

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 365/08
5132597**

BETWEEN OLDSCO PTI LIMITED
Applicant

AND PHILIP HOUSTON
Respondent

Member of Authority: Leon Robinson

Representatives: Tony Drake, Counsel for Applicant
Penny Swarbrick and Payal Mudaliar, Counsel for
Respondent

Investigation Meeting: 20 October 2008

Determination: 23 October 2008

DETERMINATION OF THE AUTHORITY

Application for removal

[1] The applicant Oldco PTI Limited ("Oldco") lodged a statement of problem on 6 August 2008 ("the statement of problem") seeking damages against the respondent Mr Philip Houston ("Mr Houston"). It also lodged an application to remove the matter to the Court. This determination disposes of that application for removal.

[2] The Authority has received affidavit evidence and heard argument from Counsel.

The background

[3] These parties were also parties in a previous investigation by the Authority ("the previous investigation"). That investigation was concluded by the Authority's determination dated 20 January 2007¹. The determination has been challenged in proceedings in the Employment Court Auckland Registry numbered ARC43/07 ("the challenge").

¹ *Houston & Oldco PTI Limited*, unreported, AA184/07, 20 June 2007, M Urlich

[4] The statement of problem claims substantial damages against Mr Houston arising out of alleged breaches of his contractual duties as well as alleged fiduciary obligations. The statement of problem was lodged as a response to his counsel's objection to the pleading of the claim for damages in the challenge. The objection was that the claim for damages was not before the Authority. Oldco wishes the claim for damages be heard by the Court and consolidated with the challenge. Mr Houston opposes this application for removal.

The grounds for removal

[5] The application for removal is on the grounds that the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. It is submitted that where one of the statutory steps has been made out, the Authority then has a residual discretion to determine whether there are any relevant factors against removal.

The legal principles

[6] Parliament has provided that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. Institutions and procedures are established to ensure that investigations by the Authority as a specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations. But there are special cases.

[7] Parliament has also provided for particular cases to may be removed to the Employment Court for hearing and determination at first instance rather than being investigated conclusively by the Authority. Section 178 of the *Employment Relations Act 2000* ("the Act") is as follows:-

178. Removal to Court

(1) *Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*

(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, 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).*
- (4) *An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.*
- (5) *Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
- (6) *This section does not apply—*
- (a) *to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
 - (b) *without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.]*

[8] I have considered determinations of the Authority in *Department for Courts & Crofts*² and *Miller & Michael Percy Investments Limited*³ as well as judgments of the Court in *Auckland District Health Board -v- X (No 2)*⁴ and *Rooney Earthmoving Limited -v- McTague and others*⁵ for guidance as to the relevant principles.

[9] *Rooney* was an application to leave to extend the time for challenge but concerned a claim for damages by an employer against former employees. That is the situation in the present instance. The Chief Judge commented *obiter* on the appropriateness of the Authority considering the claims. His Honour stated at paragraph [49]:-

But I question seriously the appropriateness of such a case being considered first in an investigative body that has the role of resolving employment relationship problems according to the substantial merits and equities of the case without regard to technicalities (s157(1)) and whose aim is to promote good faith behaviour and support successful employment relationships (s157(2)).

The merits

[10] Oldco says that it was not in a position to pursue a counter-claim for damages against Mr Houston in the previous investigation. It says it was unable to do so

² unreported, AA113/01, 14 August 2001, R Monaghan

³ unreported, CA78A/05, 3 October 2005, P Montgomery

⁴ [2005] 1 ERNZ 551, Colgan CJ

⁵ unreported, CC7/07, 11 May 2007, Colgan CJ

because of commercial sensitivities. Counsel refers the Authority to Oldco's statement in reply dated 4 April 2005 where it said:-

Oldco PTI Limited and companies related to it have substantial counter claims relating to the actions of the Applicant. The Respondent strongly believes that the actions of the Applicant were such that he failed in his duties and obligations to the company and was guilty of serious misconduct. For reasons of commercial sensitivity the Respondent believes it inappropriate to disclose the full nature of the actions.

[11] So the claims were not before the Authority in the previous investigation. When it pleaded its claim for damages against Mr Houston in the challenge, Mr Houston objected. This present application was an alternative to a strike-out application by him.

[12] Ms Swarbrick mounts a number of arguments on Mr Houston's behalf to resist removal. Counsel says the Authority is best suited to assess the factual issues by use of its unique investigative process. It is said that the matters raised in the statement of problem have never been put to Mr Houston and there has been no discussion whatsoever between the parties about them. That situation is said to be unfair to Mr Houston if he has no right to challenge or appeal the factual findings. It is true that the court is the only "judicial" trier of fact in the employment law jurisdiction and litigants have no right of appeal from its factual findings. Ms Swarbrick says that Mr Houston desires access to the unique methodologies of the Authority and its problem-solving approach unconstrained by formalities or legal technicalities. Counsel says Mr Houston prefers to avail himself of the first instance forum before there is recourse to the judicial institutions.

[13] Oldco says that the issues raised in the statement of problem and in the challenge are "the same, similar or related" in conformity with section 178(2)(c) of the Act and thereby sufficient to support removal.

[14] I agree with counsel as to the distinction to be made between "issues" and "causes of action". I also agree that the purpose of section 178 is essentially about practicalities. It is undesirable to have unnecessary duplication of proceedings and discordant factual findings. It is desirable and convenient that related proceedings be disposed of together. These considerations are ultimately directed at the proper

administration of justice. They are concerned with the efficient use of scarce judicial and institution time and resources. I regard this as the purpose behind the power of removal and I interpret the provision with that purpose in mind.

[15] Mr Drake outlines issues, not causes of action, said to be common to both the Authority's investigation and the challenge to demonstrate that the Court already has proceedings which involve the same or similar or related issues. The issues alleged are:-

- (i) What were the terms and conditions of the Mr Houston's employment with Oldco and whether a disputed employment agreement which Mr Houston produced some time after the employment ended is bond fide;
- (ii) Whether Mr Houston is entitled to claim part of his salary which was payable to his (estranged) wife and whether that arrangement was unlawful, and whether Mr Houston is liable if not lawful;
- (iii) The expenses Mr Houston was authorised to claim as an employee;
- (iv) Whether during the course of the employment Mr Houston acted in a manner which any remedy as may be awarded to him in respect of his personal grievance should be reduced having regard to his own contribution or whether he should be liable to pay damages to Oldco for losses caused by his actions;
- (v) The factual circumstances, particularly from April to December 2004, which led to the receiver of Oldco's sole shareholder giving Mr Houston the option of either resigning from all positions he held with Oldco and the rest of the companies in the group, or facing a liquidation of all the group companies. The facts which go to explain why Mr Houston resigned and was not dismissed, constructively or otherwise, and why he should be liable in damages for his actions before resigning are all the same or related.

[16] Ms Swarbrick's principal response is that there is no overlap in the issues before the Court and the Authority. Counsel points out that Oldco does not plead in the challenge that Mr Houston was dismissed for cause. The allegation in the statement of claim is that Oldco denies Mr Houston was unjustifiably dismissed not because the dismissal was justifiable, but rather, because there was no dismissal. It pleads Mr Houston resigned. I too interpret that particular pleading and the statement of claim as a whole as not putting in issue the justification of any dismissal as might be found. There is no specific pleading as to any grounds of justification. Oldco pleads only that Mr Houston resigned and there is no claim in the alternative.

[17] I accept that both proceedings will involve ascertaining the terms of Mr Houston's employment. That is the foundation enquiry for any claims between the parties because the relationship is contractually based. That same enquiry will shed light on the expenses Mr Houston was entitled to claim and also the nature and lawfulness of the payment directed to his estranged wife.

[18] In adversarial litigation the burden falls on Mr Houston to establish that he was dismissed. He does not bear any onus to show he should not have been dismissed if it is found that he was. The onus will then fall to Oldco to prove any such dismissal as may be found, was justifiable. But it does not plead that way.

[19] The present statement of problem pleads conduct by Mr Houston as foundation for damages against him. That is the principal claim now before the Authority for which Oldco desires resolution. If the challenge is confined, because of the way it is presently pleaded, to the nature of the termination without any enquiry into justification, I do not see how issues (iv) and (v) above could be tried in the Court. Conduct alleged to be in breach of contract would not be in issue.

[20] For this reason, I do not agree that issues (iv) and (v) for investigation in the Authority are the same or similar issues for trial in the court. I conclude in respect of those two substantial issues, that the two proceedings do not involve "the same or similar" issues.

[21] But are the substantial issues (iv) and (v) for investigation in the Authority "related" to the more limited in scope proceedings in the Court? Mr Drake provides

the dictionary definition of "related" to the Authority. It means "having relation", "having mutual relation" or "connected". Mr Drake points out there is no qualification to either "same or similar" or "related".

[22] They are related obviously involving the same parties. Again there is no qualification as to the degree or extend of the relation. I characterise the challenge, as apparent from the present pleadings, as being about whether or not Mr Houston resigned. I characterise the Authority investigation, as apparent from the statement of claim, as being about damages. If I have correctly characterised both proceedings, I do not see any real connection.

[23] In fortification I revert again to purpose, it is undesirable for there to be unnecessary duplication of evidence, time and resources. If I have correctly characterised the essential respective enquiries, I am not persuaded there will be any unnecessary or undesirable duplication and therefore the two proceedings do not involve the same or similar or related issues. I am therefore satisfied the matter cannot be removed under section 178(2)(c) of the Act.

[24] I now give consideration to whether in all the circumstances the Court should determine the matter as grounds for removal under section 178(2)(d). I am not persuaded there are any such circumstances. On the contrary, I do not regard it reasonable that Mr Houston should be deprived of his entitlement to a first instance non-adversarial investigation because Oldco could not proceed initially to pursue its counter-problem as a response in the previous investigation.

The determination

[25] For the reasons stated above, **I decline to exercise my discretion to order the removal of this matter to the Employment Court.**

[26] Oldco is entitled to challenge my refusal or make application to the Employment Court for special leave. While a challenge does not operate as a stay, I consider it prudent to take into account any application for special leave. For that reason, I suspend this investigation for 28 days. The application for removal being put before me as Duty Member, any substantive investigation will be assigned to another Member.

Costs

[27] If any party seeks costs that party may make application for the same in writing within 28 days from the date of this determination. I will make appropriate directions in the event that an application is lodged.

Leon Robinson
Member of Employment Relations Authority