Employment Court of New Zealand

Johnston v The Fletcher Construction Company Limited [2017] NZEmpC 157 (11 December 2017)

Last Updated: 14 December 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 157

EMPC 131/2017

IN THE MATTER OF	an application for special leave to remove matter to the Employment Court
AND IN THE MATTER	of an application to strike out application for special leave
BETWEEN	GRANT CAMPBELL JOHNSTON Applicant
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Respondent

EMPC 270/2017

IN THE MATTER OF an application for leave to extend time to file challenge

AND BETWEEN GRANT CAMPBELL JOHNSTON Applicant

AND THE FLETCHER CONSTRUCTION COMPANY LIMITED

Respondent

Hearing:	20 October 2017 (Heard at Auckland)
Appearances:	T Drake, counsel for Grant Johnston R Upton, counsel for The Fletcher Construction Co Ltd
Judgment:	11 December 2017

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] There are three applications before the Court for determination:

GRANT CAMPBELL JOHNSTON v THE FLETCHER CONSTRUCTION COMPANY LIMITED NZEmpC AUCKLAND [2017] NZEmpC 157 [11 December 2017]

(a) Mr Johnston's (the applicant's) application for special leave to remove his proceedings (currently before the Employment Relations Authority) to the Court for hearing;

(b) a parallel application for leave to extend the time to challenge under s 179 of the Employment Relations Act 2000 (the Act) against a determination of the Authority declining to remove Mr Johnston's claim to the Court;1 and

(c) an application advanced by The Fletcher Construction Co Ltd (Fletcher Construction/the respondent) to strike out the application for special leave on the basis that the Court has no jurisdiction to deal with it.

[2] Both parties filed affidavits setting out the relevant background. While the evidence has not been tested at this early stage, it provides a useful context for consideration of the applications.

[3] Mr Johnston was employed by Fletcher Construction for 29 years. The company engaged in a restructuring process, as a result of which Mr Johnston's position as financial officer – corporate was disestablished. He was invited to apply for newly created positions within the company, which he did. He was offered a position as business performance manager – construction division. The parties were unable to reach agreement as to the terms and conditions attaching to the position. Issues then arose which appear to have provided the catalyst for Mr Johnston to take an extended period of leave from the company.

[4] The company reviewed matters and advised Mr Johnston that it had decided that, in retrospect, it ought not to have disestablished his previous position and was now re-establishing it. The company offered Mr Johnston the re-established position, which it contended was not significantly different from the business

performance management role he had previously been offered.

1 *Johnston v The Fletcher Construction Co Ltd* [2017] NZERA Auckland 130.

[5] Mr Johnston's claim against the company has a number of threads to it, including:

(a) for alleged unjustifiable disadvantage and dismissal;

(b) breach of contract in terms of the way in which the restructuring proposal was dealt with;

(c) an asserted entitlement to redundancy compensation; and

(d) a claim for special damages, general damages, and various other forms of relief.

[6] Mr Johnston considered that his claim ought to be determined by the Court, rather than by way of investigation in the Authority at first instance. He accordingly applied to the Authority for an order removing his claim to the Court for hearing. That application was declined for reasons set out in the Authority's determination. Mr Johnston seeks an order of the Court granting special leave to remove the matter pursuant to s 178(3) of the Act and he seeks, in parallel, leave to extend the time to challenge that determination on a de novo basis under s 179.

[7] The two alternative applications advanced by the applicant are stoutly opposed by Fletcher Construction. The parties do agree, however, that there are a number of issues that arise in the context of these applications which could usefully be clarified by the Court. In particular counsel seek clarification in relation to:

(a) the inter-relationship between s 178(3) and 179 of the Act and whether a party is entitled to pursue one or other, or both, avenues in a quest to bring a matter before the Court; and

(b) the extent of any discretion within s 178 to decline to remove a matter where one or more grounds under s 178(2) are made out.

[8] It is convenient to set out the relevant provisions at this point. Section 178 provides that:

178 Removal to court

...

(2) The Authority may order the removal of the matter, or any part of it, to the court if—

(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.

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

...

[9] Section 179 provides that:

179 Challenges to determinations of Authority

(1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2),

174B(2), 174C(3), or 174D(2) (or any part of that determination)

may elect to have the matter heard by the court.

(2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.

(3) The election must—

(a) specify the determination, or the part of the determination, to which the election relates; and

(b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing de novo**).

(4) If the party making the election is not seeking a hearing *de novo*, the election must specify, in addition to the matters specified in subsection (3),—

(a) any error of law or fact alleged by that party; and

(b) any question of law or fact to be resolved; and

(c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and

(d) the relief sought.

(5) Subsection (1) does not apply—

(aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[10] It will be immediately apparent that, while the Authority may order removal where it is of the opinion that, in all the circumstances, the Court should determine the matter, there is no comparable provision for the Court when determining an application for special leave. This point has some significance because it appears that Parliament has conferred a broader basis on the Authority to remove matters to the Court, than the Court may itself consider when determining an application for special leave.

[11] That issue (namely the breadth of the discretion to remove) would not arise if the Court was entitled to consider an application for removal by way of a de novo challenge. In such circumstances the Court would stand in the shoes of the Authority and would accordingly have the suite of factors set out in s 178(2)(a)-(d) (inclusive) at its disposal in determining such an application.

[12] There is a further potential complicating factor relating to the proper scope of the discretion to remove a matter to the Court under s 178(2) and the Court's power to grant special leave under s 178(3). That relates to whether the introductory wording of s 178(2) (the Authority "may" order removal) is imported into s 178(3) (which simply provides that, in dealing with an application for special leave the Court must consider the matters in s 178(2)(a)-(c)).

[13] I return to both issues below.

Fletcher Challenge's application to strike out application for special leave

[14] First I deal with the respondent's application to strike out Mr Johnston's

application for special leave on the ground that it constitutes an abuse of process.

[15] The application was ambitious. It centred on a submission that at least four of the questions of law identified by the applicant in his application had not been part of his statement of problem in the Authority, or his application for removal under s

178(1), and could not now be considered by the Court. The argument hinged on the wording of s 178(3), which the respondent submitted meant that the Court's power to entertain an application for special leave was only triggered *after* the Authority had considered the particular question identified by an applicant as justifying removal. If a particular question had not been identified, or had not been considered by the Authority, the Court could not do so on an application for special leave.

[16] As s 178(1) makes clear, the Authority may remove a matter or part of a matter to the Court to hear and determine without the Authority investigating it. As s

178(2) makes clear, there is a distinction between the matter removed and the underlying *grounds* on which the matter is removed (such grounds including that an important question of law may arise). The respondent's argument conflates the two points.

[17] While the fact that a particular question of law was or was not identified in the Authority may have some significance on a non-de

novo challenge under s 179 (I deal with whether this is an available avenue below) the position differs on an application for special leave. The Court must consider whether the matter, or part of the matter, should be removed.2 It may consider removal appropriate where satisfied that an important question of law is likely to arise. There is nothing in s 178 which supports the argument that either the applicant or the Court is constrained by the questions articulated in the application for removal considered by the Authority. If it were otherwise a litigant appearing on their own behalf in the Authority, who had overlooked an important question of law, could not advance such a question in the Court (when represented) on an application for special leave; nor could the Court of

its own motion identify such a question and grant special leave on the basis of it.

2 For a discussion as to what constitutes "a matter" for the purposes of s 178(3), see *Flight Attendants and Related Services (NZ) Assoc Inc v Air New Zealand Ltd* [2013] NZEmpC 125 at [7]: "The 'matter' is the broad issue which the applicants challenge, that is the lawfulness of the respondents' proposed restructuring. ... employment relations litigation is a dynamic exercise, no less in this case, and it would be wrong to freeze an issue as it was identified previously in the same litigation attempting to resolve an employment relationship problem."

Such a result would be nonsensical and not one supported by a proper reading of the statute.

[18] The respondent's application to strike out the application for special leave is declined.

Application for special leave

[19] The applicant identified seven questions of law which were characterised as important and justifying the grant of special leave. The questions are:

(a) Did the applicant's position become redundant as a matter of law on 3

October 2016 or on a subsequent date?

(b) If so, was the respondent obliged to give the applicant notice of termination of employment and pay redundancy compensation?

(c) If, following the restructuring of the 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 entitled to unilaterally require the applicant to work in that role?

(d) If it is found that the respondent must pay to the plaintiff the redundancy compensation under the applicant's contract of employment, is holiday pay at eight per cent payable on the amount of redundancy compensation?

(e) Was the incorporated term in the applicant's contract of employment, which required the respondent to act in good faith, breached by the respondent's actions and inactions between October 2016 and 25 May

2017 and, if so, can the following remedies be awarded to the applicant for breach of that contractual term?

(i) General damages; (ii) special damages; (iii) other damages.

If so, what is the correct level for such awards?

(f) Are the legal costs and disbursements incurred by the applicant before litigation was commenced and in relation to the initial mediation able to be recovered by an award of special damages or an award of compensation under s 123(1)(c)(i)?

(g) Was the termination of the applicant's employment an unjustifiable

constructive dismissal?

[20] Mr Upton, counsel for the respondent, submitted that none of these questions constituted important questions of law.

An important question of law

[21] There is no presumption in favour of or *against* removal to the Court, and it would be wrong (in my view) to read any such presumption into either s 178(2) or (3). To do so would undermine Parliament's clear intent that while some matters ought to be dealt with in the Authority, others ought to be dealt with at first instance in the Court. The point was made by Chief Judge Colgan in *Auckland District Health Board v X (No 2).* I respectfully agree with his observations:3

[43] Parliament has determined that, generally, personal grievances and other employment relationship problems should be considered first by the Employment Relations Authority using its unique and flexible investigative techniques if preliminary mediation about the problem is unsuccessful.

[44] *But Parliament has also determined that there will be cases in which, because of their nature or circumstances, that is not the most appropriate methodology*. It has specified four categories of such cases in s 178(2) the fourth of which (subs (2)(d) grants a broad power to the Authority to

3 *Auckland District Health Board v X (No 2)* [2005] NZEmpC 62; [2005] ERNZ 551 (EmpC).

remove. *But, conscious of both the conventional techniques of adversarial litigation employed by the Court and of the novel and special methodologies given to the Authority, Parliament has nevertheless made it clear that some cases meeting tests it has defined should be*

removed in spite of whatever arguable advantages the parties may have enjoyed by their case remaining before the Authority. *It is wrong to second guess Parliament's clearly expressed intention by both finding one or more of the specific tests satisfied, but then asserting that a case will nevertheless benefit from an Authority investigation that the legislation says should be superseded, and thereby refusing removal.*

(emphasis added)

[22] A question of law need not be complex, tricky, or novel to warrant use of the descriptor "important".4 It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it.5 The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point. Chief Judge Colgan dealt with this argument in *Flight Attendants and Related Services (NZ) Association Inc*:6

... the Authority decided that it was "...not persuaded that an important question of law arises which cannot be assisted by established legal precedents which can be applied to the particular factual matrix of this particular case."

That, however, misstates the statutory test and led the Authority astray. Section 178(2)(a) does not refer to whether important questions of law can be determined by established precedents. Rather, the test is that an important question of law likely to arise in the matter (first limb of the test) will do so "other than incidentally" (second limb). That second limb is not whether there is precedential guidance for the determination of those legal questions.

... Indeed, to determine the application for removal under s 178(2)(a) as the

Authority did, even if it was correct, would run the risk of ossifying the law to be applied by it because it would not allow, at least until during a further

4 At [35].

5 *Hanlon v International Educational Foundation (NZ) Inc* [1995] NZEmpC 2; [1995] 1 ERNZ 1 (EmpC) at 7; *New

Zealand Baking Trades Employees Union (Inc) v Foodtown Supermarkets Ltd [1992] 3 ERNZ

305 (EmpC); *Auckland District Health Board v X (No 2)* at [44].

6 *Flight Attendants and Related Services (NZ) Assoc Inc*, above n 2, at [27]- [28].

stage of the proceedings (in a challenge), for a review by the Court of previous legal decisions.

[23] I agree with Mr Drake, counsel for the applicant, that questions of law arise in the context of the applicant's claim which can properly be characterised as important for the purposes of s 178. The following suffice.

[24] Important issues of law are likely to arise, other than incidentally, in relation to the availability of special or general damages for any established breach of good faith by the respondent. There is a paucity of authority on the point7 and resolution of the identified questions (if they ultimately arise for determination) would have a broader impact beyond the parties to this litigation. I do not accept that the fact the questions relate to relief rather than liability take them outside the ambit of s

178(2)(a) or mean that they can properly be characterised as incidental. Section

178(2)(a) is couched in speculative, rather than definitive, terms. If the applicant fails to establish his claim, issues of relief will not arise. If he does succeed, including in part, they will. If issues of relief do arise, the questions identified above will be central to resolving his claim.

[25] Counsel were unable to identify any authority directly on point as to whether holiday pay is payable on a redundancy entitlement, although noted that there was a widespread practice of not including such a payment. The issue was touched on by Judge Perkins in *Howell v MSG Investments Ltd (formerly known as Zee Tags Ltd)* by way of obiter comment.8 There appears to be no Court authority directly on the point. Resolution of the issue is likely to have a broad, and potentially significant, impact.

[26] While it is true that issues relating to redundancy are commonplace and generally involve mixed questions of law and fact, that does not assist much in determining whether an important question of law is likely to arise in these

proceedings. The reality is that most cases involve issues of both law and fact and

7 See *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [95]- [96]; *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, (2015) 13 NZELR 157 at [110]- [114]; see also C Inglis and L Coats "Compensation for Non-monetary loss – fickle or flexible?" (paper presented to Employment Law Conference, Auckland, October 2016) at 399-400.

8 *Howell v MSG Investments Ltd (formerly known as Zee Tags Ltd)* [2014] NZEmpC 68, [2014] ERNZ 21 at [52], [58].

are ultimately resolved by an application of the former to the latter. Section

178(2)(a) is focused on important questions of law. It is not restricted to cases which are devoid of factual dispute.

[27] The sequence of events which emerges from the affidavit evidence involves Mr Johnston's original position being disestablished; him being offered a newly created position and undertaking negotiations in relation to it; and then his old position being recreated and his newly created position being disestablished.

[28] This sequence of events raises issues as to whether a redundancy situation was created at any point during the chronology and, if so, whether an entitlement to a redundancy payment arose. It also raises issues as to whether the respondent could require the applicant to return to his original position, despite its intervening disestablishment and then re-establishment. Similar issues were recently identified by the Court in *New Zealand King Salmon Co Ltd v Slotemaker* but in that case there was no need to decide these points in the particular circumstances.9 Counsel were unable to identify any other cases in which these issues have arisen.

[29] I accept that important issues of law are likely to arise other than incidentally in relation to the applicant's entitlement to redundancy compensation, including if and when such an entitlement arose. Resolution of those issues will be determinative of part of the applicant's claim.

Residual discretion to decline leave?

[30] Mr Drake argues that once the Court is satisfied that one of the grounds in s

178(2)(a)-(c) is made out, special leave must be granted – there is no residual discretion to decline it. The argument centres on the wording of s 178(3) and, most particularly, the reference back to the factors in s 178(2)(a)-(c) but not to the introductory wording of that provision ("the Authority *may* order the removal of a matter ... to the court ..."). Rather, Mr Drake contends that s 178(3) provides that in deciding an application for special leave the Court must consider the factors in s

178(2)(a)-(c).

9 *New Zealand King Salmon Co Ltd v Slotemaker* [2017] NZEmpC 99.

[31] Interpreting s 178(3) in the way contended for would create an uncomfortable distinction between removal powers. Such a distinction would lead to illogical results. It would mean that an applicant would have heightened prospects of success on their second bite of the cherry (in the Court), over their first bite of the cherry (in the Authority). There is no discernible reason why this would be so. Nor is this the approach that has been adopted to date by the Court, in recognising and applying a residual discretion to decline special leave to remove even where one or more of the grounds in s 178(2)(a)-(c) have been made out.10

[32] Some cases have emphasised that a cautious approach to the grant of leave under s 178(3) is required. In *Owen v Chief Executive of the Department of Corrections*, for example, the point was made that if special leave was granted it would deprive the parties of a general right of appeal against findings of fact in the Authority at first instance, and that:11

This is a significant point to be considered in applications for removal and a strong ground for establishing *the principle that the discretion to order removal should be sparingly exercised.*

[33] I prefer to approach the residual discretion issue on the following basis. Parliament has made it clear that many cases are best dealt with by way of the Authority's unique investigative processes (and under which determinations are made "according to the substantial merits of the case, without regard to technicalities");12 some cases are best dealt with by the Court. Parliament has specified three particular grounds warranting removal by way of grant of special leave. The Court retains a discretion to decline leave notwithstanding that one or other of the grounds in s 178(2) has been made out. However, to adopt a starting point that leave ought rarely to be granted (for example because it would mean that a right of 'appeal' would be denied), runs the risk of undermining the objective of the

provision and of reading in qualifying criteria which are not there. I respectfully

10 See, for example, *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] NZEmpC 85; [2002] 1 ERNZ 74 (EmpC), at [28]; *McAlister v Air New Zealand Ltd* AC22/05, 11 May 2005 (EmpC) at [38]; *Flight Attendants and Related Services (NZ) Assoc Inc*, above n 2, at [47]; *Hall v Westpac New Zealand Ltd* [2013] NZEmpC 66 at [11].

11 *Owen v Chief Executive of the Department of Corrections* [2014] NZEmpC 215 at [15] (emphasis added). See too *Sheath v The Selwyn Foundation and Selwyn Care Ltd* [2015] NZEmpC 226 at [16] (in relation to applications for leave to remove under s 178(2)), citing the observations to this effect in *Carter Holt Harvey Ltd*, above n 10, with approval.

12 Employment Relations Act 2000, s 157(1).

agree with Judge Couch's observation in *Transpacific Industries Group (NZ) Ltd v*

Harris that:13

[The loss of a right of appeal] occurs whenever a matter is removed under s

178 and the legislature must have regarded it as an acceptable consequence.

[34] The same point applies in relation to other arguments routinely advanced on behalf of respondents, including that Parliament intended that disputed questions of fact would be dealt with at first instance by the Authority. This was a factor (along with numerous others) identified in the first case decided under s 178(3), *Carter Holt Harvey*, and which was said (along with other factors) to weigh against the grant of special leave despite the finding that the ground in s 178(2)(a) (important question of law) had been made out.14 It is, however, helpful to read that judgment (which was decided in 2002, so well before the 2011 amendments which appear to have

been directed towards making it easier for the Authority to remove matters to the Court) alongside later decisions of the Court, including *Flight Attendants and Related Services (NZ) Association v Air New Zealand Ltd*. There it was said that:15

First, it is claimed that the case will involve a number of disputed questions of fact which "Parliament has intended ... be resolved at first instance by the Authority". That may be so but, equally, Parliament has created a unique hierarchical regime which includes what is known as a challenge by hearing de novo in which all matters before the Authority (including disputed questions of fact) are considered afresh by the Court without regard to the Authority's determination of them. So, to remove a proceeding still allows for a resolution of all disputed facts, although by adversarial as opposed to investigative means. ...

[35] In granting special leave in *Transpacific* Judge Couch referred to the Court's residual discretion and the applicant's desire to achieve certainty of result and to have a fully reasoned substantive decision by the Court. Judge Couch accepted that:16

... it is obviously more economical for this to be done in one hearing of the matter removed to the Court rather than an investigation meeting and a hearing de novo of a challenge.

13 *Transpacific Industries Group (NZ) Ltd v Harris* [2012] NZEmpC 17 at [24]. See too Chief Judge Colgan's observation that "Parliament intended some cases and their parties to lose such right [of appeal] by operation of the removal regime", in *Flight Attendants and Related Services (NZ) Assoc Inc* above n 2, at [50].

14 *Carter Holt Harvey*, above n 10, at [38].

15 *Flight Attendants and Related Services (NZ) Assoc Inc*, above n 2, at [48].

16 *Transpacific Industries Group*, above n 13, at [23].

[36] There is force in these observations. Litigation tends to be expensive. Employment litigation is no exception, particularly where an investigation meeting runs for days or weeks, and calls for numerous procedural steps (the exchange of briefs of evidence, disclosure, preparation of bundles of documents, and the preparation and filing of written submissions) which will inevitably be replicated if the matter proceeds to an adversarial hearing in the Court. Litigants have an interest in where their (generally limited) financial resources are applied. This factor seems to me to have particular relevance in the context of a statutory scheme which provides for de novo challenges, conferring on dissatisfied parties the right to start from scratch again in the Court. I perceive that to be the point that Judge Couch was making in *Transpacific*, in considering the cost factor in the exercise of the Court's discretion in that case.

[37] As an aside, it is perhaps interesting to note that the bulk of applications for special leave advanced in the Court since 2001 have been pursued by employees, not employer parties. It is possible only to speculate on why this is so.

[38] As I have said, Parliament has made it clear in s 178 that there are many cases which are more appropriately dealt with by way of investigation in the Authority and some which are more appropriately dealt with by way of a more formal court hearing. It is not, as was pointed out in *X (No 2)*, a matter of patch protection.17 Rather it is a matter of directing cases to either forum applying the criteria set by the statute. Section 178 does not, either expressly or impliedly, contain a presumption that cases will generally be heard in either institution and such a presumption should not be read in. To do so runs the risk of undermining Parliament's intent.

[39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a)-(c), which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose.18 The overarching point will be

whether a particular case is best suited for resolution by the Authority's investigative

17 *Auckland District Health Board v X (No 2)*, above n 3, at [41].

18 Interpretation Act 1999, s 5.

processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure- laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

Conclusion

[40] I am satisfied that a number of important issues of law are likely to arise in these proceedings other than incidentally.

[41] I have considered whether there are any factors which might weigh against the grant of special leave. I do not consider that there are, and I did not understand Mr Upton to be submitting otherwise.

[42] The application for special leave is accordingly granted. The entire matter is to be removed to the Court. A statement of claim should be filed within 14 days of the date of this judgment, with the usual time for filing a statement of defence. A telephone directions conference should then be scheduled with a Judge.

Application for leave to extend time to file a challenge

[43] I have already concluded that special leave ought to be granted and the matter removed to the Court. That means that it is unnecessary to deal with the alternative application advanced on Mr Johnston's behalf, namely the application for leave to extend time to file a challenge. However I make the following observations in relation to it.

[44] The application raises the issue of whether a party who is dissatisfied with a decision of the Authority declining leave to remove a matter to the Court has one or two remedial avenues available to it. This issue has been touched on in a number of previous cases, but the point appears to have been left open.

[45] In *Vice-Chancellor of Lincoln University v Stewart (No 2)* the Court observed:19

... it is clearly preferable that a party dissatisfied with the Authority's determination of an application for removal should proceed under the particular provisions in s 178(3) and s 178(5) rather than the general right of challenge under s 179. Given the clear words of s 179, however, it would be wrong to construe them as excluding a challenge to such a determination. I adopt in this context the view of the full Court in *NZ Banking Trades Union (Inc) v Foodtown Supermarkets Ltd*, where, dealing with an analogous situation under the Employment Contracts Act 1991, they said:

"We should not be taken as having decided that an appeal does not lie from such a decision, but only that despite the fact that right of appeal to this Court is expressed generally to encompass any decision of the Tribunal, some very good reason would need to be advanced for not following the procedure provided for by s 94, which has been expressly enacted with this kind of situation in mind..."

Adapting that dictum to the circumstances of the Employment Relations Act

2000, some very good reason would need to be advanced for proceeding by way of challenge under s 179 rather than by way of application under s

178(3) or s 178(5).

[46] The Court noted:

[13] As a matter of principle, it is unsatisfactory for there to be two alternative processes available in the Court to address the same issue. Such a situation is even more unsatisfactory where those two processes involve the application of different criteria.

[14] That is clearly the case where the Authority has declined to order removal. If a dissatisfied Plaintiff seeks special leave pursuant to s 178(3), the Court must consider the merits of removal according to the criteria set out in s 178(2)(a) to (c) but not s 178(2)(d). If that same party pursued a challenge and the issue came before the Court by way of a hearing de novo, the Court would be required to exercise the jurisdiction of the Authority which would extend to all four criteria under s 178(2).

[47] Mr Drake submitted that both avenues remained available to a litigant, not having been expressly excluded by Parliament. He made the point that the Court has previously recognised the availability of both routes, although acknowledging that a threshold requirement of "some very good reason" for pursuing a challenge rather

than an application for special leave appeared to have been adopted by the Court in

19 *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 (EmpC) at [19]-[20].

both *Lincoln University* and *New Zealand Baking Trades Employees Union (Inc) v*

Foodtown Supermarkets Ltd.20

[48] The issue appears to me to boil down to a narrow question of statutory construction. Parliament has provided a general right of challenge to litigants dissatisfied with determinations of the Authority. Parliament has provided a specific vehicle for seeking to revisit a decision to decline leave to remove a matter to the Court, namely by way of an application for special leave. The specific overrides the general.21 In making specific provision for an application for special leave in a particular class of case (decisions of the Authority declining leave) Parliament has clearly indicated that that is the process which must be followed.

[49] It could be argued that the words "the party applying for the removal *may* seek the special leave of the court" suggest that it is not obligatory to take this route. Similar permissive wording is, however, found in s 179. It is tolerably clear that the word "may" in these provisions is not directed at conferring on a dissatisfied litigant a choice between one route or another. Rather it is a choice between seeking special leave, or not; and pursuing a challenge, or not. The different purpose of each provision reinforces the point – s 179 facilitates a party's entitlement to have its case heard afresh (de novo) or on a limited (non-de novo) basis. Section 178(3) is directed at ensuring that a matter is dealt with by the appropriate institution. In this regard it allows a party to seek special leave, the grant of which enables them to by- pass the usual process in resolving a grievance, bunny-hopping to the Court for hearing at first instance.

[50] It is not immediately apparent why Parliament did not broaden the wording of s 178(3) to confer on the Court (in considering an application for special leave) a comparable power to the one enjoyed by the Authority in s 178(2)(d) (in considering an application to remove a matter to the Court). Parliamentary material does not cast

any light on the issue. However, the close juxtaposition (within the same section) of

20 *New Zealand Baking Trades Employees Union (Inc)*, above n 5, at 308.

21 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis NZ Ltd, Wellington, 2015) at 465: "If one of the sections is specific and one general, the rule of generalia specialibus non derogant (general provisions do not derogate from specific ones) applies just as it does when the inconsistency is between two Acts", citing (amongst other authorities) *R v Frost* [2008] NZCA 406 on ss 18 and 21 of the Evidence Act 2006.

the Court's powers with the Authority's more expansive powers indicates that it was a deliberate omission. This may be seen as

consistent with the statutory objective of having most matters disposed of at first instance by way of investigation in the Authority, rather than the Court.22

[51] Parliament has made it clear (by referring back to the criteria in s 178(2)(a)- (c)) that the Court's involvement is limited in circumstances where a litigant is dissatisfied with a decision of the Authority declining leave to remove a matter to the Court. An interpretation allowing a litigant to deviate off down the challenge route where a "good reason" is said to exist seems to me to run the risk of reading in what Parliament has deliberately left out – namely the sort of mop-up provision contained within s 178(2)(d). And to interpret the legislation as allowing two alternative options, each of which results in a different approach and the application of a different test to determining the same issue, would (in my view) be illogical.23

Costs

[52] Costs are reserved. If they cannot be agreed, the applicant is to file and serve any submissions in support of his application for costs within 15 working days of the date of this judgment; any response from the respondent within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Judge

Judgment signed at 2 pm on 11 December 2017

22 Although it is also clear from a report from the then Minister of Labour, Kate Wilkinson, explaining the (2011) amendment to s 178(1), that the Authority needed to be able to remove a question of law to the Court with greater ease: Office of the Minister of Labour, Cabinet Business Committee "Proposals to Amend the Employment Relations Act 2000 and Related Work" (July 2010) Appendix 1, which says that the purpose of the amendment is "ensuring that issues are dealt with by the right institution at the right level of the system." This was to "improve confidence that the Authority is dealing with matters appropriate to its nature and role."

23 Judicial review would, of course, remain available (in circumstances prescribed by statute): Employment Relations Act 2000, ss 194, 184.
