

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 364
5581164

BETWEEN PAMELA SHEATH
Applicant

A N D THE SELWYN FOUNDATION
First Respondent

A N D SELWYN CARE LIMITED
Second Respondent

Member of Authority: T G Tetitaha

Representatives: A Drake, Counsel for the Applicant
S Langton, Counsel for the Respondents

Investigation Meeting: On the papers

Submissions Received: 18 September 2015 from the Applicant
14 October 2015 from the Respondents

Date of Determination: 23 November 2015

DETERMINATION OF THE AUTHORITY

A. The application to remove her personal grievance of unjustified dismissal to the Employment Court is refused. Costs are reserved.

Employment relationship problem

[1] Ms Sheath was dismissed for redundancy on 30 June 2015. She applies under s.178 of the Employment Relations Act 2000 (the Act) to remove her application of unjustified dismissal to the Employment Court. The Court is currently seized of a challenge to a previous determination about unjustified disadvantage and wage arrears.¹ The respondents consent to the removal application.

¹ *Sheath v Selwyn Foundation & Anor* [2015] NZERA Auckland 134.

Removal

[2] Consent of the parties to an application for removal is not determinative. The jurisdiction to remove a matter to the Court from the Authority is set out in s178 of the Act.

[3] The stated grounds for the removal application are:

- a) an important question of law is likely to arise in the matter other than incidentally (s.178(2)); and
- b) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues s.178(2)(c).

[4] Personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases which satisfy one of the grounds in s.178(2) of the Act.²

Important Question of law

[5] The applicants submit the important question of law that arises is:

Whether there [was] a bona fide redundancy situation at the time of the dismissal in circumstances where the position which the employee held had not become surplus to the employer's requirements, the duties and responsibilities of the position remained unchanged, and the employer's objective was to make changes to the accommodation and remuneration entitlements the employee had?

[6] Although all questions of law will be important for the purposes of resolving proceedings, this is insufficient to engage s178. The question of law must be likely to arise *other than incidentally* (s178(2)(a)). The applicant has the burden of persuading the Authority removal is justified.³

[7] The applicant's question primarily requires resolution of disputed facts about the respondent's motivation for the dismissal. It does not, other than incidentally, involve a question of law.

² *Vice Chancellor of Lincoln University v. Stewart (No.2)* [2008] ERNZ 249

³ *Hanlon v International Educational Foundation (NZ) Inc.* [1995] 1 ERNZ 1.

[8] This case does not involve large numbers of employees nor answering a question of importance to employment law generally.⁴

Same or similar or related issues

[9] The subject of the determination under challenge is wage arrears and an unjustified disadvantage in the refusal to raise the applicant's salary. These are not the same or similar matters raised in respect of the dismissal for redundancy.

[10] The unjustified dismissal occurred on 30 June 2015, after the determination under challenge was released in May 2015. The evidence about the dismissal will be new and untested.

[11] The only similarity between the challenge and the current application before the Authority are the named parties.

[12] Even if an important question arose or there were same or similar issues, I would decline to exercise my discretion⁵ to grant removal. This case is one which turns on a number of disputed facts that can be more properly and quickly dealt with in the Authority than the Court. Substantive hearing dates are available in December 2015 and January and February 2016. I am seized of the background to this case given my previous involvement. Accordingly evidence should be more focused and less hearing time required. Given the current matter before the Court, it is likely the unsuccessful party in the Authority will challenge this matter to the Court at a later stage, especially if it is determined prior to the existing challenge.

[13] I am not satisfied that Ms Sheath's matter of unjustified dismissal falls within any of the grounds in s.178(2) of the Act. The application to remove her personal grievance of unjustified dismissal to the Employment Court is refused. Costs are reserved.

⁴ See n3 above.

⁵ *McAlister v Air New Zealand Ltd* AC 22/05, 11 May 2005 at [9]-[10] citing *Hanlon v International Educational Foundation (NZ) Inc.* [1995] 1 ERNZ 1.

[14] The parties are directed to contact the Registry to arrange for a telephone conference for the purposes of setting down an investigation meeting date.

T G Tetitaha
Member of the Employment Relations Authority