

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 202  
5358693

BETWEEN MALCOLM FRENCH  
Applicant

AND ACCIDENT COMPENSATION  
CORPORATION  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Barbara Buckett, counsel for Applicant  
Peter Churchman, counsel for Respondent

Investigation Meeting: 13 December 2011

Determination: 15 December 2011

---

**DETERMINATION OF THE AUTHORITY**

---

**Application for removal of matter to the Employment Court**

[1] On the application of Mr Malcolm French, the Authority has considered and now determines whether to order the removal of an employment relationship problem to the Employment Court, for hearing and determination there without the Authority investigating the matter.

[2] Removal is opposed by the Accident Compensation Corporation (ACC), the respondent party in the case.

[3] The Authority has heard evidence from Mr French and received submissions from his counsel Ms Buckett, and also from Mr Churchman for ACC.

[4] Under s 178 of the Employment Relations Act 2000 the Authority may, on its own motion or on the application of any party to a matter, order removal to the Court. The grounds for making such an order are set out in four subsections. Two are relied upon by Mr French:

(c) *The court already has before it proceedings which are between the same parties and which involve the same or similar or related issues;*

and

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

[5] An order for removal may be made subject to such conditions as the Authority thinks fit. If the Court considers that a matter has not been properly removed it may order the Authority to investigate the matter.

[6] Removal is sought in the following circumstances. An employment relationship between Mr Malcolm French and ACC that existed for over 35 years, in its last 12 months became beset by problems leading to the multiple applications that have come before the Authority and the Court.

[7] In September 2010, when the relationship between Mr French and ACC was still a continuing one, Mr French made his first application to the Authority. He claimed that action had been taken against him unjustifiably by his employer ACC in various ways to his disadvantage.

[8] Following an investigation the Authority determined in January 2011, under [2011] NZERA Wellington 2;

- Mr French at material times had been covered by an individual rather than a collective employment agreement,
- A secondment agreement he was party to with ACC had not ended, and
- There was no evidence that ACC had unjustifiably disadvantaged him.

[9] The Authority also recorded, at para [1] of its determination, that Mr French had in his claim raised an issue as to whether ACC *failed to comply with its obligations to act in good faith and deliberately conducted itself so as to coerce the applicant [Mr French] to resign*. It is clear that when the Authority issued its determination in January 2011, the employment of Mr French by ACC had not been terminated.

[10] In February 2011 a *de novo* challenge to the Authority's determination of the previous month was filed in the Employment Court. A hearing date for the challenge has not yet been allocated by the Court.

[11] Mr French went back to work after a long period on sick leave in July 2011. Upon his return he was told by ACC that his position no longer existed and he was declared redundant. He contends that was a sham.

[12] That action led, at the end of September 2011, to a second statement of problem being lodged in the Authority by Mr French. He alleged, once more, that action had been taken unjustifiably by ACC in his employment and he also claimed that the termination of his employment, purportedly for redundancy, was an unjustifiable dismissal. Mr French sought to resolve his claims with remedies of reinstatement, reimbursement of lost remuneration and compensation for hurt feelings and humiliation and loss of expected benefits.

[13] At the same time as Mr French lodged his second application he sought removal to the Employment Court, so that the matter could be heard there together with the challenge earlier made to the Authority's determination of the first application.

[14] I find that the Authority's discretion to order removal should be exercised in this case to grant the application, for the following reasons.

**Section 178(2)(c) – other proceedings already before the Court**

[15] The parties in the proceedings before the Court and in the second application made to the Authority are the *same*. Although the Court and Authority proceedings may not involve the *same or similar* issues, they do concern *related* issues and therefore fall within the subsection (2)(c) ground for removal.

[16] I find that the issues are related by or through the secondment agreement that was a feature of Mr French's employment relationship with ACC from about 2000 until 2010. Alterations or alleged changes made unilaterally in the performance of that secondment agreement led to Mr French bringing his first application to the Authority. The Authority determined that the secondment agreement was still in effect as at January 2011, but by July when Mr French returned to ACC the agreement had been brought to an end or was no longer being performed. ACC considered that

there was no position any longer for Mr French to return to at the end of his secondment and declared him redundant.

[17] In my view, the rights and obligations of Mr French and ACC under an employment relationship in which a secondment agreement operated are the linkage between the issues in Mr French's first application to the Authority and his second application. I agree with Ms Buckett that the matters within the first and second applications may be seen as part of a continuum in respect of the operation or application of the secondment agreement. The consequences of termination of that agreement are a particular issue, one that may also give rise to an important question of law within the scope of s 178(2)(a).

[18] Removal may therefore be ordered on the ground under subsection (2)(c).

#### **Section 178(2)(d) – Authority's opinion**

[19] As a separate but additional ground for removal, the Authority is strongly of the opinion that in all the circumstances the Employment Court should determine the matter. In the Authority's determination of January 2011, Mr Asher prophetically described the matter as having "proven to be an evolving employment relationship problem." It is likely that the final disposition of matters between Mr French and ACC arising out of his employment relationship and the associated secondment agreement will not be finally resolved in the Authority but may be in the Court, although there is some chance in a case like this of an application being made to the Court of Appeal for leave to appeal a Court decision.

[20] Mr French's evidence is that to this point he has so far incurred something over \$80,000 in legal expenses. It seems to the Authority unjust that he should have to remain before the Authority until his investigation is completed and determined and then, if there is a challenge, which is likely, duplicate if not increase that expense by going, or being taken, to the Employment Court for a *de novo* challenge.

[21] Also, the resources of the Authority are not unlimited and there are other parties who are waiting to have their fair share of those for resolving their employment relationship problems. I consider that the Authority's resources will now be better used on other cases, given the likelihood of a challenge to any determination of the Authority. Given the history and likely future of this matter it will most justly, efficiently, economically and effectually be disposed of if removed to the Court. That

course will also avoid the possibility of fragmentation of resolution, by having decisions of both the Court and the Authority given at different times about what I regard as being closely related issues.

[22] Mr Churchman indicated that the Court may not have a fixture available for disposal of this second application on removal for 18 months or so, and I weigh the possibility that removal will unduly protract disposal of the matters. However I am also concerned that Mr French, who contemplates working for only a few more years, may have a good proportion of his career time left taken up with having this matter finally resolved, if the Authority leg must be completed before the likely second leg in the Court can be started upon.

[23] Removal may be ordered on this additional ground under subsection (2)(d).

### **Determination**

[24] For the above reasons, the application for removal is granted under subsections (2)(c) and (2)(d) of s 178 of the Employment Relations Act. Mr French's personal grievance claim under file number 5358693 is to be transferred to the Court in its entirety, for hearing and determination without the Authority investigating it.

### **Costs**

[25] Costs are reserved.