Employment Court of New Zealand

McPherson v Oji Fibre Solutions (NZ) Limited [2022] NZEmpC 185 (17 October 2022)

Last Updated: 21 October 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2022] NZEmpC 185
EMPC 335/2022

IN THE MATTER OF	an application for special leave to remove proceedings from the Employment Relations Authority
BETWEEN	STEPHEN MCPHERSON Applicant
AND	OJI FIBRE SOLUTIONS (NZ) LIMITED Respondent

Hearing:	Submissions-only hearing held on 12 October 2022
Appearances:	S R Mitchell, counsel for applicant D J France, counsel for respondent
Judgment:	17 October 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This decision resolves an application by the applicant, Stephen McPherson, for special leave to remove a personal grievance proceeding from the Employment Relations Authority to the Court.

[2] Previously, the Authority determined that the criteria for removal were not made out and that the matter should proceed to investigation on 26 and 27 October 2022.1 In essence Mr McPherson's application proceeds on the basis that the Authority erred.

1 *McPherson v Oji Fibre Solutions (NZ) Ltd* [2022] NZERA 465 (Member Robinson).

[3] Mr McPherson's application relies on two grounds. Both grounds concern an interpretation issue as to whether there is an availability provision in Mr McPherson's individual employment agreement (IEA) that meets the requirements concerning such provisions in the Employment Relations Act 2000 (the Act).

[4] The first ground is that there are already proceedings before the Court involving a similar issue. Thus, Mr McPherson submits that the qualifying criteria as to similarity under s 178(2)(c) of the Act are made out.

[5] The second ground is that the interpretation of the availability provisions in Mr McPherson's IEA involves an important question of law which is likely to arise other than incidentally. Thus, Mr McPherson submits that the qualifying criteria of s 178(2)(a) of the Act are made out.

[6] Finally, it is submitted for Mr McPherson that there are no discretionary factors warranting a conclusion that removal

should be declined.

[7] For the employer, Oji Fibre Solutions (NZ) Ltd (Oji), it is submitted that there is not a sufficient degree of similarity between the two sets of proceedings. Further, the personal grievance proceeding does not necessarily engage an important question of law. Thus, neither of the criteria relied on are made out. Given the history of the matter, it would be preferable for the Authority to proceed to investigate this matter as currently timetabled.

[8] In order to understand the context of this contested application, it is necessary to summarise the facts giving rise to the personal grievance as well as the procedural history.

Background matters

[9] There is no real dispute as to the key facts which the Court must consider for the purposes of the present application.

[10] Mr McPherson's personal grievance relates to his dismissal by Oji.

[11] At all material times, he was a #2 Pulp Dryer Dry End Operator at Oji's Kinleith Mill at Tokoroa. On 22 April 2021, he was contacted by the D Shift Manager and given notice he was required to attend work on 25 April 2021, which for him was a rostered day off. He advised he would be unavailable, but he did not provide a reason.

[12] On 23 April 2021, Mr McPherson was contacted again. He was told he needed to attend work or the issue might be escalated to a potential disciplinary matter. He repeated he was unavailable and provided details of his union representative to the D Shift Manager.

[13] On 24 April 2021, the Acting Shift Manager contacted Mr McPherson on the same topic. Mr McPherson again repeated he was unavailable to work on 25 April 2021. Once again, Mr McPherson did not provide a reason.

[14] He failed to attend work on 25 April 2021.

[15] Oji asserts that as a result of Mr McPherson's absence, the #2 Pulp Dryer machine was short-staffed and had to be shut down for safety reasons. The company says that there was therefore a loss of production that day.

[16] A disciplinary proceeding was instituted. This resulted in Mr McPherson being dismissed for failing to follow a lawful and reasonable instruction and failing to disclose why he was unavailable to work.

[17] In Mr McPherson's statement of problem of 27 May 2021, he alleged that he had been entitled to refuse to work what were in fact extra hours. He also asserted that there was not a qualifying availability provision which required him to attend work when requested because there was no allowance for compensation as required under s 67D of the Act.

[18] An application for interim reinstatement was brought. The Authority found against Mr McPherson on various grounds.

[19] In assessing whether there was a serious case to be tried, it noted that although Mr McPherson asserted there was an issue about the adequacy of an availability provision in his IEA, this was a claim which he advanced after the event. It was not provided as an explanation for his refusal to undertake extra work during the disciplinary process.2

[20] The Authority went on to find on an interlocutory basis that Oji was entitled to provide lawful and reasonable instructions to Mr McPherson, that the requirement to work extra hours to provide cover on an un-rostered basis was a contractual requirement under Mr McPherson's IEA, and that there was an allowance for this factor in his salary whether or not he worked the hours. For these and other reasons, it concluded Mr McPherson had an arguable case for unjustified dismissal but not a strong one.3 After reviewing reinstatement considerations, the Authority concluded that Mr McPherson did not have a more than weakly arguable case.4

[21] The Authority considered balance of convenience and overall justice considerations and concluded that the application for interim reinstatement should be dismissed.5

[22] Subsequently, in June 2022, the Authority investigated a separate relationship problem raised by Mr McPherson and eight fellow workers.

[23] The Authority recorded that the context of the problem was whether Oji breached the availability provisions of the Act by requiring the applicants to be on-call during their rostered days off and by not paying them reasonable compensation for their availability.6

2 *McPherson v Oji Fibre Solutions (NZ) Ltd* [2021] NZERA 383 at [58].

3 At [58]–[66].

4 At [67]−[73].

5 At [85].

6 *Hastie v Oji Fibre Solutions (NZ) Ltd* [2022] NZERA 263 at [1].

[24] After reviewing the circumstances, the Authority found that the applicants were rostered to work 2,184 shift hours per annum. This was based on a four-days on, four-days off shift system. Each day was worked for 12-hours. The applicants were also required to work 175 extra un-rostered hours as necessary in specified circumstances. The Authority determined these were the "agreed hours of work" for the purposes of s 67C of the Act.7

[25] Then the qualifying criteria in s 67D(1) and (2) were analysed. The Authority concluded that the arrangements recorded in the IEAs were not availability provisions as provided for in the Act. An aspect of its reasoning was that payment for the 175 extra hours was guaranteed and paid irrespective of whether or not the extra hours were worked.8

[26] The Authority accordingly concluded that there was no availability provision in the IEAs which covered the applicants. The determination was issued on 22 June 2022.

[27] Mr McPherson and six of the original applicants then brought a challenge to this determination on 13 July 2022. After a statement of defence was filed by Oji on

12 August 2022, a telephone directions conference was arranged for 13 September 2022. On that occasion, I was advised that an application for removal of Mr McPherson's personal grievance proceeding was under consideration by the Authority. I was told that were it to be allowed, consideration would need to be given to the possibility of the personal grievance being heard at the same time as the dispute.

[28] After exploring potential hearing dates when counsel, witnesses, and the Court would be available, I confirmed in a minute of 13 September 2022 that possible hearing dates were available for 7, 8 and 9 December 2022 for the hearing of the challenge. That hearing could potentially be in Auckland, but the Registrar was directed to explore other dates in various regional courts, so as to accommodate the location of the various witnesses who work at the Kinleith Mill. I also recorded that

7 At [36]−[37].

8 At [31].

if the personal grievance proceeding was to be removed, hearing both matters concurrently may have an impact on the length of the hearing.

[29] The Registrar explored dates in various regional courts. Although earlier dates were available in the Tauranga District Court, not all witnesses could attend at that time.

[30] The Authority then issued its removal decision on 15 September 2022.9 It was not persuaded that the personal grievance proceeding was "the same as or similar to" the dispute proceeding.10 Having recorded its understanding that there would be a significant lapse of time before the matter could be heard in the Court, it also determined it was preferable to proceed with the imminent investigation meeting. The application to remove was accordingly declined.

[31] An application for special leave to remove the personal grievance proceeding was filed on 23 September 2022, which was dealt with urgently. This was necessary because the application would have to be resolved before the investigation meeting which had been established for 26 and 27 October 2022 commenced. Accordingly, I convened an urgent telephone directions conference with counsel and timetabled the application for a submissions-only hearing for 12 October 2022. I indicated my judgment would be issued as quickly as possible and prior to 26 October 2022.

[32] I also confirmed that hearing time was available in Auckland in early December 2022, and that after my judgment was issued, there would be a telephone directions conference to discuss the necessary procedural steps in this Court once the outcome of the application for special leave was known.

Legal framework

[33] The salient provisions of s 178 of the Act are:

178 Removal to court

(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the

9 *McPherson v Oji Fibre Solutions (NZ) Ltd,* above n 1.

10 At [40].

court to hear and determine the matter without the Authority investigating it.

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

...

> (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).

...

> [34] In summary, an application to the Court is one for special leave, which is governed by the criteria of s 178(2)(a)–(c).
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> [35] This case focuses on the first and third of these criteria.
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> [36] In assessing the criteria in s 178 there is no presumption in favour of or against removal. To do so would undermine Parliament's clear intent that while some matters ought to be dealt with in the Authority, that is not the appropriate approach for other matters in light of their nature or circumstances.11
>
> [37] For the purposes of s 178(2)(a), a question of law does not need to be complex, tricky or novel to warrant being called important.12 It may be important if the answer is likely to have a broad effect or could assume significance in employment law generally. But previous cases have made it clear that it is not necessary for the issue to have an impact beyond the particular parties. Rather, a question may be regarded

11 *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [21];

Auckland District Health Board v X (No 2) [2005] NZEmpC 62; [2005] ERNZ 551 (EmpC) at [44].

12 *Johnston v Fletcher Construction Co Ltd,* above n 11, at [22].

as important if it is decisive of the case or some important aspect of it or is strongly influential in bringing about a decision in the case or a material part of it.13

> [38] Turning to s 178(2)(c), a different set of criteria apply. Under that provision, it is necessary to compare the proceeding before the Authority with the proceeding before the Court. As part of that assessment, it is necessary to consider whether the two proceedings are between the same parties, and whether they involve "the same or similar or related issues".
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> [39] Judge Ford noted in *Randwick Meat Company Co Ltd v Burns* that the Court does not necessarily need to carry out an issue-by-issue analysis as to which evidentiary matters in the respective proceedings may or may not overlap, or whether certain matters can be dealt with separately. He concluded that once it is established that the proceedings are between the same parties, the test envisages a more holistic consideration of the relevant issues.14 I agree.
>
> [40] The question raised by the subsection is whether there is a sufficient nexus between the two sets of proceedings to justify removal. The goal is to achieve the apparent policy imperatives of practical justice that fall for consideration when there are related proceedings before two employment institutions. These imperatives include mitigating time and cost for the parties, reducing a risk of inconsistent findings of fact or law, and allowing for the more efficient use of judicial resources.

First issue: sufficient similarity?

> [41] Mr Mitchell, counsel for Mr McPherson, suggested the ground raised under s 178(2)(c) was the stronger of the two grounds raised. I therefore deal with that ground first.
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> [42] He submitted that the same question of law lay at the heart of both Mr McPherson's personal grievance proceeding and

the interpretation proceeding.

13 At [22]; and *Auckland District Health Board v X (No 2),* above n 11, at [35].

14 *Randwick Meat Company Co Ltd v Burns* [2015] NZEmpC 188 at [27].

> [43] By contrast, Mr France, counsel for Oji, submitted that the nature of each proceeding was quite different. He submitted that a broader analysis would be required for the purposes of the personal grievance. That analysis would entail an assessment of whether the steps taken by the employer were those of a fair and reasonable employer in all the circumstances. Whilst consideration of the validity of the availability provisions contained in Mr McPherson's IEA would arise, the central point would be whether the dismissal was justified and if not, whether reinstatement was an available remedy.
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> [44] A point raised in the submissions of both counsel related to the potential application of the line of dismissal cases where an instruction has been given by an employer, who asserts it was lawful and reasonable, in a context where there is a bona fide dispute as to the parties' legal rights.
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> *[45] Sky Network Television v Duncan* is one well known example.15 After reviewing previous authorities, Judge Travis concluded that the issue was not purely whether the employer's instruction was lawful. If there was a bona fide dispute as to the employee's legal rights, the justification for the dismissal should not depend on the resolution of the dispute. If it turned out the employer's interpretation was incorrect, the order would have been unlawful. It did not follow that if the dispute was resolved in favour of the employer, that would necessarily justify the dismissal of an employee who had bona fide grounds for advancing a contrary interpretation, and who, objectively analysed from the viewpoint of the fair and reasonable employer, was not engaged in activities which destroyed the essential trust and confidence or went to the root of the contract.16
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> [46] Mr France accepted that the decision-maker dealing with Mr McPherson's personal grievance would have to look at the merits of the legal argument for the purposes of assessing justification, but he argued that the decision-maker would not necessarily have to resolve that debate.

15 *Sky Network Television Ltd v Duncan* [1998] 1 ERNZ 354 (EmpC). On appeal, the Court of Appeal agreed with the statement of law expressed by Judge Travis: see *Sky Network Television Ltd v Duncan* [1998] NZCA 246; [1998] 3 ERNZ 917 at 923.

16 At 361.

> [47] Mr Mitchell has advised the Court that Mr McPherson's case, in both instances, will focus on how the provisions relating to agreed hours of work are to be interpreted under s 67C and then applied under s 67D(1) and (2). A further legal issue which he said would be common to both cases is that as there was an availability requirement, the IEA should also have allowed for the payment of reasonable compensation under s 67D of the Act.
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> [48] For the purposes of the personal grievance proceeding, it will be submitted that there is no provision for reasonable compensation. As a result, under s 67E of the Act an employee such as Mr McPherson was entitled to refuse the instruction to undertake extra work. Further, under s 67F of the Act he was entitled not to be treated adversely after refusing to perform certain work under.
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> [49] Thus, Mr Mitchell submits that it will be necessary to consider the extent of Mr McPherson's statutory rights when assessing justification.
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> [50] At this early stage, it is not appropriate to resolve how a decision-maker – whether the Authority or the Court – would resolve the question as to whether Oji was justified in dismissing Mr McPherson for refusing to obey an order. However, it can be concluded that it will be necessary to consider Mr McPherson's legal rights arising from the terms of his IEA and the extent to which these impact on the assessment of justification.
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> [51] In the dispute proceeding, the Court will also be considering whether the provisions of the same IEA met the availability requirements of the Act. It will do so by undertaking an orthodox interpretation analysis which will focus on the IEA's and the relevant sections of the Act.
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> [52] Considering the two proceedings on a holistic basis, I am not satisfied that the personal grievance proceeding involves the "same" issues that arise in the interpretation proceeding. The personal grievance proceeding will require a factual and legal analysis as to justification, and the possible consideration of remedies including reinstatement. This exercise is different from that which will be required in the interpretation proceeding; on the basis of the challenge raised, the Court will need

to consider if a declaration should be made that the particular clauses of the IEAs constitute an availability provision, and if so, whether a declaration should be made that these are unenforceable due to non-compliance with the statutory requirements.

> [53] However, I am satisfied that the issue is sufficiently central to both proceedings as to conclude that the personal

grievance is one involving "similar, or related issues" to those which will arise in the interpretation proceeding. Accordingly, this ground for special leave is established.

Second issue: important question of law likely to arise other than incidentally

[54] The ground relied on under s 178(2)(a) is different in that it requires the Court to categorise a question of law and to ask whether it is likely to arise in the matter other than incidentally.

[55] At the heart of Mr Mitchel's submission was the contention that although there have been relatively few judgments of the Court dealing with availability provisions, none of these have involved an analysis of ss 67E and 67F in the context of justification for dismissal.17 Mr France acknowledged that point. The decision-maker will have to consider how those sections interface with the principles of justification in s 103A of the Act.

[56] A collateral question which may fall for consideration is whether the statutory protections apply even when the employee did not rely on them at the time. This was the case here, according to the Authority's analysis in the interim reinstatement determination. It appears the issue will be: since Mr McPherson did not expressly rely on the alleged non-compliant availability provisions to refuse extra work, can Oji therefore say it was entitled to require him to undertake the extra work?

17. *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 49 [2019] ERNZ 78; and *Lye v ISO Ltd* [2020] NZEmpC 231, [2020] ERNZ 551.

[57] This legal question has not been considered previously in a dismissal case. As observed by Chief Judge Colgan in *Flight Attendants and Related Services (NZ) Assoc Inc v Air New Zealand Ltd*, the scheme of the legislation is not that the first instance body determines authoritatively questions of law. This is because it is a pragmatic problem-solving and investigative body as confirmed in s 143(f), (fa) and (g).18

[58] In my view, the legal point here is one which will arise other than incidentally. It is one of some importance to the present parties and potentially to others. It is appropriate for this Court to consider how the relevant availability protections in ss 67E and 67F should interface with s 103A of the Act.

[59] This ground for removal is also made out.

Third issue: discretionary considerations

[60] The final issue is whether the application for special leave should be declined.

[61] When the Authority considered removal, it referred to timing issues. It recorded a submission, which it said had been made for Oji, that there would be significant delay were the matter to be removed to the Court.

[62] Mr France submitted that a misunderstanding had arisen from the particular submission he had made to the Authority and that what was said as to timing was not in fact correct. I accept a misunderstanding arose.

[63] Mr France accepted that the timing for hearing the personal grievance in the Authority would not be greatly delayed were it to be removed. Both bodies can hear the grievance by the end of this year. Plainly, timing is not a consideration which could lead to a conclusion that it is preferable for Mr McPherson's claim to remain before the Authority.

18. *Flight Attendants and Related Services (NZ) Assoc Inc v Air New Zealand Ltd* [2013] NZEmpC 125 at [33].

[64] Mr France also submitted that it would be desirable for the Authority to undertake the initial investigation, given its background involvement and knowledge of the issues.

[65] However, Mr Mitchell said in a related submission that this was not the case. He argued that in hearing the personal grievance, the Authority would be required to determine whether or not there is an availability provision, having already decided that there was not in the context of the interpretation dispute.

[66] He submitted it would be difficult for the Authority to reach a different conclusion for the purposes of the personal grievance. Moreover, since the Authority's original conclusion is now under challenge, an investigation by the Authority involving the same point would result in a needless hearing, because the resulting determination would inevitably be challenged.

[67] In *Transpacific Industries Group (NZ) Ltd v Harris*, Judge Couch noted that there may be circumstances where one hearing of a matter moved to the Court is preferable to an investigation meeting and a hearing de novo of a challenge.19 This observation is particularly apt in the present case given its relatively unusual procedural history.

[68] These considerations are an answer to Mr France's submission that it would be preferable for the matter to remain with the Authority given its knowledge of the background. Accordingly, I place this particular consideration to one side.

[69] There are no other compelling reasons for declining leave.

Result

[70] Mr McPherson's application for leave is granted. The proceeding in the Authority is removed to this Court.

19 *Transpacific Industries Group (NZ) Ltd v Harris* [2012] NZEmpC 17 at [23]; see discussion in

Johnston v Fletcher Construction Co Ltd, above n 11, at [36].

[71] Costs are reserved. If they cannot be agreed, the applicant is to file and serve any submissions in support of his application within 15 working days of the date of this judgment. Any response is to be given within a like period.

B A Corkill Judge

Judgment signed at 12.20 pm on 17 October 2022
