

The application for removal

[3] The applicant filed proceedings in the Authority in January 2007 seeking rectification and/or variation of the parties' employment agreement under common law or Contractual Mistakes Act 1977. Related District Court proceedings have delayed the investigation of the substantive problem. Those proceedings have now been dealt with and a copy of the relevant judgment provided to the Authority¹.

[4] The application for removal was filed in November 2007 and is made on two alternative grounds:

- (i) that an important question of law is likely to arise in the matter other than incidentally; namely, the application of the principles of rectification in equity or under the Contractual Mistakes Act 1977 in respect of an individual employment agreement which has been terminated (s178(2)(a) Employment Relations Act 2000); and
- (ii) that in all the circumstances the Court should determine the matter (s178(2)(d) Employment Relations Act 2000)

[5] In relation the first ground Mr Toogood submitted on behalf of the applicant that there does not appear to be any established authority on whether rectification, as sought by the respondent, might take place retrospectively. It is accepted on behalf of the applicant that the principles of rectification at common law and/or under the Contractual Remedies Act 1977 are reasonably well understood in the employment setting but that those principles are not frequently applied. It is also submitted that the rectification issue is fundamental to the applicant's claim; if an order for rectification is not made then its claim will fall away.

[6] As to the second ground it is submitted that the substantial financial consequences of the outcome of these proceedings and the novel and difficult question of law at its heart, mean it is highly probable that the Authority's

¹ *Michael and Amanda Watkins (as Trustees of the Watkins Investment Trust) v Ogilvy New Zealand Limited*, Judge Joyce QC, 12 December 2007, CIV-2007-004-001798

determination would be challenged and that, in any event, it is appropriate that the issue be determined by the Court in the first instance.

[7] Ms Wilson, for the respondent, opposed the removal on the basis that the Authority would be able to form a view of the facts and apply settled legal principles. It is submitted that the question of law identified by the applicant is not important and that the application of those principles is the same whether the claim for rectification occurs before or after termination. The submissions refer to an Authority determination where post termination rectification was considered² and notes that no comment was made as to the retrospective nature of the remedy sought.

[8] Ms Wilson further submits that all the circumstances of the case do not favour removal to the Court. She submits that the high probability of challenge is not a sufficient ground for removal because the asserted financial consequences of the outcome have not been particularised, no evidence of loss has been filed with the statement of problem and there is no novel or difficult question of law for the Authority to determine. It is further submitted that if the matter was removed to the Court there would be no right of challenge apart from an appeal on questions of law and that the Authority could utilise a more flexible and cost-effective approach to determine the applicant's claim for rectification.

Determination

[9] The statute provides that the Authority is to determine matters at first instance and should generally do so unless it is satisfied that one of the removal criteria is met and that it is appropriate given the Authority's residual discretion for it to remove the matter.

[10] Rectification of a collective employment agreement may be ordered after the contract has expired³. This issue has been specifically considered and determined by the Employment Court. I have been unable to find similar authority for individual employment agreements. I accept that it is central to the applicant's claim that an order for rectification may be made after the termination of an individual employment

² *Ranburn Rest Homes Limited v Senora* (Member Monaghan, 29 March 2006, AA95/06)

³ *NZ Engineering Union Inc v Babcock NZ Ltd* [1997] ERNZ 82

agreement and that this is an important question of law which is not incidental to the matter. Given this conclusion it is unnecessary to consider the alternative ground for removal further.

Order for removal

[11] On the grounds established under s 178(2)(a) Employment Relations Act 2000 the matter is removed to the Court in its entirety.

Marija Urlich

Member of the Employment Relations Authority