

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 348
3043511

BETWEEN SHANE HAYWARD
Applicant
AND HORIZON CONCEPTS
LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Jenifer Silva, advocate for Applicant
Penny Swarbrick, counsel for Respondent
Investigation Meeting: On the papers
Joint Submissions Received: 2 November 2018
Date of Determination: 13 November 2018

DETERMINATION OF THE AUTHORITY

A. This matter is removed in its entirety under s 178 of the Employment Relations Act 2000 for the Employment Court to hear and determine the substantive issues between the parties without first being investigated by the Authority.

Employment Relationship Problem

[1] Shane Hayward claims that he was subject to unjustified actions by Horizon Concepts Limited (Horizon or the company) to his disadvantage and was unjustifiably dismissed by it. In addition he claims that the company breached its duty of good faith to him and that it owes him holiday pay.

[2] The parties agreed that an issue regarding whether Mr Hayward was an employee or an independent contractor would be dealt with by the Authority as a preliminary matter.

[3] On 6 August 2018 the Authority issued a preliminary determination (the previous determination), finding that Mr Hayward was an employee of Horizon.¹

[4] On 30 August 2018 Horizon filed a de novo challenge in the Employment Court to the previous determination.

[5] The parties have now jointly applied to the Authority for removal of the entire matter lodged in the original claim.

[6] The application is made upon the grounds that the Employment Court already has before it proceedings which are between the same parties and which involve a related issue within the meaning of s 178(2)(c) of the Employment Relations Act 2000 (the Act). Additionally, the parties consider that the Court should determine the matter under s 178(2)(d) of the Act.

Employment Court Proceedings

[7] The matter of Mr Hayward's employment status is already before the Employment Court. If the removal application is granted then the Court could go on to consider whether he has a personal grievance or other claims.

[8] The parties consider that it would be more efficient and save time and costs for them if the entire proceedings were dealt with by the Court. This would avoid the need for further proceedings in the Authority and any challenge which might flow from that.

[9] The Employment Court has listed this matter for a two-day hearing on 13 and 14 March 2019 in anticipation of this application.

[10] The parties submit that it is in the interests of justice to remove the entire matter. They also rely on the Authority's obligation to act in equity and good conscience pursuant to s 157(3) of the Act.

¹ *Shane Hayward v Horizon Concepts Limited* [2018] NZERA Auckland 244.

Submissions

[11] Joint submissions were filed by the parties in support of their application for removal. In addition a minute from the Court of 16 October 2018 was filed.

[12] The parties rely on *Randwick Meat Co Limited v Burns*², in particular Judge Ford's statement that where the proceedings are between the same parties "the test [under s 178(2)(c)] envisages a more holistic connection of the relevant issues". Although the relevant issues in that case were not identical, they were sufficiently similar or related to justified removal.³

Removal

[13] It is only necessary to establish one of the tests under s 178(2) of the Act in order for removal to be granted.⁴

[14] All of Mr Hayward's claims are dependent on him having been an employee. They are therefore clearly connected to the matter of the proceedings in the Court, namely his employment status.

[15] The proceedings in the Authority and the Court are between the same parties. They are related within the meaning of s 178(2)(c) of the Act.

[16] A common consideration in removal cases is the prospect of the matter being heard on a more speedy basis by the Authority. However, that does not apply in this case. The Authority's consideration of the substance of Mr Hayward's claims was awaiting the Court's determination on the employment status issue. The Court has allocated two days for this matter in the relatively near future, in anticipation of the prospect of hearing the de novo challenge and the substance of Mr Hayward's claims together.

[17] Another consideration is that the granting of leave would deprive the parties of a general right of appeal against the Authority's factual findings. However, in this case both parties are in agreement that removal is their preference.

² *Randwick Meat Co Limited v Burns* [2015] NZEmpC 188.

³ Above n 2 at [27].

⁴ *Auckland District Health Board v X (No. 2)* [2005] 1 ERNZ 551.

[18] I consider that it would be more efficient and save the parties time and costs to have the entire proceeding together in the Employment Court. This would avoid the need for the Authority to undertake a further investigation regarding Mr Hayward's grievance, good faith and holiday pay claims and avoid any challenges which might flow from that.

[19] Both the grounds in s 178(2)(c) and (d) of the Act are established. In the interests of justice, the entirety of the matter still before the Authority is removed to the Court to hear and determine the substantive issues between the parties, without the issues first being investigated by the Authority.

[20] There is no application for costs regarding the removal application. Costs regarding the preliminary application were reserved in the previous determination.

Nicola Craig
Member of the Employment Relations Authority