IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 170
5354511

BETWEEN	MICHAEL CUMMINGS Applicant
A N D	COCA COLA AMATIL (NZ) LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Tanya Kennedy, Counsel for Applicant Mark Lawlor and Claire English, Counsel for Respondent
Investigation Meeting	By agreement on the papers
Received:	Application by respondent for removal of matter to the Employment Court and affidavit of Peter Desmond Kelly in support of application lodged on 26 October 2011 from Respondent Letter from applicant in response dated 28 October 2011
Date of Determination:	4 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent has applied to the Authority to remove to the Employment Court the matter lodged under file No 5354511 in the Employment Relations Authority in its entirety.

[2] The application is made in reliance on three grounds. The first is that an important question of law is likely to arise in the matter other than incidentally - s.178(2)(a) of the Employment Relations Act 2000. The second is that the nature of the case being such that it is in public interest to have it removed to the Court and that the Court already has before it proceedings removed from the Authority in *Blackmore v. Honick Properties Ltd* [2011] NZERA Auckland 216.

[3] The applicant neither opposes nor consents to the application but as set out in Ms Kennedy's letter to the Authority dated 28 October 2011, says, amongst other matters:

> *Whilst the Applicant does not agree that the grounds for removal (section 178(2) of the Employment Relations Act) have been made out, the applicant will abide by the Authority's decision if the Authority decides to remove the entire matter to be heard and determined by the Court.*

[4] Ms Kennedy sets out a number of matters that she asks the Authority to take into account in determining the application for removal.

[5] Counsel agreed that the Authority could deal with the matter on the papers it had before it.

The background to the proceedings

[6] A statement of problem was lodged with the Employment Relations Authority in Christchurch on 25 August 2011. One of the problems the applicant wished the Authority to resolve was whether or not there was a valid s.67A 90 day trial period in the employment agreement.

[7] The legal issue described as important by the respondent is neatly encapsulated in paras.2.2 and 2.3 of the statement of problem as below:

> *2.2 Mr Peter Kelly of the Respondent offered the Applicant employment as Health and Safety Co-ordinator on or about 31 March 2011. The Applicant accepted the offer of employment during that discussion on or about 31 March 2011. No 90 day trial period was mentioned.*
>
> *2.3 At this point the Applicant became a person intending to work and therefore an employee in terms of section 6 of the ER Act 2000. Accordingly, at that point he was not an "employee" as defined in section.67A(3) and the employment agreement could not lawfully contain a section 67A trial period (which the Respondent sought to introduce later as outlined below).*

[8] On 9 September 2011, a statement in reply was lodged by the respondent and the respondent set out its view that the trial period provision in the signed individual employment agreement was valid and binding on the parties.

[9] On 23 September 2011, the Authority held a telephone conference with Ms Kennedy and Mr Lawlor with a view to discussing issues such as mediation and

an investigation meeting date. Priority was given to the matter in circumstances where Mr Cummings sought reinstatement as one of his remedies. An investigation meeting date was set for 6 December 2011 if the matter did not resolve at mediation prior to that date.

[10] The Authority asked the parties to consider whether that investigation meeting should be limited to the preliminary issue whether or not there was a valid 90 day trial period or the matter in its entirety should be dealt with on that day. It was agreed that counsel in consultation with their respective clients would give consideration to the scope of the investigation if the matter did not resolve at mediation. The Authority was to be advised of the parties' view in that regard in due course.

[11] In the intervening period, the Authority became aware of the removal to the Employment Court by the Authority of the *Blackmore* matter and had the senior support officer advise counsel of this.

[12] Following that email Mr Lawlor applied on behalf of the respondent to remove this matter to the Employment Court.

The grounds relied on for the application

[13] There is an important question of law in this case. The question of law is whether or not any prior oral agreement and/or discussion about employment between the applicant and respondent can then affect or invalidate a provision under s67A in an individual employment agreement then signed before employment commenced.

[14] This question of law is likely to arise other than incidentally in this case.

[15] The case of *Blackmore* is not identical to this matter but there are sufficient similarities to conclude that an outcome in that case may well be relevant to this matter.

[16] Ms Kennedy correctly refers to the objects of Part 10 of the Act, including prompt resolution of problems. The Authority had provided the parties with a date for investigation, but it was not finally decided whether that would be to deal with the preliminary matter only or the case in its entirety. There is nothing before me to suggest that this matter could not be dealt with promptly in the Employment Court so I consider that factor to be neutral.

[17] I accept Ms Kennedy's submissions that there are factual issues in this case. Equally there is an important question of law arising other than incidentally in this case. There would be I accept public interest in this matter although that is not a determining factor in removal.

Determination

[18] I am of the view that this matter does raise an important question of law and find that the ground under s.178(2) (a) is accordingly made out..

[19] The matter is to be removed in its entirety to the Employment Court at Christchurch. The investigation meeting therefore set down by the Authority for 6 December 2011 will not proceed.

Costs

[20] 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