

D. Costs are reserved.

Removal Application

[1] The joint applicants and the first and second respondents are parties to proceedings before the Authority in respect of an application to enforce a restraining provision in an individual employment agreement and a counter-claim by the first respondent that her resignation was the result of a repudiation and breaches of the employment agreement which entitled her to cancel the employment agreement as well as a claim for unpaid money.

Procedural History

[2] The Authority has issued two previous preliminary determinations in this matter. The first determination resolved applications for non-publication orders, closure of the investigation meeting, removal of certain parts of sworn affidavits and interim injunctions against the first respondent. The second determination resolved the matter of costs on the first determination.

[3] Both determinations were challenged to the Employment Court and at the same time an application for removal was lodged with the Authority. The challenge was heard by the Court on 1 June 2017.

[4] Prior to the challenge being heard, on 3 May 2017 the Court issued a Minute to the parties confirming various directions that had been made during a telephone directions conference which included interim non-publication orders in each proceeding, and until further order of the Court as follows:

- a) An order of non-publication of the name of the parties, and any identifying details until 4.00 pm on the hearing date, that is, 24 May 2017; and
- b) The file may not be searched by any non-party without leave of a judge.

[5] In submissions the joint applicants state that on 1 June 2016 the Court extended the non-publication order set out in the 3 May 2017 Minute until three working days after delivery of his judgment or until further order of the Court. To give effect to the non-publication orders of the Court I have continued to suppress the

names of the parties and identifying details and have ordered that the Authority file not be searched by any non-party without the leave of the Authority.

[6] On 6 June 2017 Judge Corkill issued a minute to the parties advising them that he wished to consider the possibility of deferring his judgment with regards the matters heard by the Court on 1 June 2017 until the question of whether the Authority proceedings are to be removed to the Court.

[7] There are also concurrent proceedings lodged in the High Court and which have been set down for hearing over five days starting on 12 March 2018.

Application for removal

[8] This is an application by the joint applicants to remove the proceedings to the Employment Court without prior investigation by the Authority. The application is opposed by the respondents.

[9] By consent the application for removal is being dealt with on the papers currently before the Authority. Section 178 of the Act allows the Authority to remove a matter to the Court without investigating it if one of the following four grounds of removal are established:¹

- 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.

[10] The joint applicants rely on the grounds that the Court already has proceedings which are between the same parties and which involve the same, or similar, or related

¹ Employment Relations Act 2000 section 788(2).

issues or that an important question of law is likely to arise in the matter other than incidentally.²

The Court has proceedings between the same parties which involve the same, or similar, or related issues

[11] Clearly the Court has proceedings between the same parties. That is the challenges to the two preliminary determinations of the Authority. In relation to whether the proceedings involve the same or similar or related issues the Court has previously stated:³

...This does not necessarily involve an issue by issue analysis as to what evidentiary matters in the respective proceedings may or may not overlap or whether certain matters can be dealt with separately... the test envisages a more holistic consideration of the relevant issues.

[12] I am satisfied the issues to be determined by the Court involve related issues to those in the Authority. It will be significantly more convenient for the parties to have the matter heard in one forum. I am also cognisant of the Courts comment in the 6 June 2017 Minute that it would be preferable to consider all issues in a cohesive way at the same time, rather than on a piecemeal basis.

[13] I find the elements of section 178(2)(c) have been established and it is appropriate that the proceedings are removed to the Employment Court for determination. Section 178 only requires the Authority to establish one of the four grounds and so I have not gone on to determine whether an important question of law will arise other than incidentally.

Determination

[14] The joint applicant's application is to be removed to the Court for hearing and determination without a prior investigation by the Authority.

Costs

[15] I reserve the issue of costs but note that it may be appropriate for each party to bear its own costs on this application. In the event that the joint applicants wish to seek costs they will have 14 days from the date of this determination to lodge and serve memorandum on the matter. The respondents shall have a further 14 days in

² Employment Relations Act 2000 section 178(2)(a) and (c).

³ *Randwick Meat Company Limited v Burns* [2015] NZEmpC 188 at [27].

which to lodge and serve a memorandum in reply. All submissions must include a breakdown of how and when costs were incurred and be accompanied by supporting evidence.

[16] The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority