

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Heather Miller (Initiating party)
AND Michael Percy Investments Limited t/a Field Maple (Responding party)
REPRESENTATIVES Phil Butler (Advocate for the Applicant)
Scott Fairclough (Counsel for the Respondent)
MEMBER OF AUTHORITY Paul Montgomery
APPLICATION & REPLY 05 September 2005 and 22 September 2005
DATE OF DETERMINATION 03 October 2005

DETERMINATION OF THE AUTHORITY

The Problem's Progress

[1] On 24 December 2004 Heather Miller (Ms Miller) lodged a Statement of Problem and an Amended Statement of Problem was lodged on the 22 February 2005 which resulted in the Statement in Reply being lodged and served on the 9 March 2005.

[2] Ms Miller claimed that Michael Percy had defaulted in the payment of commissions, breached Section 64 of the Employment Relations Act and unjustifiably dismissed her from her employment. Those claims were denied by Mr Percy.

[3] The preliminary issue for determination was whether or not an employment relationship existed between the parties. It was agreed at a telephone conference held between the Authority and the representatives of the parties on 14 April 2005 that an investigation meeting would be convened on 10 May 2005 to deal exclusively with the question of whether there was in fact an employment relationship or not.

[4] However, the original determination, dated 26 May 2005, contained an error as to the date of a significant letter written by Mr Michael Percy to Ms Miller and when that error was pointed out to the Authority, the original determination was recalled and a fresh determination dated 16 June 2005 was issued with appropriate corrections. The Authority determined there was an employment relationship between the parties.

[5] In the directions conference held on 9 June 2005 at which the error in the original determination was discussed, the Authority Member undertook to:

- a. Correct the error; and

b. To stand aside from the substantive investigation meeting which was at that stage scheduled for the 28 June 2005.

[6] The Authority Member offered to stand aside from the substantive investigation meeting because the representative for Ms Miller indicated that, despite the fact that Ms Miller had been successful in the preliminary decision the Member had issued in relation to her employment status, Ms Miller had lost confidence because of the error in the date of the letter which is referred to above. As a consequence, the Authority Member withdrew and the matter has passed to me.

[7] The respondent has challenged the determination in respect to the finding of an employment relationship and that challenge was filed on the 13 July 2005.

[8] This detailed background is given because it is relevant to the consideration of the application for removal which I now turn to consider.

The Removal Application

[9] On 5 September 2005 the Authority received an application seeking to have the whole matter removed to Employment Court. The respondent's solicitor duly lodged a Statement in Reply opposing removal, which was received on 22 September 2005.

[10] Section 178 (2) of the Employment Relations Act 2000 states

- (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.

[11] The ground set out in the application is that contained under Subsection (2) (c).

[12] That application for the whole of the matter to be determined by the court is opposed by the respondent.

[13] Clearly the Court already has before it a challenge to the preliminary determination of the Authority and the proceeding before the Court is between the same parties and involves issues related to the issues that the applicant proposes should be removed. However, they are not part of the same factual matrix which forms the basis of the applicant's claim in respect of her personal grievance and remedies.

[14] Of necessity, the matters are discrete in that the matter before the Court is concerned with the type of relationship between the applicant and the respondent, while the substantive issues turn on a separate factual matrix relating to the applicant's claim of unjustifiable dismissal and remedies.

[15] The determination of this whole matter is a two-step exercise. It now falls to the Employment Court to determine the first step however, given that the second step turns on completely different set of facts and none of the other three grounds under Section 178 of the Act are made out, I decline the application.

[16] I will accord this substantive matter priority once the decision of the Court has become available.

Orders

[17] I decline to order the removal of the substantive matter.

Costs

[18] Costs are reserved and will be dealt with either as part of the substantive matter or following issue of the Court's decision should the Court elect not to deal with costs in the Authority.

Paul Montgomery
Member of Employment Relations Authority