IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 94
5416630

	BETWEEN	AGUS RIYANTO AND 86 OTHERS Applicants
	A N D	DONG NAM COMPANY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Marcus Elliott, Counsel for Applicant Kelvin Reid, Counsel for Respondent
Investigation Meeting:	Determined by consideration of the papers
Submissions Received:	9 and 25 June 2014 as joint memoranda
Date of Determination:	1 July 2014

DETERMINATION OF THE AUTHORITY

This matter is to be removed to be heard by the Employment Court without the Authority investigating it.

Employment relationship problem

[1] The 87 applicants were crew members on three South Korean flagged fishing vessels (*Sur Este 700*, *707,* and *709*) owned by the respondent. The applicants are all nationals of the Republic of Indonesia, resident outside of New Zealand, and were all employed by the respondent.

[2] The respondent is a company with a registered office in South Korea. The vessels were, at all material times, registered to fish in New Zealand fisheries waters pursuant to s.103(4) of the Fisheries Act 1996.

[3] The applicants claim that the respondent has failed to pay wages to them for work carried out on the fishing vessels. The total amount claimed on behalf of the 87 applicants amounts to $6,572,790. The applicants' representative has indicated that this figure may be amended pursuant to further information being received from the respondent, although that amendment has not yet been provided. It is alleged by the applicants that the respondent has breached its obligations to them under their Crew Employment Agreements by failing to pay them their full wage entitlements.

[4] It is further alleged that the respondent has breached s.6 of the Minimum Wage Act 1983 by failing to pay the applicants their full wages entitlements. It is also asserted on behalf of the applicants that the applicants may have been on-call 24 hours per day, seven days a week for the period they were at sea and that, pursuant to *Idea Services v. Dickson* [2011] NZCA 14, they would be entitled to be paid the minimum wage 24 hours per day and seven days a week during their period on call at sea.

[5] The respondent admits that the provisions of the Minimum Wage Act 1983 and of the Crew Employment Agreements applied to the parties but denies that the dates on which the applicants are said to have commenced work, and then left the vessels, are entirely correct. The respondent also denies that it failed to keep accurate time records, breached the obligations owed to the applicants under the Crew Employment Agreements, breached s.6 of the Minimum Wage Act and denies that the applicants would be entitled to be paid the minimum wage 24 hours per day, seven days per week for the period they were on call at sea.

[6] Pursuant to a joint memorandum from counsel, the parties seek an order that the matter be removed to the Employment Court.

[7] The claims were originally lodged by way of three statements of problem (one per fishing vessel) but by order of the Authority, the three matters have been consolidated into a single matter under the present matter number. The lodging and service of an amended, consolidated statement of problem with updated information in relation to the alleged wage arrears claimed had also been directed, but in light of the application for removal, I stay that direction *sine die*, which will lapse if the Employment Court accepts the removal to it of the matter. The parties have attempted to resolve the matter by mediation.

Should this matter be removed to the Employment Court?

[8] The jurisdiction of the Employment Relations Authority and of the Employment Court to determine this issue arises from s.103 of the Fisheries Act 1996, which sets out the requirement for registration of fishing vessels used to take fish, aquatic life or seaweed for sale in New Zealand fisheries waters. Once consent has been given for registration of a fishing vessel owned or operated by an overseas person, the following provisions apply while the vessel is in New Zealand fisheries waters:

> *103(5)(a)* *for the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of such other enactments as are necessary to give full effect to those Acts, a person engaged or employed to do work on the vessel who holds a temporary entry class visa with conditions that allow the person to work under the Immigration Act 2009 shall be deemed to be an employee;*
>
> *(b)* *For the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983 and such provisions of any other enactments as are necessary to give full effect to those Acts, the employer of a person referred in paragraph (a) shall be deemed to be:*
>
> *(i)* *If the operator of the vessel is the employer or contractor of those persons, the operator;*
>
> *(ii)* *In any other case, the person from whom the operator has, by virtue of a lease, sub-lease, charter, a sub-charter or otherwise, for the time being obtained possession and control of the vessel;*
>
> *...*
>
> *(g)* *The Employment Relations Authority and the Employment Court may exercise jurisdiction in respect of any employment relationship that arises by virtue of paragraph (a) or paragraph (b) as if it were a lawful employment relationship subject to New Zealand law.*

[9] Section 178 of the Employment Relations Act 2000 (the Act) provides as follows:

> ***178 Removal to court***
> *(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.*
> *(2) The Authority may order the removal of the matter, or any part of it, to the court if—*

> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
> *(b) 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; or*
> *(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
> *(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.*
>
> *(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*
>
> *(4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.*
>
> *(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
>
> *(6) This section does not apply—*
> *(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
> *(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.*

[10] The parties have not indicated the grounds that they believe are satisfied under s.178 of the Act justifying removal of this matter to the Employment Court. However, in my view, removal to the Court is justified pursuant to both subsections 178(2)(a) and (d).

Is an important question of law likely to arise in the matter other than incidentally?

[11] In the Employment Court case of *Hanlon v. International Educational Foundation (NZ) Inc*. [1995] 1 ERNZ 1, Chief Judge Goddard stated:

> *A question of law arising in a matter would 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.*

[12] The question of law involves whether *Dickson* may apply to the applicants' conditions on board while in New Zealand waters. The Court of Appeal's judgment in *Dickson* has been considered in a number of cases in both the Authority and the Employment Court. The Court of Appeal set out very clear principles which are capable of being applied to a range of employment situations, as was confirmed by the Employment Court in *The New Zealand King Salmon Co Limited v. Cerny* [2012]

NZEmpC 195 in which His Honour Judge Ford stated that the legal position (as set out in *Dickson*) has been considered and determined at one of the highest levels, that the Court of Appeal did not appear to confine its observations to community service workers, [15], and that the principle confirmed in *Dickson* has a wider application than its application to community service workers involved in sleepovers, [16].

[13] However, whilst the three tests set out in *Dickson* in assessing whether sleepovers constituted work can clearly be applied to a wide range of occupations and activities, it is my view that work on a fishing vessel is of a unique character which cannot easily be compared to the vast majority of occupations that the Authority is likely to encounter, given that the crew of fishing vessels are forced to live on the vessels throughout the engagement, with no possibility of leaving (except, perhaps, in an emergency or due to illness). This unique nature of the fishing industry has in fact been recently confirmed by the Employment Court in the case of *Law & Ors v. Board of Trustees of Woodford House & Ors* [2014] NZEmpC 25 in which, referring to the Employment Court case of *Sealord Group Limited v. New Zealand Fishing Industry Guild Inc.* [2005] ERNZ 535, the Court stated that *Sealord* was an industry specific case *based on a unique regime* (namely, payment of employees on ocean going fishing vessels).

[14] For this reason, I consider that an important question of law is likely to arise in the matter other than incidentally; namely, whether a member of crew working on a fishing vessel in New Zealand fisheries waters can be said to be on-call 24 hours a day, seven days a week while at sea and, if so, whether being on call would constitute work for the purposes of the Minimum Wage Act.

Should the court in all the circumstances determine the matter?

[15] I am also satisfied that removal of this matter is justified under s.178(2)(d) of the Act. This is a case where a substantial sum of money is being sought by a significant number of employees, the majority of whom will speak little or no English and, it is understood, none of whom reside in New Zealand. Counsel for the applicants has estimated that the Authority would need to set down an investigation meeting lasting 25 days in order to consider and determine the matter. I do not believe that the respondent has commented on this estimate, but I also do not believe that it is significantly inaccurate.

[16] Whilst the Authority is capable of investigating complex matters of fact and of considering complex issues of law, it is not set up logistically to consider a multi-party, multi-day investigation meeting requiring 25 days of evidence taking. The Authority does not audio record evidence as it is given and does not have the facilities to have a dedicated note taker present to take accurate notes of the evidence and to transcribe it.

[17] I consider that it would be far more practicable for the Employment Court to handle a matter of this kind in view of the practical constraints upon the Authority.

[18] Furthermore, the Employment Court operates a different regime to the Authority in respect of the discovery of documents and I consider that this is a case in which a large volume of documentation is likely to be required to be dealt with which, again, may be more effectively achieved using the Employment Court's discovery regime.

Determination

[19] For the reasons set out above, I find that, pursuant to subsections 178(2)(a) and (d) of the Act, the matters consolidated under the Authority's file number 5416630 should be removed to the Employment Court on the basis that an important question of law is likely to arise other than incidentally and that the Authority is of the opinion that, in all the circumstances, the Court should determine the matter.

[20] Accordingly, I order the removal of this matter to the Employment Court.

Costs

[21] Costs are reserved. Whilst I invite the parties to serve and lodge memoranda of counsel within 14 days of the date of this determination if they believe a contribution towards their costs should be made by the other party, my preliminary view is that it is appropriate for costs in this matter to lie where they fall.

David Appleton
Member of the Employment Relations Authority