

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 8  
5450533**

BETWEEN

FREDERICK PRETORIUS  
Applicant

AND

MARRA CONSTRUCTION  
(2004) LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Danny Jacobson, Counsel for Applicant  
Ken Patterson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 12 November 2015 from Applicant  
19 November 2015 from Respondent

Determination: 7 January 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Frederick Pretorius claims that he was unjustifiably dismissed by the Respondent, Marra Construction (2004) Limited (Marra)

[2] Mr Pretorius further claims that Marra breached an oral agreement made in 2007 to pay him an increased salary rate and a bonus.

[3] The preliminary issue of whether or not the remuneration arrears claims brought by Mr Pretorius are outside the six year limitation time period set out in s.142 of the Employment Relations Act 2000 (the Act) and thus statute barred from proceeding in the Authority was addressed in determination [2015] ERA Auckland 314. That determination has been appealed to the Employment Court by both the Applicant and the Respondent.

[4] Mr Jacobson, on behalf of Mr Pretorius seeks an order for removal to the Employment Court for hearing and final determination of his remuneration arrears claims.

[5] Mr Patterson, on behalf of Marra, opposes removal.

*Submissions of the Applicant*

[6] Mr Jacobson submits as relevant to this issue that:

- i. There is an important question of law involved in the application of s.142 of the Act as that provision applies to determining when a cause of action arises on a breach of promise to pay an increase in remuneration to a salaried employee, or alternatively on a claim for *quantum meruit*.
- ii. Given that the Respondent has challenged parts of determination [2015] ERA Auckland 314 and a challenge *de novo* has been made by the Applicant, the Court already has proceedings before it which are between the same parties and which involve the same or similar matters;
- iii. The remuneration arrears claims are a distinct and separate matter from the unjustifiable dismissal claim remaining before the Authority;
- iv. The Authority has, apart from the issue of a bonus payment, effectively determined the remuneration claim arising under contract, and has finally determined the claim in *quantum meruit*; and
- v. It is in the interests of justice that Mr Pretorius not be put to the cost of having his remuneration arrears claims referred back to the Authority when those claims can be more efficiently dealt with in the Employment Court when it determines the challenge before it.

*Submissions of the Respondent*

[7] Mr Patterson opposes removal of Mr Pretorius remuneration arrears and submits:

- a) The fact that there is an important question of law surrounding the application of s.142 of the Act is irrelevant in the circumstances and therefore does not provide a proper ground for removal. The circumstances are:
  - i. Determinations on s.142 can and have been regularly dealt with more than adequately by Members of the Authority;
  - ii Section 142 has been the subject of determination in this instance.

- b) The fact that both Applicant and Respondent are challenging determination [2015] ERA Auckland 314 does not provide grounds to move the entire remuneration arrears claims proceedings to the Court.
- c) The issues to be resolved between the parties are wider than the issues being currently referred to the Court:
  - i. It is only the preliminary issues that were the subject of determination [2015] ERA Auckland 314. The remaining issues which involve an unjustified dismissal and a very significant counterclaim by the Respondent still remain before the Authority.
  - ii. It is illogical to have the claims split as suggested by the Applicant which confirms in its application for removal that the unjustified dismissal claim will remain before the Authority.
  - iii. The Applicant had made no comment in the application on the counterclaim which also remains for determination by the Authority.
- d) The Authority has not ‘*effectively finally determined the remuneration claim*’. On the contrary the determination of the Authority specifically stated that no such ruling had been made.<sup>1</sup>
- e) It is not in the interests of justice that this matter should be referred to the Court.
- f) The Authority is a cost-effective medium properly equipped to resolve the entirety of this dispute between the parties.

## **Removal Application and discussion**

### *General Principles of Removal*

[8] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

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<sup>1</sup> *Pretorius v Marra Construction (2004) Limited* ERA Auckland 314 at para [28]: “*I note that this determination is concerned only with whether or not Mr Pretorius is able to raise a claim on this basis; I make no determination at this stage on the merits of such claims.*”

[9] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court<sup>2</sup>.

### **Determination**

[10] The Authority is an investigative body and I find that the remuneration arrears claims in this matter are factual areas which the Authority has been statutorily charged with investigating.

[11] I observe that in determination [2015] ERA Auckland 314 at [28] I specifically commented that I had made no determination on the merits of Mr Pretorius' remuneration claims.

[12] Following the judgment of the Court on the appeals raised in reference to determination [2015] ERA Auckland 314, I consider it appropriate that the matter be remitted back to and dealt with in the Authority in light of that judgment, and in this respect I note that there is an absolute right of challenge to the Court on that subsequent determination.

[13] In relation to the question of the issue being an important question of law pursuant to s.178 (2)(a) of the Act I find that the Applicant's personal grievance claim, which remains with the Authority, is of a nature that is appropriately dealt with by the Authority.

[14] I observe that the Authority has previously<sup>3</sup>, and is able to, determine claims based upon issues regarding the limitation period pursuant to s.142 of the Act.

### *In All the Circumstances*

[15] In light of my findings as outlined above, I do not consider that this matter should be removed to the Court pursuant to s 178(2)(d) of the Act.

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<sup>2</sup> *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]

<sup>3</sup> Cf: *Abbot v Alles Verlore Limited* [2014] NZERA Auckland 421; *Lau v Canaan Productions Ltd* [2011] NZERA Auckland 29; *Tan v Wang & Anor* 29 Sept CA 189/10

## **Costs**

[16] Costs are reserved pending the final determination of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**