

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 175/07  
5048008

BETWEEN                      NOEL KIMBLE MANNING  
   AND 29 OTHERS  
   Applicants

AND                              HEWLETT PACKARD NZ  
   LIMITED  
   Respondent

Member of Authority:        Robin Arthur

Counsel:                        Stephen Langton and Alison Clements for Applicants  
   Richard McIlraith and Gillian Service for Respondent

Submissions received:        25 May and 7 June 2007 and from Applicants  
   5 June 2007 from Respondent

Determination:                13 June 2007

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**DETERMINATION OF THE AUTHORITY**

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[1]     The applicants seek an order for removal of this matter to the Employment Court under s178(2)(a) of the Employment Relations Act (“the Act”), that is because an important question of law is likely to arise in the matter other than incidentally. The respondent opposes the removal application. By consent the application is determined on the papers.

**The background**

[2]     This matter concerns a dispute and personal grievance applications about whether the respondent could stop paying superannuation contributions for the 30 applicants without compensating them for the loss of those contributions. The issue arises in an ongoing employment relationship with the applicants whose individual service ranges from five to 25 years.

[3] The applicants were members of the Hewlett Packard (New Zealand) Limited Retirement Plan (“the Plan”), an employee pension or superannuation scheme operated under a trust deed. Each applicant received between 7.45 and 11.4 per cent of their gross annual remuneration as contributions and related payments made by the respondent to the Plan.

[4] In the financial year ending March 2003 the respondent closed the Plan to new members but the applicants continued to belong to the Plan, with their voluntary contributions and the respondent’s contributions credited to their member accounts.

[5] In March 2006 the respondent began consultation with the applicants about closing the Plan entirely. Closure was said to be required because the respondent’s parent company had directed its subsidiaries remove all employee benefits not required by law to be paid. There are some differences between the parties on what was required or happened during this consultation but both agree that in June 2006 the respondent made a decision to stop making superannuation contributions to members of the Plan from 1 July 2006 and to start steps to close the Plan.

[6] From correspondence between counsel it appears that the content of employment documentation for the applicants varies in reference to superannuation benefits, if any. They fall generally into three categories:

- (i) Those with express reference in their individual employment agreements to the existence of the Plan. These refer to the Plan as not forming part of their contract and the respondent reserving the right to “stop or amend it as seen fit”.
- (ii) Those with employment agreements silent as to any superannuation benefit but referring to the first respondent’s Employee Benefits Guide (“the Guide”). This Guide states the respondent intends providing the benefits “long term” but reserves “the right to modify or change these benefits at any time in the future”. Details set out in the Guide are said to be overridden by any Trust Deed or company policy.
- (iii) Those with employment agreements silent as to any superannuation benefit and not referring to the Guide, however the respondent accepts the Guide would apply to those employees.

[7] The applicants say the respondent's contributions to the Plan were a condition of their employment and ending those contributions, without providing compensation for doing so, was a breach of that condition.

[8] The respondent denies that claim. It says the applicants' terms of employment, including the provisions of the Guide, allow the Plan to be withdrawn. Further it says removal of the Plan without compensation was justified in the circumstances in any event.

[9] At issue between the parties is:

- (i) whether the superannuation benefits received by the applicants under the Plan were a condition of each applicants' employment – that is a dispute over interpretation, application or operation of their employment agreements; and
- (ii) whether the withdrawal of the Plan and contributions, without compensation, was an unjustified action of the respondent amounting to an unjustified disadvantage to the applicants – that is a personal grievance claim.

### **Approach to considering removal applications**

[10] A removal application is considered in three steps: firstly, whether there is a question or questions of law arising other than incidentally; secondly, whether the answer to the question is likely to be decisive or strongly influential in deciding the case or an important aspect of it; and thirdly (where the statutory test for removal is satisfied), whether there are nevertheless any relevant factors in the particular case that are good and sufficient reasons for the Authority, in the exercise of its discretion, not to order removal.<sup>1</sup>

### **The applicants' submissions**

[11] The applicants submit that two important questions of law arise in this matter:

- (i) whether the phrase "conditions of employment" in s103(1)(b) of the

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<sup>1</sup> *Auckland District Health Board v X* (unreported, EC Auckland, AC33/05, 29 June 2005) at [30].

Act has a wider or different meaning from the phrase “contractual terms”, and

- (ii) whether an express provision allowing the respondent to change or amend benefits under the Plan permits it to remove the Plan and its benefits entirely.

[12] They contend that a condition of employment is wider than a term of employment and rely on *ANZ National Bank Limited v Doidge* (unreported, EC Auckland, AC 42/05, 1 August 2005). In that case a mileage allowance was held not to be a contractual term of employment but its payment was, at least, a condition of employment. However another more recent decision of the Court has found that a retirement benefit, provided under a policy allowing for change at the employer’s discretion, was not a term of employment and could be removed against the employee’s wishes: *Cuttriss v Carter Holt Harvey Limited* (unreported, EC Auckland, AC 19/07, 27 April 2007).

[13] On the basis of alleged differences in the approach taken by the Court in both cases, the applicants say there is an unresolved question of law of major significance to employment law generally.

[14] A second unresolved aspect is whether – where words in a policy or an employment agreement reserving the right for an employer to “change or modify” provision of a benefit do not refer expressly to *removing* such a benefit – an employer may stop providing a benefit entirely, that is to make the change absolute. Put another way, in my words, does such a provision for change mean that an employer may only change from “something to something” or may the change be from “something to nothing”?

### **The respondent’s submissions**

[15] The key point of the respondent’s riposte to the removal application is that there is no unresolved question of law arising. It says both the *Doidge* and *Cuttriss* decisions consistently take the same broad approach to matters, other than contractual terms, making up part of an employment agreement.

[16] In *Cuttriss* there is said to have been no issue as to whether the benefit in question was a “condition” and no need to define what a condition was as the benefit was clearly contained in a policy of the employer. That differed from *Doidge* where the benefit was referred to only in a covering letter of offer so that it was necessary to establish what weight that letter had in regard to the employment agreement.

[17] The respondent argues the applicants’ participation in the Plan was not a condition of employment, with the implication that there is no question of law needing to be considered regarding the scope of what comprises a condition. Rather it submits the central issue is the justifiability of the respondent’s actions. It says the facts relating to the circumstances of each applicant, with a number of differences in wording in relevant policy and other employment documents, would be most cost-effectively determined in the Authority.

## **Discussion**

[18] I am satisfied that the questions posed by the applicants are questions of law which are more than incidental to the case. To put it colloquially, they are really what the case is all about. It follows that the answers to them will be decisive or strongly influential in deciding it.

[19] At issue between the parties is whether their arrangements regarding the Plan and contributions to it amounted to a condition of employment and, if so, the extent of obligation created where such a condition is not an express contractual term.

[20] Also at issue is what the phrase “change and modify”, used in documentation about the Plan for some if not all the applicants, allows the employer to do.

[21] Both are not simply questions of fact but are questions of law. Such questions need not be novel or complex. Neither do they need to be the subject of unclear precedent as the applicant suggests. Rather, the statutory test of importance, as interpreted in case law, requires that the answers to those questions would be decisive or strongly influential of the matter, as they plainly are here.<sup>2</sup>

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<sup>2</sup> *McAlister v Air New Zealand* (unreported, EC Auckland, AC22/05, 11 May 2005) citing *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EC).

[22] Their importance is not only on the outcome for the parties but also for employment law more generally. The answers by the Court to those questions may provide important guidance on identifying what amounts to a condition, the extent of obligations under such conditions and the ability to change those conditions.

[23] The issue of making changes to employer-provided superannuation schemes presently also has a heightened interest for parties beyond those in the immediate matter. The introduction of the state-subsidised KiwiSaver work-based superannuation scheme is likely to result in many workers and employers looking at changes, modification or closure of their existing arrangements. In looking at that they will also need to look at what processes those existing arrangements allow for change and closure. With so much at stake, there will inevitably be disputes. Whatever guidance the Court can give now on how to approach provisions for change or modification will no doubt be of keen interest to such parties and their advisors.

[24] Against those factors I do not consider there are any good and sufficient reasons to exercise the discretion not to order removal. I note the respondent's concern about costs but the statute allows for such sufficiently important matters to be determined by the Court at first instance. Loss of a level of appeal – here that is the ability to challenge an Authority determination in the Employment Court – is balanced against the knowledge that Parliament must have known this would be a consequence in all cases when it legislated the provisions for removals.<sup>3</sup>

### **Order for removal**

[25] For the reasons given I order the whole of this matter be removed to the Employment Court for the Court to hear and determine without the Authority investigating the matter.

Robin Arthur

Member of the Employment Relations Authority

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<sup>3</sup> *Andrew v Commissioner of Police* (unreported, EC Christchurch, CC21A/03, 31 July 2003) at [28]