IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 152
EMPC 111/2024

IN THE MATTER OF	an application for special leave to remove a matter to the Employment Court
BETWEEN	YQO Applicant
AND	MYN Respondent

Hearing: 3 July 2024

Appearances: M O'Brien, counsel for applicant
CW Stewart and D Church, counsel for respondent

Judgment: 13 August 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The applicant (YQO) has lodged a grievance in the Employment Relations Authority (the Authority). YQO has applied for special leave to remove the grievance to the Court for hearing. Special leave is required because the Authority declined an earlier application for removal.[1] The application for special leave is opposed.

[2] The Court's power to grant special leave is contained within s 178(3) of the Employment Relations Act 2000 (the Act). Section 178 materially provides that:

> **178 Removal to court generally**
>
> (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

[1] *YQO v MYN* [2024] NZERA 108 (Member Robinson).

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).

[3] In summary, the Court may grant leave where it is satisfied 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 it is in the public interest that it be removed immediately to the Court; or the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. In the present case the application is focused on the first of these grounds, namely that an important question of law is likely to arise.

[4] It is convenient to note at this point that, while a number of submissions were directed at the correctness or otherwise of the Authority's determination to decline removal, I do not regard this as relevant. It is for the Court to decide whether it considers the grounds in s 178(3) have been made out; and the grounds are somewhat more limited than those available to the Authority, in that the Court does not have a residual discretion to grant leave.[2] The Court's residual discretion is limited to declining leave, notwithstanding a finding that one or more grounds have been made out.

---

[2] Employment Relations Act 2000, s 178(3); *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [50]-[51].

[5] In order to assess the issues of law identified by the applicant, and whether they are likely to arise other than incidentally, it is necessary to set out in further detail the matters at issue between the parties.

Matters alleged to have given rise to the grievance

[6] YQO was employed by MYN as a sales manager. YQO's employment agreement contained a trial period clause. It provided that:

> **Trial period**
>
> The first 90 days of employment will be a trial period, starting from the first day of work.
>
> During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.
>
> During the trial period, the employer's normal notice period doesn't apply. Instead, either the employee or the employer may end this agreement by giving one weeks notice before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.
>
> If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, eg discrimination, harassment or unjustified disadvantage.
>
> During the trial period, the employer and employee must treat each other in good faith.

[7] YQO claims that shortly after they commenced their employment they became aware of conduct that they considered amounted to serious wrongdoing by the company. YQO also claims that they informed a company director about this on three separate occasions. On 12 July 2023 YQO was asked to attend a meeting the next day. On 13 July they were advised in writing that their employment was to end pursuant to the trial period clause in their employment agreement.

[8] On 21 July 2023 YQO's counsel wrote to the company raising grievances for unjustifiable dismissal and disadvantage. The company rejected each of the concerns that had been raised.

[9] YQO later filed a grievance in the Authority claiming that they had been unjustifiably dismissed and unjustifiably disadvantaged. The factors said to support the claims were broadened and now included a claim related to the alleged protected disclosures that YQO had made to the company director. It was said that these disclosures were made under the Protected Disclosures (Protection of Whistleblowers) Act 2022 (the Protected Disclosures Act); that YQO was dismissed in retaliation for their disclosure; that they were entitled to be protected from retaliatory action under that Act; and that the dismissal was unjustified.

[10] The company filed a statement in reply to the statement of problem, denying the alleged breaches and taking issue with a number of the factual matters referred to in YQO's statement of problem.

[11] YQO subsequently applied to the Authority to have their claim removed to the Court. Four questions were identified in support of the application, namely:

(a) Is an employer entitled to rely on the operation of s 67B of the Employment Relations Act 2000 (the trial period provision) in dismissing an employee where that dismissal is a retaliatory action within the meaning of s 103(1)(k) of the Act (as defined in s 21 of the Protected Disclosures Act)?

(b) If the answer to the first question is yes, does that prevent an employee from bringing a claim in respect of the dismissal if that dismissal is a retaliatory action within the meaning of s 103(1)(k)?

(c) How does s 103(1)(k) (introduced on 1 July 2022) operate in practice?

(d) By including a specific reference to good faith in a trial period clause in an individual agreement, is an employer entitled to rely on s 67B if it has failed to act in accordance with that contractual obligation of good faith?

[12] On the special leave application a further question was identified, namely in the context of a dismissal of an employee, what is the meaning of good faith at common law?

Analysis

[13] Ms Stewart, counsel for the respondent, submitted that removal under s 178 is contemplated in relatively limited circumstances, citing *Labour Inspector v Gill Pizza*[3] in support.

[14] As recently explained in *Pilgrim/Courage*,[4] *Gill Pizza* is best interpreted as reinforcing the basic point under the Act that the ordinary run of cases is to be determined at first instance in the Authority but there will always be cases that are appropriately removed to the Court. The obiter observations in *Gill Pizza* should not be interpreted as applying an additional gloss to s 178.

[15] The correct approach to s 178 has been articulated by judgments of this Court and is well established.[5] The well-established approach simply requires the Authority (on a removal application) and the Court (on a special leave application) to apply the mandatory qualifying criteria set out in s 178(2) to assess whether, in the particular circumstances, any of those criteria are met and if so whether (for the Court) special leave should nevertheless be declined; and (for the Authority) whether leave should nevertheless be ordered or declined.

[16] As I have said, only one criteria is claimed to be relevant in this case – that an important question of law is likely to arise in the matter other than incidentally.

[17] As will be apparent from the wording of s 178(3), the Court does not need to be satisfied that an important issue *will* arise other than incidentally; rather that it is *likely* to arise other than incidentally. Mr O'Brien, counsel for the applicant, submitted

---

3 *Labour Inspector v Gill Pizza* [2020] NZCA 192, [2021] ERNZ 237.
4 *Pilgrim v Overseeing Shepherd* and *Courage v Overseeing Shepherd* [2024] NZEmpC 146.
5 See for example *Johnston*, above n 2; *QDY v Counties Manukau District Health Board* [2022] NZEmpC 117, [2022] ERNZ 434.

that in assessing whether a question of law is likely to arise other than incidentally the pleadings will be pivotal; if an important question of law is pleaded and if that question may have an effect on the outcome if it falls for determination, then leave should be granted. The recent judgment of the Court in *LDJ v EZC* was cited in support of this proposition.[6] There it was said that:

> [12] It is not necessary for the applicant to prove that the question of law will fall for determination in the case; it is only necessary to prove that it is "likely to arise". As the Court is not in a position to consider the merits of a claim when considering a removal application, it will ordinarily be satisfied that a question of law is likely to arise other than incidentally where that question is included as part of the pleadings and where, if it falls for determination, it may have an effect on the outcome.

[18] Mr O'Brien submitted that the questions posed meet the threshold as described in *LDJ* because each question is tethered to a claim advanced in the statement of problem and if they do fall for determination, they may have an effect on the outcome.

[19] I agree with Ms Stewart that it is not enough to refer to a question of law in pleadings and thus obtain removal no matter how contingent the potential impact of that question would be and I do not read *LDJ* as suggesting otherwise. If it were the case, it would likely create perverse incentives for litigants to simply mould their pleadings to bypass the Authority.

[20] I accept that the applicant's grievance in the Authority identifies a number of potentially difficult, and novel, questions; including in respect of the interaction between the trial period provision and the Protected Disclosures Act, and whether the trial period provision is a carve out of the remedies that might otherwise apply under that legislation.

[21] The respondent strongly submits that the protections afforded to employees against retaliatory action do not extend to those in a 90-day trial period (so they can be fired at will, including in retaliation for making a protected disclosure). I do not accept that the position is as unarguable as is submitted. It involves reading protections afforded to all employees, conferred by a later Act (the Protected

---

6 *LDJ v EZC* [2024] NZEmpC 109 at [12].

Disclosures Act), as being limited by an earlier enacted exclusion clause (in the Employment Relations Act). It is true, as Ms Stewart points out, that the answer to the question will involve an exercise in statutory interpretation. It does not, however, follow that the statutory interpretation exercise will be straightforward. The law reports are riddled with judgments involving issues of statutory interpretation, including in this jurisdiction (s 6 is an obvious example).

[22] I accept too that there are unresolved issues relating to the reach of the statutory duty of good faith and whether it excludes the operation of a common law or contractual duty.[7] In this case the parties inserted into their employment agreement a duty to deal with each other in good faith. That is an obligation that may – but also may not – simply reflect the statutory duty imposed on all employers and employees. Issues as to whether the parties shouldered broader obligations will likely involve consideration of the agreement in context. The short point is that issues relating to the co-existence or otherwise of good faith obligations in statute/contract/common law have yet to be fully resolved.

[23] The stronger point for the respondent is that the identified questions are all predicated on a finding that a protected disclosure was actually made by YQO. This is a matter which is firmly in dispute and will need to be resolved. If those matters are resolved in the respondent's favour, the identified questions will not need to be answered; similarly in relation to the identified questions in respect of the nature and scope of the contractual, as opposed to statutory, duty of good faith and whether that brings an additional overlay to the obligations contained (non-exhaustively) within s 4.

[24] In summary, I am satisfied that important questions of law may arise in the context of the Authority's investigation; I am not satisfied that they are likely to arise. Whether they do arise is contingent on a number of factual findings that may or may not be made; if they are not made in the applicant's favour, the questions of law will

---

7 See for example *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA).

not need to be answered. It seems to me that this is the sort of circumstance which s 177 was likely designed to address.

[25] Section 177 provides that:

> **177 Referral of question of law**
>
> (1) The Authority may, where a question of law arises during an investigation,—
>
> (a) refer that question of law to the court for its opinion; and
>
> (b) delay the investigation until it receives the court's opinion on that question.
>
> (2) Every reference under subsection (1) must be made in the prescribed manner.
>
> (3) The court must provide the Authority with its opinion on the question of law and the Authority must then continue its investigation in accordance with that opinion.
>
> (4) Subsection (1) does not apply—
>
> (a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and
>
> (b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.

[26] In summary, even if I had been satisfied that an important question of law was likely to arise (which I am not at this stage and on the basis of the material before the Court), I would have declined to grant leave. That is because I see the s 177 process as the appropriate mechanism in a case such as this. It has the effect of allowing the Authority to get on with its investigation, keeping the grievance in that forum until a question of law actually arises which would benefit from an opinion from the Court.[8] The Court is well positioned to deal with any question referred to it for answer promptly, in accordance with what appears to be the statutory scheme.

[27] Finally it is notable that the statement of problem filed with the Authority reveals a broad range of claims and concerns which are unconnected to the legal issues which the applicant has referred to as justifying the grant of special leave. They are the sorts of matters that the Authority is well equipped to deal with. This fact reinforces the exercise of my discretion to decline leave.

---

[8] See *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 99, [2015] ERNZ 798 at [39].

Conclusion

[28] While I accept that important issues of law may arise in this case, I am not satisfied that they are likely to arise. If they do ultimately arise, it remains open to the Authority to pause its investigation and refer such questions to the Court for answer under s 177. Even if I had been satisfied that an important question of law was likely to arise other than incidentally, I would have declined leave.

[29] The application for special leave is declined.

Costs

[30] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 8.45 am on 13 August 2024