



New Zealand Employment Relations Authority Decisions

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Burwell v Rightway Limited (Auckland) [2018] NZERA 240; [2018] NZERA Auckland 240 (31 July 2018)

Last Updated: 8 August 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 240
3032277

BETWEEN GENDI BURWELL Applicant

A N D RIGHTWAY LIMITED First Respondent

A N D EDWIN FREDERICK SHAND READ

Second Respondent

A N D GREGORY MICHAEL SHEEHAN

Third Respondent

Member of Authority: Rachel Larmer

Representatives: Tony Drake, Counsel for Applicant

Bridget Smith and Matthew McGoldrick, Counsel for

First, Second and Third Respondents

Investigation Meeting: On the papers

Submissions Received: 19 July 2018 from Applicant

26 July 2018 First, Second and Third Respondents

30 July 2018 from Applicant

Date of Determination: 31 July 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Burwell seeks removal of this matter to the Employment Court in the first instance. She relies on s.178(2)(a) on the basis that an important question of law arises other than incidentally and on s.178(2)(d) relating to the Authority's view that the

matter should be dealt with by the Employment Court under the Employment

Relations Act (the Act) as her grounds for removal.

[2] Ms Burwell's important questions of law are attached to this determination as Appendix A. The first four questions in Appendix A are identical to the questions Ms Kazemi posed to the Employment Court.¹

[3] The Employment Court held that that the first four questions in Appendix A (which were the same questions it considered in Ms Kazemi's case) met the s.178(2)(a) grounds for removal under the Act.

[4] Even though the fifth question in this case was not a question in Ms Kazemi's case it is clear in light of the Employment Court decision in *Kazemi*² that Ms Burwell's case does involve important questions of law that meet the s.178(2)(a) test for removal.

[5] Ms Burwell's fifth question of law involves the share purchase issues which the Respondents' claim the employment institutions do not have jurisdiction over. Even if the Respondents are right about that (which Ms Burwell does not accept) it would not prevent the Authority removing this matter.

[6] Rightway admits that Ms Burwell's case involves important questions of law but says that the Authority should exercise its residual discretion to decline to remove the matter to the Employment Court, notwithstanding it meets the legal test for removal.

[7] Rightway Limited provides accountancy and business advisory services to customers throughout New Zealand. It employs around 20 "Regional Partners" and approximately 100 employees within New Zealand.

[8] At the material time the Second Respondent Mr Read was Rightway's Chief Operating Officer, the Third Respondent Mr Sheehan was the Chief Executive Officer.

[9] Rightway employed Ms Burwell as "Regional Partner". This role required her to sell Rightway's business related services to prospective customers.

¹ *Kazemi v Rightway Limited & Ors* [2017] NZERA Auckland 300 and *Kazemi v Rightway Limited & Ors* [\[2018\] NZEmpC 3](#).

[10] Before Ms Burwell accepted the offer of employment Rightway had given her a Deed Poll, Deed of Adherence and proposed individual employment agreement to consider.

[11] The Deed Poll established Rightway's Regional Partner Programme (the Programme) which was intended to give Regional Partners the opportunity to participate in Rightway's growth.

[12] This participation occurs via the "RP Owner" referred to in the Deed Poll. The RP Owner is a Regional Partner's family trust or a company controlled by the Regional Partner.

[13] The RP Owner is the entity who participates in the Programme by holding a commercial interest in Rightway's client register. Ms Burwell's RP Owner was Fusion IT Limited. It was as part of that Programme that Ms Burwell via Fusion IT Limited (as the RP Owner) paid the Buy-In Fee.

[14] Rightway said this meant that the Buy-In Fee paid by Fusion IT Limited was part of a genuine commercial transaction which was separate to Ms Burwell's employment so therefore was not an unlawful employment premium.

[15] Ms Burwell claims Rightway told her that her offer of employment as a Regional Partner was conditional upon her agreeing to pay Rightway a "Buy-In Fee" of \$125,000.

[16] Ms Burwell and Rightway entered into an employment agreement dated 29

October 2015. She paid the Buy-In fee on 06 November 2015 and started in the

Regional Partner role on 07 December 2015. Her employment ended on 04 May 2018.

[17] On 07 February 2018 Ms Burwell demanded repayment of the Buy-In Fee on the basis it was an unlawful employment premium. Rightway denies it was an employment premium and has not repaid the Buy-In Fee to Ms Burwell.

[18] On 17 December 2015 Ms Burwell's family trust (Pohutukawa Hill Family Trust) purchased \$50,000 of Rightway's shares which it then transferred to Ms Burwell personally.

[19] Ms Burwell claims that Rightway was not lawfully allowed to sell its shares to her because she was not a director, senior manager shareholder, WholeSale Investor or Eligible Investor as defined by the [Financial Markets Conduct Act 2013](#) (FMCA).

[20] Rightway denies breaching the FMCA. It further says that Ms Burwell's shareholding claim is not an employment relationship problem so the Authority doesn't have jurisdiction over it.

[21] Ms Burwell says she is one of "many people" who have been seeking to recover their \$125,000 Buy-In Fee from Rightway. Ms Burwell refers to another Regional Partner, Ms Kazemi, as an example of one such person.³

[22] Ms Burwell also says she is aware of four non-managerial employees of Rightway (not including Ms Kazemi) who are in a similar position to her (Ms Burwell) regarding the share purchase and FMCA issues she is pursuing Rightway over.

[23] Ms Burwell says that her case should also be removed because the Employment Court's decision in Ms Kazemi's substantive case will not be decisive of Ms Burwell's claims, because of the share issue.

[24] Ms Burwell does not want to wait for the outcome of Ms Kazemi's Employment Court case before she (Ms Burwell) can begin to progress her own substantive claims against Rightway.

[25] Ms Burwell says that the most efficient and appropriate way of resolving her employment relationship problem is to remove this case to the Employment Court to deal with in the first instance.

[26] The Employment Court in a Judicial Minute dated 18 July 2018 issued timetable orders for Ms Kazemi's case. Judge Holden's Minute acknowledged that Ms Burwell had applied to the Authority to remove her claims to the Employment Court but that the removal application had not yet been determined by the Authority.

[27] Judge Holden noted in her Minute that if Ms Burwell's removal application succeeded then she could apply to the Employment Court for directions that would

align her Employment Court proceedings with Ms Kazemi's Employment Court hearing.

[28] Rightway advised the Authority that the Kazemi case had been set down for hearing by the Employment Court in the week of 26 November 2018.

[29] While Ms Burwell's case has a number of common issues with Ms Kazemi's case, Ms Burwell also has the additional issue regarding the dispute involving her share purchase, which is not part of Ms Kazemi's case.

[30] Ms Burwell's case has met the legal test in [s.178\(2\)\(a\)](#) for removal.⁴

[31] Once the grounds of removal have been met the Authority has a residual discretion to determine whether there are any factors that make removal inappropriate. This discretion is to be exercised on a principled basis.

[32] Rightway submits that the Authority should exercise its discretion not to remove this matter for reasons that may be broadly summarised as follows;

a. Given Ms Kazemi's case has been set down for the end of November it is highly unlikely that Ms Burwell's case would be consolidated with it so the two cases probably could not be heard together;

b. Question 5 identified by Ms Burwell does not give rise to an important question of law because it simply involves a straightforward application of [s.161](#) of the Act to her shareholding claim to determine whether or not it is an employment relationship problem;

c. The Court's substantive decision in Kazemi may dispose of Ms Burwell's claims in so far as they are substantially similar to the issues the Court decides in the Kazemi case;

d. Even if that doesn't occur a subsequent Authority investigation could potentially be confined to the jurisdictional issue relating to the shareholding claim;

e. Ms Burwell may incur no or very limited legal costs if the matter is not removed because the ambit of her claims will be affected by the outcome of Ms Kazemi's claims;

f. The Court may decide to progress both cases on separate tracks which will not materially benefit Ms Burwell in terms of costs she is likely to incur.

[33] The Authority does not agree that any of these matters should result in it exercising its residual discretion against removal in this case.

[34] Rightway's submissions regarding how the Employment Court may or may not handle Ms Burwell's matter, should this case be removed by the Authority, is speculative.

[35] Judge Holden's Minute was dated 18 July 2018 so the Authority does not anticipate that relatively short intervening period (of 14 days) will pose insurmountable problems in terms of the Court's handling of Ms Burwell's case.

[36] Even if I am wrong about that, then it would still be open to the Employment Court, on challenge from Rightway, to send Ms Burwell's case back to the Authority if the Court subsequently decides to set aside the Authority's removal determination.

[37] The Authority considers that because the Employment Court is already in the process of hearing another related case with a substantially similar fact situation which will involve a significant amount of the same or substantially similar

documentation, that is a strong factor that weighs against exercising the Authority's discretion to decline removal.

[38] The Authority is satisfied that there are likely to be significant efficiencies Ms Burwell can obtain in terms of resolving her employment relationship problem should her case be removed to the Employment Court.

[39] Ms Burwell will almost certainly obtain a final conclusion to her claims far earlier than if her matter stays with the Authority but is stayed pending the outcome of Ms Kazemi's Court hearing.

[40] The speed of final resolution of Ms Burwell's claims is a compelling factor against exercising the Authority's residual discretion to not remove this case despite it fulfilling the removal test in [s.178\(2\)\(a\)](#) of the Act.

[41] For these reasons the Authority concludes that there are no factors which would warrant an exercise of the residual discretion against removal. Accordingly, Ms Burwell's matter under AEA 3030658 is to be removed to the Employment Court in the first instance under [s.178\(2\)\(a\)](#) of the Act.

[42] Costs are reserved sine die.

Rachel Larmer

Member of the Employment Relations Authority

APPENDIX A

1. Was the amount of \$125,000 that was paid to the First Respondent on

30 October 2015 a premium in respect of the employment of the Applicant in contravention of s.12A [Wages Protection Act 1983](#)?

2. Is the structure and arrangements contained in the Deed Poll and Deed of Adherence part of the contract of employment or is it a separate commercial structure and arrangement?
3. Are all the provisions of the Deed Poll together with the provisions of the Deed of Adherence an illegal contract, or otherwise void in relation to the Applicant and her contract of employment? If not all of the provisions are an illegal contract or otherwise void, then: (a) if the provisions relating to the transfer and sale of the Client Register are not an illegal contract or void what amount of restitution or compensation should be awarded in respect to the Client Register which the Respondents value as being in excess of \$104,000?; (b) if the provisions relating to the payment of commission to the RP Owner are not an illegal contract or void are the total commission payments that have been paid by the First Respondent relevant to, or affect, the Applicant's right to recover the amount of the \$125,000 buy-in as a debt due?
4. Was the incorporated term in the Applicant's contract of employment, which required the First Respondent to act in good faith, breached by the First Respondent's actions, and if so, can general damages be awarded to the Applicant for breach of that contractual term, and what is the correct level for such award?
5. Does the Employment Court have jurisdiction to hear and determine the applicant's claim relating to loss suffered from the First respondent having sold its shares to her and if so what is the appropriate level of damages to be awarded?