

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 131  
5300480

BETWEEN	TRANSPACIFIC ALL BRITE LIMITED Applicant
AND	MICHAEL RICHARD SANKO First Respondent
	TIMOTHY MICHAEL BLAIR COMBS Second Respondent

Member of Authority:	P R Stapp
Representatives:	Stephen Langton for Applicant Stuart Webster for Respondents
Investigation Meeting:	On the papers and telephone conference
Submissions received:	9 May 2010 from Applicant 23 May 2010 from Respondents
Telephone Conference:	5 July 2011
Determination:	4 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is an application for removal of a matter to the Employment Court made by the applicant. The application has been opposed by the respondents. This application follows a decision by me not to adjourn the employment relationship problem after the applicant decided to proceed with High Court proceedings first.

[2] The history of this matter has involved an application for a stay of proceedings from the applicant on the basis that causes of action have been subsequently filed in the High Court involving the same parties and others. The application for a stay was opposed, and I declined to grant a stay of proceedings because the matters filed in the Authority had separate causes of action (including a claim for damages and penalties).

[3] This application has been made before any arrangements are put in place for a case management telephone conference, timetabling and scheduling an investigation meeting.

### **Issues**

[4] Is there an important question of law likely to arise in the matter other than incidentally? The application relies on a question of law arising from 4 matters:

- a. The concurrent proceedings in the High Court concerning the same subject matter and same relief sought.
- b. The applicant has elected to pursue the High Court matter first.
- c. It is an abuse of power to allow two concurrent proceedings involving the same subject matter to proceed.
- d. The Authority has declined a stay of proceedings.

[5] The application relies on s 178 (2) (a) of the Act that an important question of law is likely to arise “*other than incidentally*”. The question of law upon which the applicant relies does not arise out of the matter of procedure that the Authority has followed in not granting a stay and to bar its removal (s 178(6) of the Act).

[6] The application relates to the Authority’s exclusive jurisdiction to deal with claims but is barred from hearing and determining tort claims that include the same claims and subject matter in the High Court jurisdiction. It is the lawfulness of the Authority’s exercise of its powers and determinations made that the applicant has submitted makes the question an important question of law. Also it was submitted that the applicant’s right of access to take matters in the High Court also makes the question an important one, especially on any parties seeking to litigate economic torts arising out of employment relationships.

[7] The respondents have opposed the application for removal on the basis that there is no important question of law, there is an employment relationship problem filed that is in the Authority's jurisdiction leaving the other matters within the civil jurisdiction of the High Court, and any relief relating to the Employment Relations Authority's jurisdiction and the High Court's jurisdiction can be severable.

[8] Are there any other reasons against removing the entire matter to the Employment Court under s 178 (2) (d) of the Act?

### **Determination**

[9] The consideration of this application is based on s 178 (2) (a) and s 178 (2) (d) of the Act.

[10] The essence of this matter is that until evidence is presented it is not altogether clear what the degree of overlapping factual matters will be in the Employment Relations Authority and the High Court and there is the prospect that the same facts will be relied upon. I will return to this point shortly.

[11] The application for removal has been made on the grounds of important questions of law likely to arise other than incidentally (s 178 (2) (a) of the Act). Because I decided to decline the application for a stay of proceedings I am not barred from removing the matter so long as the grounds under the Act have been met: s 178 (6) of the Act. On first blush it would appear that the application for removal has something to do with the Authority's decision in regard to its procedure not to grant a stay, but I accept that given the matters raised there is a genuine point being made by the applicant.

[12] It is apparent that difficult issues are going to arise when there is the potential for overlapping facts and any findings needed on the evidence. Clearly there are tensions created by the applicant's decision to proceed with separate matters in two institutions and the requirement for the Authority to act speedily in determining a matter and where another party's rights might be affected. The applicant has raised

concerns about its right to be heard in the High Court first, and any implication because of any involvement of the Authority.

[13] I am not satisfied that there is an important question of law likely to arise other than incidentally from the application made by the applicant as opposed to a difficult issue. They are not the same but nevertheless the degree of difficulty highlights that this is a matter that potentially requires a higher court exercising its jurisdiction; (s143 (fa) of the Act). The potential for arguments relating to disclosure is still to be resolved, and this adds to the problems likely to arise.

[14] Any conflict over factual findings made in the Authority may have an implication in regard to the impact on the matters and the applicant's right to decide to proceed in the High Court first and whether or not the Authority's findings will be binding on the parties, persuasive or even relevant. In this regard there will be difficult issues likely to arise in regard to the evidence, and as such arguments are likely to arise over evidential matters.

[15] It follows that s 178 (2) (d) of the Act is relevant also. That section reads as follows:

*the Authority is of the opinion that in all the circumstances the court should determine the matter.*

[16] One factor is that any removal of the matter to the Employment Court would take away the parties' rights to challenge any determination of the Authority. The parties should not be deprived of that right, and it is but one factor. I cannot make any presumption that there will be any challenge to a determination, but it would seem to be most likely in as much as the applicant is concerned. Also, given the seriousness of the claims and the scrutiny likely to arise on the overlapping evidence I accept this will involve some difficult aspects relating to the evidence if the Authority's investigation goes first. However, because there will be difficulties that will go to the heart of the issues and will undoubtedly involve matters of an evidential nature and involving superior Courts and where the Employment Court has previously noted the difficulties in overlapping proceedings, this is an important factor for the consideration of removal.

[17] There is also the matter of delays occurring, but the prospect of that being an on going issue exists because the applicant has stated that it would apply for a stay in the Court, and if granted would be a matter of the interest of justice being served, and if it is not granted would either involve the applicant withdrawing and or a hearing in the Court would be actually shorter.

[18] The loss of an investigation has not been unforeseen because of the law that provides for a removal.

### **Orders of the Authority**

[19] Section 178(6) of the Act permits this application for removal because it does not relate to the Authority's procedure to decline an indefinite stay considering the respondents' wanted the matter dealt with. I have accepted that the applicant has raised a genuine point in regard to the removal of the matter.

[20] I have decided that there is not an important question of law likely to arise other than incidentally. However, I am satisfied that there is good reason under s 178 (2) (d) to remove the matter, because some aspects of the matter include overlapping evidence, documents and factual matters associated with the jurisdiction of superior Courts and to proceed would likely give rise to serious arguments involving the parties' rights for which the Employment Court is better placed with its procedures to deal with. This means that this is properly a matter for the Employment Court.

[21] I remove the entire proceedings to the Employment Court to hear and determine without the Authority investigating it.

[22] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority