New Zealand Employment Relations Authority Decisions

Kazemi v Rightway Limited (Auckland) [2017] NZERA 300; [2017] NZERA Auckland 300 (29 September 2017)

Last Updated: 7 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 300
3016171

BETWEEN ELENA KAZEMI Applicant

A N D RIGHTWAY LIMITED First Respondent

A N D EDWIN FREDERICK SHAND READ

Second Respondent

A N D GREGORY MICHAEL SHEEHAN

Third Respondent

A N D DARRYL DEVENDRA JHINKU Fourth Respondent

Member of Authority: Rachel Larmer

Representatives: Tony Drake, Counsel for Applicant

Gillian Service and Chris Baldock, Counsel for First, Second and Third Respondents

No appearance by Fourth Respondent

Investigation Meeting: On the papers

Submissions Received: 30 August 2017 from Applicant

06 September 2017 from First, Second and Third

Respondents

11 September 2017

No submissions from Fourth Respondent

Date of Determination: 29 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Rightway Limited provides accountancy and business advisory services to customers throughout New Zealand. It employs around 20 "*Regional Partners*" and approximately 100 employees within New Zealand.

[2] At the material time the Second Respondent Mr Read was Rightway's Chief Operating Officer, the Third Respondent Mr

Sheehan was the Chief Executive Officer and the Fourth Respondent Mr Jhinkhu was the Chief Financial Officer.

[3] On 07 December 2015 Rightway employed Elena Kazemi as a Regional Partner.1 Ms Kazemi role involved selling Rightway's business related services to prospective customers.

[4] Rightway and Ms Kazemi first started discussing the possibility of employment in mid-July 2015. Rightway gave Ms Kazemi a Deed Poll, Deed of Adherence and proposed individual employment agreement before she accepted the offer of employment.

[5] The Deed Poll established Rightway's Regional Partner Programme (the Programme). The Deed Poll records that the Programme is intended to give Regional Partners the opportunity to participate in Rightway's growth.

[6] This participation occurs via the "*RP Owner*" referred to in the Deed Poll. The RP Owner is a Regional Partner's family trust or a company controlled by the Regional Partner. The RP Owner is the entity who participates in the Programme by holding a commercial interest in Rightway's client register.

[7] Participation in the Programme is at Rightway's Board's discretion. Clause 3.1 of the Deed Poll also says participation is "*separate and independent of a Regional Partner's employment relationship with Rightway.*"

[8] The RP Owner's interest in Rightway's client register can be sold or transferred. The Deed Poll records how the RP Owner's interest in Rightway's client

interest is to be valued.

1 Her job title changed to Business Partner in mid- 2016.

[9] The Deed of Adherence was entered into by Rightway, Ms Kazemi and Ms Kazemi's company Kaz Limited. Kaz Ltd is recorded as the RP Owner for the purposes of participation in the Programme.

[10] The Deed of Adherence required Kaz Limited as the RP Owner to pay Rightway $125,000 for its commercial interest in Rightway's client register. It did not specify a date for that to occur. This amount was paid on 30 October 2015. Ms Kazemi started work on 07 December 2015.

[11] Ms Kazemi claims that Rightway's offer of employment was conditional on her paying Rightway $125,000, which as described in the relevant documentation as the *"Buy In"* amount.

[12] Ms Kazemi claims that the $125,000 her company paid Rightway was in fact an unlawful employment *"premium"* which breached the Wages Protection Act 1983 (WPA). She seeks recovery of that amount and that penalties be imposed on Rightway for breaching the WPA.

[13] Ms Kazemi also seeks:

a. relief under the Illegal Contracts Act 1970 (the ICA);

b. recovery of the sale value of the client register as at date of termination;

c. General damages for breach of contract arising from an implied breach of good faith;

d. Damages under the Contractual Remedies Act 1979 (CRA) for alleged misrepresentations made by the Respondents;

e. Penalties against Rightway for alleged breaches of WPA, her employment agreement and of the statutory good faith obligations in the Employment Relations Act (ERA);

f. Penalties against Second, Third and Fourth Respondents for aiding and abetting Rightway's alleged breaches of the implied duty of good faith in Ms Kazemi's employment agreement;

g. Interest, costs, bank charges and other expenses incurred in addition to other "*appropriate*" remedies.

[14] Rightway denies all of Ms Kazemi's claims.

[15] Rightway says that the $125,000 Ms Kazemi paid was not an employment premium. Rather it was the purchase of a legitimate commercial interest in Rightway's client base, which occurred in accordance with its Regional Partner Programme.

[16] Rightway says the $125,000 was paid pursuant to a genuine commercial arrangement whereby Ms Kazemi purchased a transferrable commercial interest which was recorded in a well-documented and expressly termed commercial arrangement.

[17] Rightway says that the Deed of Adherence entered into by Ms Kazemi and her company Kaz Limited are not illegal contracts under the ICA because the contractual documentation articulates legitimate commercial arrangements which were

agreed to and freely entered into by a sophisticated and commercially astute individual and her company.

[18] Rightway further says that the commercial arrangement with Kaz Limited did not form part of Ms Kazemi's employment agreement and that none of the respondents have breached their statutory or common law obligations to Ms Kazemi in respect of her employment with Rightway.

[19] Rightway and the other respondents say that Ms Kazemi is not entitled to any remedies or penalties because none of the respondents have done anything wrong.

[20] The Respondents say that the Programme involved the issue of an interest in its client register so it was a genuine commercial arrangement whereby senior professional accountants and business advisers invested in and grew Rightway's business throughout New Zealand then shared in the financial returns on their investment.

[21] Rightway says the Programme was introduced to incentivise its professional services employees by providing them with an opportunity to participate in successfully developing and expanding a loyal client base.

[22] Rightway says that Ms Kazemi's entity, Kaz Limited, enjoyed commission pay outs from its interest in the client register in excess of $30,000 before Ms Kazemi ceased participating in the Programme.

[23] Rightway says that when Ms Kazemi ceased to participate in the Programme Kaz Limited's interest in Rightway's client register was valued in excess of $120,000, in accordance with the formula specified in the Deed Poll.

[24] Ms Kazemi has sought removal of this matter to the Employment Court in the first instance. She relies on s.178(2)(a),(b) and (d) of the ERA as grounds for removal. Rightway says that the grounds in s.178 of the ERA have not been met so the Authority should not remove this matter to the Employment Court.

The issues

[25] The issues to be determined by the Authority are:

(a) Are any of the s.178(2) tests relied on by Ms Kazemi for removal in the Act been met? In particular;

a. S.178(2)(a) - Does this matter involve an important question of law?

b. S.178(2)(b) - Is the case of such a nature and urgency that it is in the public interest for it to be removed?

c. S.178(2)(d) - Does the Authority consider that in all the circumstances this matter should be removed?

(b) If yes, then are there any factors which mean the Authority should decline to exercise its discretion to remove the matter?

(c) What, if any, costs should be awarded?

Are any of the s.178(2) tests relied on by Ms Kazemi for removal in the Act been met?

S.178(2)(a) – Does this matter involve an important question of law?

[26] Section 178(2)(a) of the ERA provides that a matter may be removed to the Employment Court in the first instance if there is an important question of law that is likely to arise other than incidentally.

[27] There are two aspects to the Authority's assessment – the first is whether the question is actually a question of law and if so, the Authority must then assess whether it is an important question of law because not every question of law will be important enough to fall within the ambit of s.178(2)(a) of the Act.

[28] The Employment Court has held that a question of law is important if it is decisive of the matter under investigation or if it is strongly influential in bringing about a decision in respect of the matters under investigation.2

[29] There is no requirement that a question of law needs to be difficult or novel to bring it within the ambit of s.178(2)(a) of the Act3.

[30] Mr Drake has set out four questions which he says are all important questions of law that warrant removal t the Employment Court at first instance.

[31] The first important question of law is:

Was the amount of $125,000 that was paid to the first respondent on

30 October 2015 a premium in respect of the applicant in contravention of s.12A Wages Protection Act 1983?

[32] I find that this question is not a stand-alone question of law. Rather it is a mixed question of law and fact which will be

determined in light of the factual findings made by the Authority regarding the applicable documentation.

[33] The answer to Mr Drake's first question will include an evidential assessment of the financial benefits obtained by Ms Kazemi through her participation in the Programme which is under dispute and in particular the terms and circumstances

surrounding the execution of the Deed Poll.

2 *McAlister v Air New Zealand Ltd*, Shaw J, 11 May 2005, AC22/02 and *Auckland District*

Health Board v X (No 2) [2005] NZEmpC 62; [2005] 1 ERNZ 551, Colgan CJ.

3 Supra.

[34] The Authority's factual findings will be critical in deciding whether or not the

$125,000 paid by Kaz Limited is an unlawful employment premium under the WPA.

[35] I am not satisfied that an important question of law needs to be resolved by the

Employment Court regarding the current unlawful employment premium claim.

[36] The law involving employment premiums has been addressed by the legal test set out by the Employment Court in *A Labour Inspector of the Ministry of Business Innovation and Employment v Tech 5 Recruitment Ltd*4.

[37] The Authority will also be applying the legal principles identified by the Employment Courts' in *Holman v CTC Aviation5* which endorsed the legal principles espoused by the Employment Court in *Tech 5* and then further refined the definition of *"premium"* with a simple two-step test.

[38] This approach involves two questions for the Authority to determine, namely whether;

a. the buy-in price paid by KAZ Limited, was a condition for her obtaining employment;

b. Ms Kazemi received any benefit, other than her employment, in exchange for the buy-in price paid to Rightway by Kaz Ltd.

[39] The response to these two key questions will involve factual findings which will then inform the Authority's determination of Mr Drake's first question. I therefore consider it to involve more of a factual inquiry than a genuine legal question that needs to be resolved.

[40] I do not accept Mr Drake's submission that question 1 involves complex legal issues. I consider that the inquiries the Authority will have to make in the course of determining question 1 are part of the Authority's normal investigative role and are well within the Authority's capabilities.

[41] Mr Drake says the second important question of law is:

4 [2016] NZEmpC 167.

5 [2017] NZEmpC 60.

Are the structure and arrangements contained in the Deed Poll and Deed of Adherence part of the contract of employment or is it a separate commercial structure and arrangement?

[42] The answer to this question lies in interpretation of the relevant documentation which the Authority routinely engages in. I accept Ms Service's submission that question 2 is fundamentally a question of fact.

[43] The Authority's determination in relation to question 2 will relate to the factual nature of the documentation and the evidence relevant to the Programme, Deed Poll and the Deed of Adherence and the degree to which (if any) they are linked to Ms Kazemi's employment or the extent to which they record separate and genuine commercial arrangements.

[44] There is not an important question of law to be resolved. [45] Mr Drake says the third question of law is:

Are all the provisions of the deed poll together with the provisions of the deed of adherence an illegal contract, or otherwise void in relation to the applicant and her contract of employment? If not all of the provisions are an illegal contract or otherwise void, then:

If the provisions relating to the transfer and sale of the current register are not an illegal contract or void, what amount of restitution or compensation should be awarded in respect of the client register for which the respondents value as being in excess of $104,000;

If the provisions relating to the payment of commission to the RP owner are not an illegal contract or void, are the total commission payments that have been paid by the first respondent relevant to, or effect, the applicant's right to recover the

amount of the $125,000 buy-in as a debt due?

[46] I accept Ms Service's submission that the question of whether the material documentation constitutes an illegal contract for the purposes of the ICA will only arise if the Authority finds in favour of Ms Kazemi on the first two questions identified by Mr Drake.

[47] I therefore consider that question 3 is a question which arises incidentally and is therefore outside the ambit of s.178(2)(a) of the ERA.

[48] I also consider that question 3 involves an application of well-settled law which clearly falls within the Authority's jurisdiction pursuant to s.162 of the Act.

[49] Likewise, the question of restitution falls within the Authority's jurisdiction. Further, question 3 would only arise if the Authority was to agree with or partially agree with the applicant's illegality argument.

[50] I am not satisfied that question 3 involves an important question of law because it will be determined by interpretation of the material documentation in light of well recognised contract interpretation principles.

[51] Mr Drake says the fourth important question of law is:

Was the incorporated term in the applicant's contract of employment, which required the first respondent to act in good faith, breached by the first respondent's actions, and if so, can general damages be awarded to the applicant for breach of that contractual term, and what is the correct level for such award?

[52] The Authority routinely deals with claims involving breaches of good faith. In the event that a breach of good faith is established, then it is well within the Authority's capability to be able to determine what if any legal consequences should follow.

[53] I consider that the answer to question 4 will involve determination of factual issues rather than on resolving a question of law.

Conclusion on s.178(2)(a) threshold

[54] I am not satisfied that any of the four questions posed by Mr Drake meet the s.178(2)(a) threshold.

[55] All four questions will require factual findings being made by the Authority which will be determinative in terms of answering the questions posed by Mr Drake. Accordingly, the application for removal under s.178(2) of the ERA does not succeed.

S.178(b) - Is the case of such a nature and such an urgency that it is in the public interest that it be removed immediately to the Court?

[56] Section 178(2)(b) of the Act enables a case to be removed if it is of such urgency that it is in the public interest that it be removed immediately to the Court.

[57] I find that there is no such urgency in respect of this matter. The employment relationship has ended. Ms Kazemi is no longer one of Rightway's Regional Partner's. There is a contractual mechanism for the RP Owner's interest in the client register to be divested by Kaz Ltd.

[58] It is likely that the Authority can determine this matter much more quickly than the Employment Court can. So any urgency that may exist is best addressed by not removing this matter.

[59] Nor do I accept there is any public interest in removing this matter.

[60] In an affidavit filed by Edwin Read on behalf of the respondents, there are no other Regional Partners who have taken issue with the Programme and the evidence in Mr Read's affidavit is that in fact most of the Regional Partners are doing exceedingly well from their investment.

[61] Nor is there any evidence that any of the other Regional Partners or RP Owners consider their investment to be an unlawful employment premium in contravention of the WPA.

[62] No other Regional Partners have commenced proceedings. I find the mere existence of other Regional Partners, none of whom have challenged the arrangement in issue, does not make this a matter of public interest. Ms Kazemi appears to be the only person affected by her claims against Rightway.

[63] The claims brought by the applicant will be very fact-specific to her particular situation. They will involve a close assessment and interpretation of the relevant contractual documentation and an examination of the representations made between the parties at the material times.

[64] Given the uniqueness of the arrangement, it is highly unlikely that there are any other cases that involve the same set of facts. I therefore consider that the employment institutions' findings in respect of this particular contractual and commercial arrangement, as it relates to Ms Kazemi's employment relationship, is likely to be confined to these particular facts.

[65] I therefore find that this matter does not involve urgency that would require it to be removed immediately to the Court. I am also not aware of any facts which justify this matter being given priority over any other currently before the employment institutions.

[66] I am therefore not satisfied that this matter falls within the requirements of s.178(2)(b) of the Act. The removal application under s.178(2)(b) does not succeed.

S.178(d) - Is the Authority of the opinion that in all the circumstances the Court should determine the matter?

[67] Section 178(2)(d) of the ERA enables the Authority on its own motion to order removal without an application from the parties.

[68] It is therefore unusual that Mr Drake would put forward that the Authority invoke s.178(2)(d) of the Act as a ground for removal when it is being raised by him and not the Authority.

[69] I do not accept Mr Drake's submission that this matter is exactly the type of case which Parliament intended to have removed to the Employment Court in the first instance. Parliament clearly intended the Authority to deal with matters in the first instance unless one of the statutory grounds of removal are established.

[70] This is a matter which is well within the Authority's usual expertise and experience so it can easily be appropriately investigated by the Authority in accordance with its obligations under the Act.

[71] I find that the s.178(2) ground has not been made out so removal on that basis does not succeed.

Outcome

[72] None of the four questions posed by Ms Kazemi involve important questions of law. They are mixed questions of law and fact which are likely to be determined on the basis of the Authority's factual findings and/or assessment of the contractual and other material documentation.

[73] There is no urgency or public interest which warrants removal. Nor is there any other reason that would justify removal.

[74] I therefore find that Ms Kazemi has failed to establish to the required standard that any of the four potential grounds for removal specified by s.178(2) of the Act exist. The Authority therefore has no discretion to order removal because the requirements of s.178(2) have not been met.

[75] Ms Kazemi's application for removal does not succeed.

Costs

[76] The first, second and third respondent, as the successful parties, are entitled to a contribution towards their actual costs on this removal application. The fourth respondent was not involved in the removal application so is not entitled to any legal costs.

[77] The parties are encouraged to resolve costs by agreement. If that is not possible, then the first, second and third respondents have seven days within which to file a costs application.

[78] If a costs application is filed, then the applicant has seven days from service of it on her to file her response. The first, second and third respondents then have a further three working days within which to file any reply to the applicant's costs submissions.

[79] Proof of costs actually incurred by the first, second and third respondents will be required in support of any costs application.

Rachel Larmer

Member of the Employment Relations Authority
