

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 104
5358997

BETWEEN PHILIP TOMPKINS
 Applicant

A N D CONSTRUCTA LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Peter van Keulen, Counsel for Applicant
 Amanda Douglas, Counsel for Respondent

Investigation meeting: Determined on the papers, by agreement

Submissions Received 17 and 25 May 2012 from Applicant
 14 and 25 May 2012 from Respondent

Date of Determination: 29 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Tompkins claims that he is owed the net sum of \$553,877 pursuant to a profit share arrangement that he had with the respondent (a property developer) when he was employed by it as a project manager. The respondent denies that Mr Tompkins is entitled to this sum, relying on a reconciliation that calculates that the sum due is \$13,812. The respondent also counterclaims in the sum of \$46,101 in respect of works undertaken by Mr Tompkins to a property which the respondent claims were unauthorised.

[2] This determination addresses an application by the respondent for the Authority to remove that problem to the Employment Court for the Court to hear and determine the matter without the Authority investigating it.

[3] The application arose after Mr Tompkins lodged a statement of position, in accordance with the Authority's directions, which increased the sum initially claimed by him in correspondence from \$105,785 to the \$553,877 currently claimed.

[4] The jurisdiction of the Authority to remove a matter to the Employment Court derives from s 178 of the Employment Relations Act 2000 (the Act). This provides as follows:

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

[5] The respondent, in its application, relies upon s 178 (2)(d) of the Act. The respondent's stated reasons for its application can be conveniently summarised as the following:

- a. The statement of position is vague and confusing, with the claim poorly set out;

- b. Very little justification for or calculation of the amount claimed has been provided;
- c. Supporting documentation has not been identified;
- d. A new basis of calculation of the profit share has been used by Mr Tompkins;
- e. The dispute between the parties is essentially a commercial one;
- f. The Employment Court exercises its powers as a court of record;
- g. The evidence will be complex and may require a forensic accountant to give expert evidence;
- h. The Employment Court will generally apply the High Court rules of evidence ;
- i. A more routine trial process is required to ensure the claim is properly set out;
- j. The Employment Court may make any order for discovery that the District Court may make;
- k. The Employment Court will allow cross examination;
- l. A high standard is required in determining the issues because of the level of quantum;
- m. The matter is likely to come before the Employment Court in any event due to the level of quantum claimed; and
- n. A potential question of law may be raised if Mr Tompkins objects to the respondent's counterclaim.

[6] Mr Tompkins' response is that these points largely relate to the procedure that the Authority would apply as compared to the Employment Court, and that is expressly excluded by s 178(6) as a reason for removal. This prohibition is echoed in s 179 of the Act which does not allow a challenge to the Employment Court in respect of the Authority's procedure.

[7] I am in agreement with Mr Tompkins' counsel that most of the reasons given by the respondent's counsel for removal relate to the procedure that the Employment Court would or could use to determine the matter, with the implication that the procedures available to the Authority to address the alleged deficiencies in Mr Tompkins' case, and to determine the issues, are inadequate. Putting aside the validity of that implication for a moment, such reasons cannot be considered by me in this application as they relate to procedural matters which are precluded by operation of s 178(6).

[8] In respect of the respondent's argument that the dispute between the parties is essentially a commercial one, it arises out of an employment relationship and so is one that falls squarely within the jurisdiction of the Authority. Furthermore, the Employment Court is also a specialised employment jurisdiction, which hears employment relationship problems, and not commercial disputes, as a matter of routine.

[9] In respect of the statement that the Authority's determination would be challenged in any event by one party or the other because of the quantum sought, whilst that may be true, that cannot give rise to a reason for removal as every party could argue that they intended to challenge the Authority's determination if it did not go their way.

[10] In respect of the possible question of law, that has not yet been raised formally by either party as far as I am aware. I cannot judge, therefore, whether it would be *an important question of law [...] likely to arise in the matter other than incidentally*.

[11] This matter is factually complex as the respondent has stated, and it is possible that expert evidence may need to be adduced on discrete accountancy and taxation points. However, the Authority is a body well used to undertaking factual enquiries and the key matters in contention (in a nutshell, what was agreed between the parties as to the basis of calculation of the profit share and the underlying data from which the calculation is to be made) can be robustly investigated by the Authority in my view.

[12] The case referred to by counsel for the respondent, *New Zealand Amalgamated Engineering & Related Trades IUOW v Carter Holt Harvey Ltd*

declined removal as resolution in that case was substantially dependent on factual rather than legal matters. The present matter is no different in my view.

[13] Although the quantum sought in this case is not insubstantial, I agree with the submission of counsel for Mr Tompkins that that is no reason to remove the matter to the Employment Court. The case of *Jackel (New Zealand) Ltd v Ireland* ERA Auckland AA340/03, 11 November 2003 raised similar complex accountancy issues and involved a substantial quantum, but these were not enough to satisfy the legislative requirements for removal.

[14] Finally, the respondent's counsel has raised concerns, by implication, that the Authority will not be able to address what she sees as inadequacies in Mr Tompkins' case as pleaded. However, without passing judgement at this stage about those alleged inadequacies, the Authority has wide powers under s 160 of the Employment Relations Act 2000 to issue a range of directions which would effectively address them. Furthermore, since 1 April 2011, the Authority must allow cross examination of a party.

Summary

[15] In light of the above, I decline to order removal of this matter to the Employment Court.

Costs

[16] Costs are reserved.

David Appleton
Member of the Employment Relations Authority