

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 265
5441627

BETWEEN

BRYCE TOZER
Applicant

A N D

FRANIX CONSTRUCTION
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Hugh Fulton, Counsel for the Applicant
David Dickinson, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 12 June 2014 from Counsel for the Applicant
23 June 2014 from Counsel for the Respondent

Date of Determination: 26 June 2014

DETERMINATION OF THE AUTHORITY

- A. The application by the respondent, Franix Construction Limited, for removal of this matter to the Employment Court to hear and determine is declined.**
- B. The Authority is to proceed with its investigation of Mr Bryce Tozer's personal grievance and recovery of wages claims.**

[1] By consent the application for removal of this matter was determined on the papers. Counsel for both parties provided the Authority with detailed submissions.

The employment relationship problem

[2] On 5 May 2014, the Employment Relations Authority (the Authority) determined that the relationship between Mr Bryce Tozer and Franix Construction Limited (Franix) was that of employer and employee.¹

[3] On 3 June 2014, Franix filed a challenge to the Authority's determination in the Employment Court (Court) which is yet to be heard and decided by it.

[4] As a result of the Authority's determination that the relationship between Mr Tozer and Franix was that of employer and employee and it has jurisdiction to investigate Mr Tozer's substantive claims of unjustified dismissal and recovery of wages (the claims), the Authority has timetabled and scheduled an investigation meeting. The investigation meeting is scheduled to take place on 24 September 2014 to allow sufficient time for the Court to hear and decide the challenge brought by Franix.

[5] On 3 June 2014, Franix filed an application in the Authority for the removal to the Court of the claims. Franix advanced two grounds for removing the claims to the Court without prior investigation by the Authority:

- (a) That the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; and,
- (b) In all the circumstances the Court should determine the matter.

[6] Counsel for Franix submits in support of its application for removal to the Court, that the bar to removal in s.178(2)(c) of the Employment Relations Act 2000 (the Act) is not high, the issues before the Court are similar or related to those before the Authority, the employment relationship is not ongoing, there are not sufficient grounds militating against removal and pragmatic reasons exist favouring removal.

[7] Mr Tozer opposes the application to remove the claims on the grounds that they are not matters currently before the Employment Court. Therefore, it is argued the Court does not have before it proceedings which involve the same or similar or related issues.

¹ [2014] NZERA Auckland 170

[8] The Authority may order removal if it is satisfied one of the grounds in s.178(2) of the Act have been met.

[9] Section 178 is set out below:

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 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] Counsel for Franix accepts that the matter being challenged to the Court is a preliminary matter and if Franix is not successful, Mr Tozer's employment relationship problem will still be before the Authority for resolution. However, Counsel for Franix submits that there are "*compelling pragmatic reasons*" why the matter should still be removed to the Court.

[11] The key principles the Authority must consider when dealing with applications to remove matters to the Employment Court are summarised in *McAlister v. Air New Zealand Ltd*² at paras.[9] and [10]. The principles regarding factors to be considered by the Authority when exercising its discretion to remove in para [10] in particular are relevant in the current situation:

[9] The principles to be applied in such an application were discussed with the Chief Judge in Hanlon v. International Educational Foundation (NZ) Inc. In summary these are:

- (1) An application for special leave under section 178 of the Employment Relations Act 2000 carries the burden of persuading the Court that an important question of law is likely to arise in the matter other than incidentally, or the case is of such a nature and of such urgency that the public interest calls for its immediate removal to the Court. It is necessary to identify a question of law arising in the case other than incidentally.*
- (2) It is necessary to decide the importance of the questions.*
- (3) It is not necessary that the questions should be difficult or novel.*

The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It 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 the case or a material part of it.

[10] Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of a challenge in any event.

[12] The Court in *NZEPMU v Carter Holt Harvey*³ sets out a number of discretionary considerations that must be applied. Relevant to this case are that ‘...there are a number of questions of disputed fact that Parliament intended be dealt with at first instance by the Employment Relations Authority, The Authority is able to offer the parties a very prompt investigative meeting and determination of the problem...There is now a statutory right of challenge to a determination of the Authority and generally this may be by a *de novo* hearing...’

[13] The matter before the Court is a challenge to the Authority’s determination that the relationship of the parties is one of employment. The matters still before the Authority to be investigated and determined by it are whether Mr Tozer was unjustifiably dismissed and whether he is owed wages by Franix.

[14] Mr Tozer’s claims are related to the jurisdictional matter being challenged in the Court in so far as if the challenge is successful, the Authority will not have jurisdiction to determine Mr Tozer’s claims. However, in that instance the Court will also not have jurisdiction. This is because the relationship between the parties will not be an employment relationship and will not be subject to the provisions of the Act. That will be the end of the matter before the Court and the Authority.

[15] In the event the challenge is not successful and the Authority’s decision is to stand then it will investigate and determine Mr Tozer’s substantive claims. It is the institution of first instance and the claims are of a nature that are regularly dealt with by the Authority and do not fall in to any of the other categories of s178(2) which may justify removal to the Court, in my view. Further, either party has a statutory right to determine the Authority’s determination.

[16] I find the grounds for removal advanced by Counsel for Franix that the claims before the Court and Authority are similar or related or that there are compelling pragmatic grounds, insufficient to persuade me to remove Mr Tozer’s claims to the Employment Court.

[17] The Authority is accommodating Franix’s challenge to its preliminary determination, by not scheduling an investigation of Mr Tozer’s claims until late September 2014, by which time the Court may have decided whether the Authority’s decision is to stand. This date can be reviewed by the Authority in the event the preliminary matter has not been determined by the Court.

³ [2002] 1 ERNZ 74 at para [38]

[18] The Application by Franix for Removal of the proceedings before the Authority, is declined.

Anna Fitzgibbon
Member of the Employment Relations Authority