

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN William Gordon Alexander Ferguson (Initiating party)

AND Sounds of Forest Limited (Responding party)

REPRESENTATIVES Peter Cullen, Counsel for the applicant
Jim Roberts, Counsel for the respondent

MEMBER OF AUTHORITY Philip Cheyne

MEMORANDA RECEIVED 4 April 2005
6 April 2005

DATE OF DETERMINATION 12 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] William Ferguson says that his employer breached their employment agreement by acting in a manner likely to destroy their relationship of trust and confidence. He also says that in August 2004 he was unjustifiably dismissed from the employment. Mr Ferguson wants the problem remedied by awards of compensation for distress, general and exemplary damages, compensation for lost remuneration and a penalty for breach of the employment agreement.

[2] Sounds of Forest Limited says that it engaged Mr Ferguson as an independent contractor or a partner, not as an employee. Alternatively, it says that if an employee, Mr Ferguson breached his obligations such as to cause a complete loss of trust and confidence and to justify a dismissal.

[3] While Mr Ferguson lodged his statement of problem (and an amendment) in the Authority, he also commenced proceedings in the Employment Court pursuant to section 6(5) of the Employment Relations Act 2000 for a declaration that he was an employee. Mr Ferguson indicated to the Authority that he would seek the removal of the problem to the Employment Court for the Court to hear and determine it without the Authority investigating the matter. During a phone conference with the Authority, Sounds of Forest having indicated its opposition to removal, the parties agreed to provide some documents and submissions in support of and opposition to the removal application with the Authority to determine the point based on that material. This determination resolves the application for removal. I will refer to the law that sets out the relevant grounds for removing proceedings to the Employment Court, determine whether any grounds apply here and assess whether some or all of the problem should be removed. The three grounds relied on by Mr Ferguson are duplication of proceedings, an important question of law and the Authority's general power.

Duplication of proceedings

[4] This refers to section 178 (2) (c) of the Employment Relations Act 2000 which permits the Authority to remove the whole or part of a matter to the Court if the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. This is the principal ground relied on by Mr Ferguson. An issue before the Authority is the status of the relationship between Mr Ferguson and Sounds of Forest and that same issue is before the Court. Accordingly, section 178 (2) (c) applies. Sounds of Forest points out that the duplication exists because Mr Ferguson issued proceedings in the Court when he could have left the issue to the Authority to investigate and determine as part of the personal grievance claim. Often, the force of an argument in favour of removal rests on minimising both parties' legal costs and time. Here, however, in light of the respondent's opposition, I see little force in Mr Ferguson's point even though the ground for removal of part of the matter is made out.

[5] The issue of status is only *related to* the other parts of the problem before the Authority in that they are claims only available to an employee. If Mr Ferguson succeeds before the Court on the question of his status, it will provide no answer to his personal grievance or the other parts of the problem before the Authority. Put another way, there is no or very little overlap between the evidence required to resolve the status issue and that required to dispose of the substantive claims. This is very much a case where the Authority probably would have first investigated and determined the issue of Mr Ferguson's status as a preliminary issue but for the Court proceedings. Hence I see no merit in the claim to remove the whole of the problem even overlooking the respondent's opposition.

[6] If Mr Ferguson pursues his application to the Court under section 6 (5) of the Act, it will resolve that part of the problem before the Authority. It is not necessary to remove that part of the problem to achieve that outcome. The better option is to defer any further investigation of the problem before the Authority pending the Court's judgment on Mr Ferguson's application. If Mr Ferguson is found to be an employee, the investigation into his problem can proceed, subject to a likely direction to mediation. If Mr Ferguson is found not to be an employee, the Authority will not have jurisdiction to investigate the substantive claims.

Important question of law

[7] This refers to section 178 (2) (a) of the Act which permits the Authority to remove the whole or part of a matter to the Court if an important question of law is likely to arise in the matter other than incidentally. There are said to be two such questions: first, the test distinguishing between contracts of and for service in a forestry industry context; and secondly, whether the Authority has jurisdiction to award exemplary damages.

[8] The first question is not an *important* question of law. This is not a case about a widespread industry practice. It is about the arrangements between Mr Ferguson and those who engaged him and how those arrangements developed over time. It is no more than the application of the Employment Relations Act 2000 and how the statute has been interpreted in cases such as *Three Foot Six Limited v Bryson* (12 November 2004) CA 246/03 and some earlier Employment Court cases to the facts as found. The outcome of the issue about Mr Ferguson's status is unlikely to be of lasting interest to anyone other than those immediately involved.

[9] The jurisdiction of the Authority to award exemplary damages was found to be an important question of law warranting its removal to the Court in the case of *Anderson v National Trade Manual Limited* (1 August 2003) AA 236/03. There are some similarities between how that case was advanced and the procedural steps in this matter. Coincidentally, counsel for Mr Ferguson was

also counsel for Mr Anderson. Here, the respondent cautions that Mr Ferguson's attempts to have the whole matter heard at first instance by the Court are inconsistent with Parliament's expressed intention that the Authority is the forum of first instance. It is not necessary to take that point any further because it is clear that the issue of exemplary damages arises incidentally if at all in the present case. The problem is a relatively straight forward personal grievance claim. The alleged behaviour at the heart of the exemplary damages claim is far less bad than that alleged in *Anderson* and it also forms the basis of the claim for a statutory penalty. It is difficult to see that there is anything in the exemplary damages claim that could not be properly dealt with by the imposition of a penalty accompanied by a payment order. On any reasonable view of the problem, the question of exemplary damages arises incidentally. It cannot support removal of the whole or any part of the matter to the Court.

General power to remove

[10] Section 178 (2) (d) permits the Authority to remove the whole or part of a matter to the Court if the Authority is of the opinion that in all the circumstances the Court should determine the matter. Mr Ferguson says that it is practical for the whole matter to be removed in order to mitigate costs associated with hearings in two forums; to accommodate the logistical difficulties arising from the different geographical locations of himself, witnesses, both counsel and the respondent's directors; and to best meet several objects of the Act.

[11] I am not persuaded by the first point. Mr Ferguson created the duplication, perhaps for the tactical reason of having what is essentially a personal grievance claim removed to the Court. The respondent prefers to have the Authority investigate at least the substantive part of the claim and I see no reason to deny it that opportunity.

[12] The second point also lacks merit. The Authority through its flexible procedures is no less able than the Court to efficiently accommodate the logistical issues referred to. To some extent the point is also about the potential for additional costs for two hearings given the spread of locations of those involved but my comment in paragraph [11] applies to that.

[13] The three objects relied on are section 3 (a) (ii) (inherent inequality of bargaining power), section 3 (a) (iv) (reducing judicial intervention) and section 142 (g) (difficult issues of law will need to be determined by higher Courts).

[14] Expressed more fully, the object of the Act as amended is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship by (amongst other things) acknowledging and addressing the inherent inequality of power in employment relationships. Mr Ferguson says that there was a manifest inequality in his employment relationship which was exacerbated by the respondent's actions after its termination. Assuming the truth of those allegations, they do not support removing the problem to the Court.

[15] Another object is reducing the need for judicial intervention. That object follows the promotion of mediation as the primary problem solving mechanism. I also note section 143 (f) which states that an object of part 10 of the Act dealing with the institutions is to recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements. Those objects are best achieved in the present case by not removing the whole of the matter to the Court.

[16] I am unconvinced that the issue about Mr Ferguson's status is a difficult question of law as envisaged by section 142 (g). The provision of the Act giving effect to that object is section 178. I

have already found that the issue of Mr Ferguson's status is not an *important* question of law. It is just a case of applying well known common law and statutory provisions to the facts in this particular case. There is ample precedent in the Employment Court and beyond to assist the Authority. I see no reason to merit a different outcome under section 178 (2) (d) than under section 178 (2) (b).

[17] There being no merit in the points raised, I decline to exercise the power available to the Authority under section 178 (2) (d) to order the removal of the whole or any part of the matter to the Court.

Summary

[18] Grounds for removal under section 178 (2) (a) of the Act are not made out.

[19] While the ground under section 178 (2) (b) is made out, I decline to order the removal of the whole or any part of the matter to the Court.

[20] I decline to order removal to the Court under section 178 (2) (d).

[21] Any further investigation by the Authority awaits the Court's disposition of Mr Ferguson's proceedings.

[22] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority