

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 53
5573809

BETWEEN JAMES HARDY t/a DATCOM
 LIMITED
 Applicant

A N D VISIONSTREAM PTY LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Eska Hartdegen, Counsel for Applicant
 John Rooney, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 24 February 2016

DETERMINATION OF THE AUTHORITY

- A. The application by James Hardy t/a Datcom Limited for removal of file No 5573809 to the Employment Court pursuant to s.178(2) of the Employment Relations Act 2000 (the Act) is declined;**
- B. Costs are reserved.**

Employment relationship problem

[1] On 6 August 2015, the applicant, James Hardy t/a Datcom Limited (James Hardy) filed an application in the Authority seeking a determination under s.161(1)(c) of the Act that he is an employee not an independent contractor of the respondent, Visionstream Pty Limited (Visionstream).

[2] Mr Hardy seeks various remedies as an employee against Visionstream under the Act.

[3] In an application dated 18 February 2016, Mr Hardy applied to the Authority seeking removal of this matter to the Employment Court pursuant to s.178(2)(a) and (b) of the Act. Mr Hardy claims the matter should be removed to the Court on the grounds that:

- There is an important question of law likely to arise other than incidentally; and
- The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Employment Court.

[4] Visionstream opposes the application for an order for removal submitting that there is no important question of law likely to arise in respect of the proceedings and the issues are not of such a nature or urgency that it is in the public interest for it to be removed to the Employment Court.

The removal application

[5] The Authority may order removal if it is satisfied one of the grounds in s.178(2) of the Act has been met. Under s.178(2)(d) of the Act, the Authority has residual authority to determine whether or not in the circumstances a matter should be removed to the Court.

Question of law

[6] The onus is on Mr Hardy to establish that an important question of law is likely to arise other than incidentally¹. In *Hanlon v. International Educational Foundation (NZ) Inc*, Goddard CJ held²:

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of [s.178].

[7] In *Macalister v. Air New Zealand Ltd*³, the Court summarised the principles that apply when dealing with applications for removal to the Employment Court.

¹ *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, 5

² *Supra*, 7

³ Unreported, Employment Court, Shaw J, AC22/05, 11 May 2005

The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both, or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.

[8] The central issue in this case relates to the question of Mr Hardy's status, is he an employee or an independent contractor? Mr Hardy's application to the Authority on 6 August 2015 seeks a determination pursuant to s.161(1)(c) of the Act.

161. Jurisdiction

(1) *The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including –*

...

(c) *Matters about whether a person is an employee (not being matters arising on an application under s.6(5))*

...

[9] As the section provides, the question of whether a person is an employee or an independent contractor is a matter within the Authority's exclusive jurisdiction. Section 6 of the Act establishes a statutory test for determining a person's status. Section 6(2) states:

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[10] This question is a question dealt with on a frequent basis by the Authority. It is my view that this preliminary issue as to Mr Hardy's status under s.6 of the Act is a matter which should be dealt with by the Authority. Ms Hartdegen at para.1.22 of Mr Hardy's application says that the question of law for determination by the Authority in this matter is:

... whether the respondent's practice of forcing workers to become independent contractors when they are being used and treated as employees, is in line with fairness, and the good faith requirements and principles under the ER Act 2000 and under the law.

[11] Before this question can be determined, the preliminary question as to Mr Hardy's status as an employee or an independent contractor must be determined. This is a matter that can be determined by the Authority.

Nature and urgency of the issue

[12] Ms Hartdegen also relies on s.178(2)(b) of the Act that Mr Hardy's claim is of such a nature and such urgency that it is in the public interest to be immediately removed to the Employment Court.

[13] I accept the submission made by Mr Rooney for Visionstream that the nature of the issues are not of national importance. The issue is one between Mr Hardy and Visionstream. In the event that the Authority determines that Mr Hardy is an employee and not an independent contractor, then other employees/independent contractors of and to Visionstream may consider their own situations.

[14] With regard to the claim that the matter is urgent, Mr Hardy filed his application in the Authority on 6 August 2015. Mr Hardy has been in a contractual arrangement with Visionstream from 2009. The statement of problem did not seek urgency.

[15] The requirements of s.178(2)(b) of the Act are not satisfied.

Section 178(2)(d)

[16] The Authority has a residual discretion to remove the matter to the Employment Court pursuant to s.178(2)(d) of the Act.

[17] In *Macalister*⁴, the Court stated in relation to the Authority's residual discretion:

Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of challenge in any event.

[18] The matter for consideration for the Authority is a matter which frequently comes before it, namely the status of a person as an employee or an independent contractor. The Authority is well placed to consider the factual basis of Mr Hardy's

⁴ Ibid para.[10]

claim that he is an employee. As observed by the Court in *Singh v. Eric James & Associates Ltd*⁵:

Section 6 requires the Court to consider and determine the real nature of the relationship between Mr Singh and EJAL. The inquiry in each case is intensely factual.

[19] In the event Mr Hardy is not satisfied with a decision made by the Authority in respect of his status, he has a statutory right to challenge the determination.

Determination

[20] For all the above reasons, the Authority does not consider this to be a matter that should be removed to the Court pursuant to s.178 of the Act. Mr Hardy's application is declined.

Costs

[21] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁵ [2010] NZEmpC 1 at 16