

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 315/10
5303034

BETWEEN EQUIPMENT AND
 TRANSPORT LEASING
 LIMITED
 Applicant

AND JAMES GARVEY
 Respondent

Member of Authority: K J Anderson

Representatives: M Flyger, Advocate for Applicant
 No Appearance for Respondent

Investigation: On the Papers

Determination: 8 July 2010

DETERMINATION OF THE AUTHORITY

Application for Removal of Matter to the Employment Court

[1] On 30th March 2010, the Authority received an application from Equipment Transport and Leasing Limited (“ETL”) seeking the removal of a matter to the Employment Court. This was most unusual, as at that point in the proceedings, there was not a matter before the Authority for its investigation, let alone removal. However, on 20th April 2010, the Authority received a *Statement of Problem* from ETL in which it sought that the Authority should determine that:

“ ... the respondent was not an employee of the applicant and [make] an order for reimbursement of all amounts paid to the respondent and reimbursement of costs incurred by the respondent on the applicant’s account. Payment to the applicant of damages.”

[2] The Authority has not received a statement in reply from Mr Garvey and has not been able to obtain a response from him in regard to either of the two applications,

hence pursuant to Clause 12 of Schedule 2 to the Employment Relations Act 2000 (“the Act”), the Authority now acts as fully in the matter/s before it as if Mr Garvey “... *had duly attended or been represented.*”

Background to the application for removal

[3] The Employment Court currently has before it a challenge by ETL to a determination of the Authority (AA 283/09, Member Dzintra King, 17 August 2009).¹ This determination involved an objection to a demand notice issued by a Labour Inspector for the payment of annual holiday pay for the use of Mr Garvey. One of the grounds of the objection to the demand notice, advanced by ETL, is that Mr Garvey was not an employee. The Authority found that Mr Garvey was an employee and ordered ETL to pay the sum of \$3,073.85 as specified in the demand notice. Among other matters, ETS challenges the finding that Mr Garvey was an employee.

[4] Essentially, the *Statement of Problem* filed with the Authority also has as its subject matter (along with other things) an assertion that Mr Garvey was not an employee.

The provisions of the Act

[5] The discretion of the Authority to order the removal of a matter to the Court begins with an analysis of whether this matter involves “*the same or similar issues*” as the proceedings currently before the Court.² An examination and comparison of the Authority’s determination under challenge (AA 283/09) and the *Statement of Problem* (20 April 2010), reveals some similar issues in relation to whether or not Mr Garvey was an employee of ETL, and it is apparent to me that the matters raised in the *Statement of Problem* are of such a concurrent nature that a sufficient nexus exists to conclude that the criteria provided by s178(2)(c) is sufficiently satisfied.

[6] That then takes me to the residual discretion provided by s178(2) whereby:

The Authority may order the removal of the matter or any part of it to the Court ... (emphasis added)

¹ ARC 65/09

² Section 178 (2)(c) of the Act.

It has been held by the Employment Court that this residual discretion should be exercised to determine whether there are any relevant factors against removal of a matter.

Further, the inquiry must not be on the desirability or undesirability of removing cases, generally, because Parliament has decided some should be removed. Rather, it should be on whether it may be undesirable to remove a particular case.³

Determination

[7] Given that there is a sufficient nexus between the subject matter of the proceedings currently before the Employment Court (ARC 65/09) and the matters contained in the *Statement of Problem* filed with the Authority on 20 April 2010, and also given that I can see nothing undesirable about a removal to the Court, I find that it is appropriate that the matters, as set out in the *Statement of Problem* (file number 5303034), be removed to the Employment Court. It is so ordered.

K J Anderson
Member of the Employment Relations Authority

³ *Auckland District Health Board v White* (unreported) AC 33/05, Colgan J, 29 June 2005.