mr Drake submits that the High Court decision in *BDM Grange* considered various forms of tort action but did not make any decision about any of the remedies which the Employment Court or Authority had jurisdiction to award for a breach of a contract of employment. Mr Hall has claimed $40,000 exemplary damages for the alleged breach of contract in this case.

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1 [2005] ERNZ 343.
2 [2006] 3 NZLR 188.

[27] Mr Drake acknowledges the Employment Court decision in *Prins v. Tirohanga Group Ltd* [3] supports the proposition that the Court of Appeal's decision in *Paper Reclaim*[4] prevents exemplary damages being awarded for a breach of an employment contract.

[28] However, Mr Drake submits that subsequent to the Employment Court's decision in *Prins*[5], there have been developments in the law which cast doubt on whether *Paper Reclaim*[6] intends to exclude contracts of employment. He did not elaborate on what those developments were.

[29] Mr Drake intends to ask the Employment Court to reconsider its decision in *Prins*[7] on the issue of exemplary damages and to reach a different conclusion, viz that *Paper Reclaim*[8] does not apply to contracts of employment. He therefore submits that if removed Mr Hall's case will allow the Employment Court to reconsider the availability of exemplary damages in light of the developments in case law and changes to statute and employment laws since 2006.

[30] I accept that whether or not the Employment Court should overturn one of its previous decisions is a question of law.

Is question 3 an important question of law in terms of the requirements of s.178(2)(a) of the Act?

[31] Not all questions of law will warrant removal. The key issue is whether a question of law is of sufficient importance to warrant removal. The Employment Court's decision in *Hanlon v. International Educational Foundation (NZ) Inc*[9] provides guidance when assessing the importance of a question of law.

[32] I do not consider that question 3 is important to the outcome of the present case. It will not be decisive of the case or of any important aspect of it. Nor will it be influential in bringing about a decision in respect of the substantive claims.

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3 [2006] ERNZ 321.
4 Ibid 2.
5 Ibid 3.
6 Ibid 2.
7 Ibid 3.
8 Ibid 2.
9 [1995] 1 ERNZ 1.

[33] Mr Hall's claim for exemplary damages is a very small part of his case and will only arise during consideration of remedies. That in turn will only be required if liability is established. I therefore consider question 3 is peripheral to the substantive matters to be determined and is conditional on liability being established.

[34] It is also not a question of law which will affect large numbers of employers or employees or both. I also do not consider the answer to question 3 is of major significance to employment law generally given the extremely limited circumstances in which an exemplary damage claim is likely to arise should it be available as a remedy.

[35] The Court of Appeal in *Paper Reclaim*[10] has already rejected the availability of exemplary damages and the Employment Court in *Prins*[11] held that decision applies in the employment context. I therefore consider the law relating to the availability of exemplary damages is currently settled.

[36] I therefore conclude that question 3 is not an important question of law in terms of the requirements of s.178(2)(a) of the Act.

Are there any factors that make removal undesirable?

[37] Even if I am wrong about question 3, and it is an important question of law as defined by s.178(2)(a) in the Act, I would have exercised the Authority's residual discretion not to order removal of this matter to the Employment Court notwithstanding that one of the grounds in s.178(2) of the Act may have been met[12].

[38] I consider that the following factors weigh against removal even if question 3 had met the importance criteria in s.178(2)(a) of the Act:

(a) There is likely to be a much longer delay in having the substantive matter resolved by the Employment Court than the Authority which is currently setting down for March 2013;

(b) The matter involves factual disputes which Parliament intended to be determined at first instance by the Authority;

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10 Ibid 2.
11 Ibid 3.
12 *Auckland District Health Board v. X (No 2)* [2005] ERNZ 551.

(c) Removal will mean that the unsuccessful party will effectively be deprived of appellant rights, which is undesirable given the Employment Court is intended to be predominantly an appellate jurisdiction;

(d) Removal may increase costs to the parties as matters before the Authority typically involve less hearing time and preparation by the parties than those before the Court because of the unique nature of the Authority's investigative role;

(e) No useful purpose will be served by ordering removal of the proceedings to the Court for a hearing at first instance:

(i) Although the Authority is required to follow the Employment Court's decision in *Prins*[13] regarding the unavailability of exemplary damages it is open to Mr Hall to challenge that aspect of the Authority's determination or indeed all of the Authority's determination if he is unsatisfied with it;

(ii) The Employment Court in *Prins*[14] expressly rejected Mr Drake's argument in that case that the Court of Appeal's decision in *Paper Reclaim*[15] did not apply to employment agreements so it is likely to consider itself bound to follow the Court of Appeal's precedent if it does revisit the issue of exemplary damages.

(iii) Mr Drake has not identified any cases subsequent to *Prins*[16] or statutory changes which are likely to change the Employment Court's view on the application of the Court of Appeal's decision in *Paper Reclaim*[17] as it applies in the employment context;

(iv) There is a mechanism available which does not involve removal to the Court in first instance, which allows Mr Hall to have the Employment Court revisit the issue of exemplary damages should he wish to do so.

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13 Ibid 3.
14 Supra.
15 Ibid 2.
16 Ibid 3.
17 Ibid 2.

[39] If I had concluded question 3 met the importance requirement in s.178(2) then this was an appropriate case in which to exercise the Authority's residual discretion under s.178(2) of the Act to decline to remove the proceedings on the grounds that it would have been undesirable to remove this particular case for the reasons identified above.

[40] However I find that none of Mr Hall's stated questions meet the requirements of the test in s.178(2)(a) of the Act so his application for removal of this matter to the Employment Court to hear and determine the matter prior to the Authority investigating it is declined.

Costs

[41] Westpac as the successful party is entitled to an award of costs in its favour. The parties are encouraged to agree on costs. If that is not possible then Westpac has 14 days to file a costs memorandum and Mr Hall has 14 days thereafter to file his response. This timetable will be strictly enforced.

Rachel Larmer
Member of the Employment Relations Authority