

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 130
3004433

BETWEEN GRANT JOHNSTON
Applicant

AND THE FLETCHER
CONSTRUCTION COMPANY
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Tony Drake for Applicant
Richard Upton for Respondent

Investigation Meeting: 1 May 2017

Submissions Received orally and in writing: 18 April and 1 May 2017 from the Applicant
24 April and 1 May 2017 from the Respondent

Determination: 2 May 2017

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The application for removal to the Employment Court is declined.**
- B. Costs are reserved.**

Removal Application

[1] This is an application under section 178(2) of the Employment Relations Act 2000 (the Act) to remove Mr Johnston's claims lodged under matter number 3003952 against The Fletcher Construction Company Limited (Fletcher Construction) in their entirety to the Employment Court (the Court) without prior investigation by the Authority.

[2] As permitted by section 174E of the Act this determination has not recorded all of the submissions received from Mr Johnston and Fletcher Construction.

[3] Section 178(2) of the Act allows the Authority to remove a matter to the Court without investigating it if one of the following four grounds are established:¹

- a) an important question of law is likely to arise in the matter other than incidentally; or
- b) 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 court; or
- c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[4] Only one ground is relevant to this application, namely whether an important question of law is likely to arise other than incidentally. The questions of law Mr Johnston contends will arise, and which justify the removal to the Court are:

- a) Was the applicant's employment or employment agreement terminated, as a matter of law, on 3 October 2016 or subsequent date?
- b) Was the respondent obliged to give notice of the termination of the applicant's employment or employment agreement pursuant to the applicant's contract of employment?
- c) If, following the restructuring of its organisation, the respondent makes further changes to its restructured organisation so as to create a role that is the same or similar to the applicant's role made redundant under the initial restructuring, is the respondent lawfully entitled to redeploy the applicant to that role without the applicant's agreement to it?

¹ Employment Relations Act 2000 section 178(2).

[5] Fletcher Construction opposes the application for removal on the basis that the claim does not give rise to any important questions of law. Fletcher Construction says the claim will fall to be determined on the facts.

Background

[6] The background, as far as it can be discerned at this early stage, can be drawn from the documents and affidavits filed in support of the application for removal and summarised as follows.

[7] Mr Johnston was and continues to be employed by Fletcher Construction. His employment has been continuous for 29 years. Fletcher Construction reviewed its structures and in 2016 proposed a change to the structure of its finance division. At that time Mr Johnston was employed in the role of Finance Controller – Corporate.

[8] On 8 June 2016 Fletcher Construction released a consultation document to affected staff which set out its proposal to disestablish the role filled by Mr Johnston and establish a number of new management roles. The proposal was to create a Construction Division Financial Shared Services team.

[9] On 24 June 2016 Mr Johnston was advised that the new structure would be implemented and he was invited to apply for any of the newly established positions in the new structure. Mr Johnston was advised that his role would continue until the implementation of a new software application, referred to as “JD Edwards”, affected his business unit. At that time it was anticipated the Finance Services team would transition into the new structure.

[10] On 12 July 2016 Mr Johnston advised Fletcher Construction that he wished to apply for the role of Business Performance Manager – Construction. He was interviewed for that position on 11 August 2016 and on 27 September 2016 Mr Johnston was offered the position and a proposed employment agreement was given to him for his consideration.

[11] On 3 October 2016 Mr Johnston was advised that JD Edwards was live for group office and available for him to start using. He was provided with a user name and password, together with some instructions on how to start using the new system.

[12] The parties were unable to reach agreement on the terms and conditions to apply to Mr Johnston in the new role.

[13] In December 2016, after the appointment of a new General Manager of Finance, Fletcher Construction decided not to proceed with the disestablishment of Mr Johnston's role because of its view that the differences between Mr Johnston's Finance Controller position and the newly established Business Performance Manager position were not materially different.

[14] At the heart of Mr Johnston's employment relationship problem is his contention that his role was disestablished and was redundant on 3 October 2016 when JD Edwards went live. He challenges Fletcher Construction's right to unilaterally redeploy him and says that he was entitled to receive notice of redundancy in accordance with the terms of his employment agreement.

Is an important question of law likely to arise in the matter other than incidentally?

[15] An important question of law is one that will arise other than incidentally. Its importance has to be measured in relation to the case in which it arises and must be decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it. As the Court observed in *McAlister v Air New Zealand Ltd*:²

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.

[16] Mr Johnston says Fletcher Construction denies it has breached the employment agreement or that the employment has been terminated as a matter of law or that he is entitled to redundancy compensation.

[17] Mr Johnston submits the three questions of law are important as they will be decisive of the case or some important aspect of it, and will arise other than incidentally.

² EmpC Auckland AC22/05, 11 May 2005, unreported, Shaw J, at [9]. See also *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

[18] Mr Johnston submits that the determination of his case will turn principally on construction of clauses in the employment agreement including the redundancy and termination provisions.

[19] Finally, Mr Johnston submits that the three questions of law have not previously been considered and determined by the Court or the Court of Appeal and a determination by the Court of his case will add to the body of employment law in New Zealand.

[20] Fletcher Construction submits that all proceedings involve questions of law that are important, in the sense that they are important to the parties in the case and to the outcome of the proceedings. It submits that the questions of law posed by Mr Johnston will ultimately involve principles of contractual interpretation and/or the application of section 103A of the Act and the law in relation to both is now well established. Being a question of law does not automatically make it 'important' in terms of the criterion for removal given at section 178(2)(a) of the Act.

Question One - Was the applicant's employment or employment agreement terminated, as a matter of law, on 3 October 2016 or subsequent date?

[21] This issue will involve contractual interpretation and the application of the facts to legal principles. The Authority is regularly called on to deal with contractual interpretation issues. The principles are well established and the Authority is well-placed to deal with contractual interpretation issues and apply its factual findings to previously articulated legal principle. Mr Johnston has not suggested that any new principle of contractual interpretation will need to be applied in this case.

[22] Question one is not an important question of law that will arise other than incidentally.

Question Two - Was the respondent obliged to give notice of the termination of the applicant's employment or employment agreement pursuant to the applicant's contract of employment?

[23] As with question one this question will also require interpretation of the relevant provisions of the employment agreement. The Courts have considered similar issues in at least two cases. In both cases the Court held that a redundancy situation had arisen notwithstanding that the employer had not given notice of termination of employment.

The Court in *Wills v Goodman Fielder New Zealand Limited*³ followed the dicta from the Court of Appeal in *Auckland Regional Council v Sanson*⁴ and held there was a redundancy situation notwithstanding that the employer did not give notice of termination for redundancy. In both cases the employees refused to accept alternative positions following the disestablishment of their roles.

[24] Question two is not an important question of law that will arise other than incidentally.

Question Three - If, following the restructuring of its organisation, the respondent makes further changes to its restructured organisation so as to create a role that is the same or similar to the applicant's role made redundant under the initial restructuring, is the respondent lawfully entitled to redeploy the applicant to that role without the applicant's agreement to it?

[25] This question is also a matter of contractual interpretation. The answer will depend on the wording of the redundancy provision of the employment agreement and any company policies dealing with redeployment that may apply to Mr Johnston. The Authority regularly determines matters regarding the interpretation of employment agreements and the application of policies and procedures and there is more than adequate case law on the issue.⁵

[26] The determination of the issue will also require the application of section 103A of the Act which the Authority does regularly.

[27] Question three is not an important question of law that will arise other than incidentally.

Should the Authority otherwise remove the matter?

[28] Mr Johnston's personal grievance will be tested in accordance with section 103A of the Act which requires the Authority to scrutinise Fletcher Construction's actions and how it acted, to determine whether a fair and reasonable employer could have done what Fletcher Construction did in all the circumstances at the time.

³ [2014] NZEmpC 233.

⁴ [1999] 2 ERNZ 597.

⁵ For example *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 and followed in *McCain Foods (NZ) Limited v Service Food Workers Union Inc. and 3 ors* [2004]2 ERNZ 252.

[29] I am satisfied there is more than adequate case law on the questions raised by Mr Johnston that it is unnecessary for the Court to consider the issues before being investigated and determined by the Authority.

[30] The Employment Court has stated that the scheme of the Act is clear that personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the grounds in section 178(2) of the Act are established.⁶

[31] The parties' opportunity to have the matter dealt with at what is likely to be a lower cost in the Authority and to preserve their statutory right of challenge should not be lightly put aside.

[32] There is no inevitability to either party challenging the Authority's eventual determination. Decisions about whether to challenge a determination of the Authority is only usually made once the Authority's determination has been considered.

[33] The Authority is well placed to investigate and determine the issues which Mr Johnston has raised in his statement of problem. There is nothing difficult or challenging about the claims he is bringing before the Authority and it is well within the Authority's capabilities to deal with such matters. It has extensive experience in doing so.

Outcome

[34] The grounds for removal in section 178(2) of the Act have not been established. This is the sort of case that Parliament intended the Authority to investigate and determine.

[35] The application is declined. The Authority will now proceed with the steps necessary to carry out its investigation, unless Mr Johnston decides to first exercise his right to directly ask the Court for special leave to remove his case there.

Costs

[36] Costs in respect of this application are reserved until after the substantive determination.

Vicki Campbell
Member of the Employment Relations Authority

⁶ *Vice-Chancellor of Lincoln University v Stewart* (No 2) [2008] ERNZ 249 at [43].