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Q v W (Auckland) [2008] NZERA 116 (2 September 2008)

Last Updated: 31 July 2013

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA223A/08

5096586

BETWEEN Q

Applicant

AND W

Respondent

Member of Authority: James Wilson

Representatives: Aaron Crabb for the applicant and Ms Q in person

David France for the respondent

Investigation Meeting: Determined on the papers

Determination: 2 September 2008

DETERMINATION OF THE AUTHORITY OF APPLICATION TO REMOVE MATTER TO THE COURT

Background

[1] In a determination dated 30 June 2008 (AA 223/08) I stated:

[16] In terms of Clause 4 of the Second Schedule to the Employment Relations Act the Authority's investigation into Ms Q 's application for removal (as previously decided in determination AA 311/06; 3 October

2006) is reopened on the terms set out below.

[17] The Authority has previously received extensive submissions from the parties regarding the application for removal and these will be taken into account in reconsidering this application. However should the parties wish to make further submissions regarding the application for removal these are to be filed and served within 14 days of the date of this determination. Should such submissions be filed the parties will have seven days in which to file submissions in response.

[18] Following receipt of any further submissions and submissions in reply the Authority will determine whether or not Ms Q 's application in respect to the 90 day issue (as set out in her application for removal received on 4 July 2006) should be removed to the Employment Court.

[19] It is my inclination to determine the question of removal on the papers. However should either party believe that an investigation meeting would be beneficial they should advise the Authority forthwith and I will convene a telephone conference

to discuss whether or not a meeting is necessary and if so to make the necessary arrangements.

[2] Following that determination, both parties indicated that they did not wish to file further submission in respect to Ms Q's application i.e. that her application in respect to the 90 day issue be removed to the Employment Court.

[3] The history of Ms Q's various claims was set out in my earlier Determination (AA 223/08, 30 June 2008) and it is not necessary for the purposes of this determination to canvass that history again.

Application for removal

[4] In June 2006 Ms Q applied to have a matter removed to the Employment Court. She has challenged, in the Employment Court, the Authority's determination that she had not raised a personal grievance with her employer within the 90 day period required by section 114(1) of the Employment Relations Act (the Act). In the alternative, if it is determined by the Court that she did not raise her grievance within 90 days, she has applied to the Authority for leave to have the matter heard out of time on the basis that there were *exceptional circumstances* (section

114(4) of the Act. It is this application for leave that she has requested be removed to the Court.

[5] In support of her application for removal Ms Q relied on a minute of Judge Travis, in the Employment Court, dated 10 December 2004, in which the Judge said:

1.....

2. *One of the matters before the Court is **whether or not the grievance was raised within the 90 day time limit. The [...] was successful before the Authority in obtaining a ruling that it was not.***

3. *That has been challenged and will need evidence in support and in opposition.*

4. ***However the plaintiff has also indicated she is now wishing to seek leave if it is determined that the grievance was not raised within the 90 day limit. Counsel and the Court are in agreement that it is unlikely that the Court has originating jurisdiction on that matter as it was not previously raised before the Authority.***

5. *Counsel are to consider their respective positions but the likely indication is that **the plaintiff will be applying in the Authority for leave and seeking to have the matter transferred to the Court so that all matters may be heard together.** It is likely that there will be, if that course is successful, a hearing to deal with all matters regarding the limitation period, which at the same time could also accommodate those matters contained in the challenge in relation to the arrears claims.*

6. *If the plaintiff is successful then the grievance itself may have to be dealt with by the Employment Relations Authority which has never determined the grievance because of the rulings it made on the limitation period. That is a matter that can await further consideration.*

[emphasis added]

The University of Auckland's position

[6] In a letter to the Authority dated 19 July 2006, Mr France, for the W, said:

While the respondent opposes the substantive issues for which the applicant seeks removal, given the minute of Judge Travis dated 10 December 2004 and in particular the fact that there are issues already before the Employment Court, it would be practical to remove the application to the Employment Court so that all matters concerning the 90 day issue can be dealt with together.

[7] Following Mr France's letter of September 2006 the Authority was advised that the matters before the Court were, at that point, regarded as having been administratively withdrawn. On that basis the [] advised that there were no grounds for removal and therefore opposed the application. The Authority then declined the application for removal on the basis that, as there were no proceedings before the Court there was no basis for removal.

[8] The Court subsequently, at Ms Q's request, reinstated the proceedings before it. Ms Q then applied to the Authority to reopen her application for removal and this was granted in my determination of 30 June 2008.

Grounds for removal

[9] The grounds on which the Authority may order the removal of a matter to the

Court are set out in the Act at section 178 (2). These are:

(a) An important question of law is likely to arise in the matter other than incidentally; or

(b) The case is of such nature and 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.

Determination

[10] There is currently before the Employment Court challenges by Miss Q against determinations of the Authority - that she had not raised her personal grievance with her employer within the requisite 90 day period (determination AA

179/04, 21 May 2004) and that she had been correctly paid by [W] and was not owed any monies (determination AA179A/04, 13 September 2004). The question of whether Ms Q should be granted leave to pursue a personal grievance due

to exceptional circumstances is clearly related to these challenges. On this ground alone it is appropriate to remove Ms Q 's application to the Court.

[11] In terms of section 178 (2) of the Act, Ms Q 's application for leave to have her personal grievance heard out of time on the basis that there were exceptional circumstances (section 114(4) of the Act) is removed to the Employment Court.

Costs

[12] The question of costs in respect to the application to reopen and the application for removal is reserved. Under the circumstances, and in the interests of avoiding yet more expense for the parties, it may be appropriate for the question of costs to be considered by the Court once all matters before it are completed.

James Wilson

Member of the Employment Relations Authority

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