

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 54/10
5285609

BETWEEN	BARRY BRUNTON Applicant	EDWARD
AND	GARDEN HELICOPTERS LTD Respondent	CITY

Member of Authority: Helen Doyle

Representatives: Julian Moran, Counsel for Applicant
Neil McPhail, Advocate for Respondent

Investigation Meeting: 5 March 2010

Determination: 9 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant has applied to the Authority to remove to the Employment Court his matter lodged under file no. 5285609 being an application for a determination as to whether he was an employee and if a determination is made in his favour his personal grievance alleging that he has been unjustifiably dismissed.

[2] The application is made in reliance on the ground set out in s.178(2)(d) of the Employment Relations Act 2000. Section 178(2)(d) is not one of the specific grounds set out under that section in s.2(a), (b) and (c) but a discretionary provision which provides:

(d) *the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

[3] The applicant also seeks a direction, whether such removal is granted or not, that the respondent lodge with the Authority and serve sworn copies of the unsworn affidavits filed and served in opposition to the application for interim reinstatement which was withdrawn by the applicant before the investigation date for the interim application.

[4] The respondent opposes the application for removal on the basis that there are no grounds to remove the matter and further opposes the application for the sworn affidavits to be filed and served on the basis that the interim reinstatement proceedings for which those affidavits were prepared had been withdrawn by the applicant and therefore in relation to that matter, costs aside, the Authority is in effect *functus officio*.

The background to the proceedings

[5] The respondent operates a rescue operation in the South Island in conjunction with St Johns and also operates a fixed wing medical transfer service in conjunction with New Zealand Flying Doctor Service Ltd.

[6] On 3 November 2009 the applicant lodged a statement of problem with the Authority in which he stated that he was unjustifiably dismissed from his employment with the respondent as its Operational Manager Fixed Wing on 16 September 2009. In the statement of problem the applicant sought an order for interim reinstatement pending the hearing of his personal grievance, a declaration as his status, whether he was an employee (as he contended) or an independent contractor, an order for permanent reinstatement and remedies.

[7] On 5 November 2009 the Authority held a telephone conference with Mr Moran and Mr McPhail. The Authority assigned the matter urgency and set the application for interim reinstatement down for an investigation meeting on 27 November 2009. Following the telephone conference the Authority was advised that mediation would take place on 11 November 2009. Mediation occurred but the matter was not resolved. The Authority had made various timetabling directions including that the respondent was to lodge and serve a statement in reply by 4pm Monday 16 November 2009, affidavits in opposition by 18 November 2009 and that the representatives were to discuss disclosure in relation to company accounts in respect to income received by the applicant in relation to his log book.

[8] On 6 November 2009 the respondent applied to the Authority seeking a determination as to jurisdiction. The application provided that this matter be determined before the Authority proceeded to deal with the application for interim reinstatement. The Authority indicated that it was at that time dealing with the application for interim reinstatement on the date set for that application. On 10 November 2009 the respondent made application for removal of the matter to the Employment Court which application was opposed by the applicant. The application was made on the basis that an important question of law arose as to whether a preliminary threshold jurisdictional issue arises which must be resolved before the Authority can determine the interim injunction application.

[9] The Authority dealt with the application for removal on the papers before it in determination number CA200/09. It determined that it could consider the threshold jurisdictional issue on the basis of the affidavit evidence already before it or shortly to be lodged as part of the investigation meeting which it had already scheduled for 27 November 2009. The Authority was not satisfied that an important question of law arose. The application for removal was declined.

[10] There was some delay by the respondent in providing the sworn affidavits as timetabled. A perusal of the file indicates that some of the delay was due to matters related to disclosure. Mr McPhail wrote to the Authority on 20 November 2009 and provided a copy of the respondent's unsworn affidavits, however noted that the Authority and applicant would be provided with sworn copies prior to the date of hearing.

[11] On 23 November 2009 Mr Moran on behalf of the applicant advised that the application seeking interim relief would be withdrawn and that Mr Brunton would simply pursue a personal grievance alleging unjustified dismissal but anticipating the issue of whether his status was that of an employee or an independent contractor would require determination as a preliminary issue. Mr Moran also indicated that the applicant was presently considering whether it would be more appropriate to pursue proceedings in the Employment Court. He anticipated receiving instructions about that within the next few days.

[12] On 24 November 2009 Mr McPhail duly lodged and served a memorandum as to costs with respect to the withdrawal of the application for interim reinstatement on 23 November 2009. The Authority indicated to Mr Moran and Mr McPhail that it

preferred to leave the question of costs until there was some indication as to whether there would be an application for removal or not.

[13] Because of other commitments Mr Moran did not lodge and serve an application for removal to the Employment Court until 22 December 2009.

[14] On 22 January 2010 Mr McPhail replied to the application for removal and set out that the application was opposed. The Authority provided the parties with dates to have an investigation meeting in terms of the application for removal in February. Mr McPhail was unavailable as he was out of the country for much of February so the matter was unable to be set down until early March.

The grounds relied on for the application

[15] Mr Moran relied on the following grounds in his submissions in support of the exercise of the discretion in favour of removal to the Employment Court. The first was the likelihood of a challenge by the respondent, the second was a substantial counterclaim threatened by the respondent, the third ground was the overall amount at stake resting on the determination of the status issue and the fourth ground was procedural matters particularly in respect of discovery (party and non-party) and the ability to fully challenge evidence by way of cross examination.

[16] Mr Moran dealt with these grounds individually in his submissions and Mr McPhail responded to them in his submissions. I was assisted in making my determination by the careful submissions in this matter and I wish to thank both the representatives.

[17] In relation to the likelihood of appeal Mr Moran submitted that the respondent has demonstrated that it will use all means available to defend its position and that this was supported by the application by the respondent that the jurisdictional issue be determined before the application for interim reinstatement was heard and when that was considered unnecessary a formal application for removal to the Court. Mr Moran also referred to the application for costs against the applicant being lodged the day after advice was received that the application for interim reinstatement was withdrawn. He also refers to the respondent's solicitors, not its legal representative in the present proceedings, giving notice that the respondent did not intend to make payment of the last invoice issued through the applicant's company for the one months notice period until the final position as to Mr Brunton's status has been

determined and advising that there was an overpayment made to Mr Brunton in the sum of \$59,875.00 plus GST. To the extent to which the letter is headed *without prejudice* I am satisfied and accept Mr Moran's submission that it was not the type of letter to which privilege should be claimed. The letter simply refers to the reason a payment was not made and then seeks payment of an overpayment. It can in no way be said to be a letter touching on negotiations for settlement

[18] Mr Moran provided to the Authority a letter written to Mr McPhail on 25 February 2010 which supports the applicant's concern about the likelihood of appeal in which he suggests that the parties agree that any challenge from a determination in the Employment Relations Authority in terms of status be limited to any errors in law. On this basis Mr Moran put forward that the application for removal to the Employment Court could be avoided.

[19] Mr McPhail's response dated 1 March 2010 is also provided in which he advised that he had sought instructions and his client would not be prepared to relinquish its appeal rights in relation to any substantive proceedings. He also sets out that a careful consideration of the likelihood of success would precede any such decision to challenge.

[20] Mr McPhail submits correctly that an appeal is always possible in any case where a litigant is unsuccessful and he does not accept that the actions of the respondent to date were unreasonable or support that the likelihood of any challenge is increased. Mr Moran accepts, as does the Authority, that there can be no objection to the respondent adopting a robust approach in conducting a defence of any claim and not agreeing to restrict any challenge rights. Mr McPhail refers to the Authority determination of *Dr Y v Bay of Plenty Health Board* (AA 132/06 20 April 2006, Member Robin Arthur) in which the Authority stated at para.[23]:

The objects of the Act in seeking to reduce the need for judicial intervention and to have most matters determined by a specialist decision making body would be rendered meaningless if every party who said they were going to 'fight this all the way' were allowed to bypass the Authority and go directly to the Court on the basis of their subjective declaration.

[21] Mr McPhail also referred to *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc. v. Carter Holt Harvey Ltd* (Employment Court, Auckland) AC36/02 in which the Court stated at para.[38]:

It is not inevitable that there will be a challenge by any party to the Authority's determination. Outcomes in that forum are not necessarily stark wins or losses of everything at stake. The Authority's methodology and remedial powers enable it to craft solutions that parties can, by modifying their behaviours towards each other, live with. That is the scheme of the legislation Parliament intended to apply now and hence forth in employment relations.

[22] I accept that the respondent has adopted a robust approach in its defence of matters to date. An increased likelihood of a challenge is not a factor that would on its own ordinarily support removal.

[23] Mr Brunton could have applied directly to the Employment Court for a declaration as to his status because the Employment Court under s.187(1)(f) of the Employment Relations Act 2000 has exclusive jurisdiction to hear and determine, under s.65, any question whether any person is to be declared to be –

- (i) *an employee within the meaning of this Act; or*
- (ii) *a worker or employee within the meaning of any of the Acts referred to in section .223(1).*

[24] The next ground referred to by Mr Moran is the threatened counterclaim. Mr Moran advanced this ground on the basis that the matter highlights the importance of a determination of the status question and some finality in terms of that determination. Mr Moran in that respect also referred to whether the matter could be accommodated as a priority by the Authority. At this point in time because of the workload in the Authority I am unable to offer the parties a priority hearing of this matter.

[25] Mr McPhail submitted in relation to this matter that the counterclaim was only at this particular point a threatened counterclaim, although I accept in that regard that Mr Moran had been asked to give an indication as to whether he would accept service of proceedings. Mr Moran accepted that there would be the ability for him to apply in terms of any proceedings for a stay, pending the resolution of status issue.

[26] I accept that there is some importance in the parties having a degree of certainty in terms of the status matter because it could potentially impact on later claims and proceedings. In the circumstances of this case that may be a factor that does favour removal to the Court.

[27] Both Mr Moran and Mr McPhail said that their preference in terms of this matter would be to have the issue as to the applicant's status determined in the first instance. Mr Moran thought that the likely hearing time for that preliminary point would be 2-3 days and Mr McPhail thought it would not be more than 2 days.

[28] The third ground relied on by Mr Moran for the exercise of the Authority's discretion in favour of removal was the financial claim. He submitted that when the sums claimed against the applicant are taken into account with the sums claimed by the applicant against the respondent, there is just under \$110,000 at issue between them and that there is a potential for this to be higher. I am not persuaded that that is a strong ground for removal as the claims before the Authority can often be significant and on its own would not support an exercise of a discretion to remove to the Court.

[29] The final ground relied on Mr Moran was the procedural considerations, including discovery of various categories of documents from the respondent and from certain third parties such as New Zealand Civil Aviation Authority, Aviation Security Service, Christchurch Airport Company and maintenance contractors and others.

[30] Mr McPhail in his submissions says that the Authority has power to order evidence and information under the Employment Relations Act and may require production of necessary documents and records under the provisions of clause 5(2) of the Second Schedule to the Act. I accept that the Authority does have these wide powers but there are occasions when the more prescriptive powers and procedures with respect to discovery in the Court may be a factor that does favour removal. I am not persuaded in this particular case that there is an issue as there was in *Ramsay v. Commissioner of Police* (CA45/07 Member Doyle) where it was submitted there was difficulty in obtaining disclosure from the respondent because of the historical nature of the claim. There was nothing in front of me to indicate that the respondent had not disclosed requested documents. I do find that obtaining potential relevant material from third parties may be a factor though in this case that would favour removal because there is no certainty that those documents are also in the respondent's possession .

[31] I am not satisfied that the ability to cross examine in the Employment Court is a persuasive factor in terms of exercising my discretion as to whether the application should be removed.

[32] In exercise of my discretion I have had regard to all the factors relied on by the applicant and the opposition of the respondent. The Employment Court has the jurisdiction to determine whether or not the applicant is an employee for the purposes of the Employment Relations Act 2000. This matter came before the Employment Relations Authority in the first instance when the applicant sought an order for interim reinstatement. That application was withdrawn and it was indicated almost immediately that an application for removal would be considered by the applicant.

[33] In exercise of my discretion I consider that there is benefit in the parties receiving some certainty in terms of a decision as to the applicant's status. One such reason is that there is a potential claim against the applicant's company, the answer to which will depend on his status. The history of the matter before the Authority indicates that the respondent has taken a robust approach in terms of defending its position. It cannot be criticised for that and that in itself would not favour a removal to the Court but I have weighed that factor in terms of the jurisdiction the Employment Court already has to determine whether any person is an employee or not in the exercise of my discretion. In exercising my discretion I have considered the likelihood that there are a significant amount of documents that are relevant given the almost fourteen year relationship between the applicant and respondent. I accept the benefit of disclosure/discovery being undertaken in a formal way, including any documents held by third parties. I have also as part of the exercise of my discretion considered the inability of the Authority at the present time to provide the parties with a priority hearing and then the inevitable delays if there is then a challenge in all the circumstances. I am satisfied when I consider all these matters together that the Authority should exercise its discretion in favour of removing the matter to the Employment Court.

Determination as to removal

[34] This matter is to be removed in its entirety to the Employment Court under s.178(2)(d) of the Employment Relations Act 2000.

[35] I am of the view that as I have removed this matter to the Employment Court, whether the draft affidavits should be sworn and filed is a matter properly for the Employment Court.

Costs

[36] Mr McPhail asked the Authority to give an indication as to how it would deal with costs in terms of the withdrawal of the interim application. I indicated to Mr McPhail and Mr Moran that would depend on what was determined with respect to the application for removal. I find that to determine the matter at this stage could be unsatisfactory pending a judgment in terms of the status of the applicant. Costs at first consideration seemed to me to be inextricably linked to the substantive outcome. The most sensible way to deal with that matter in my view is to also remove that application to the Employment Court for the Court to deal with that matter which it considers it appropriate to do so.

[37] Costs in terms of the application for removal are reserved and will no doubt be dealt with by the Court when it considers it appropriate to do so.

Helen Doyle
Member of the Employment Relations Authority