New Zealand Employment Relations Authority Decisions

Ravnjak v Wellington International Airport Limited [2011] NZERA 174; [2011] NZERA Wellington 46 (25 March 2011)

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Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 46 5332049

BETWEEN DIETER RAVNJAK

Applicant

AND WELLINGTON

INTERNATIONAL AIRPORT LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received: Determination:

G J Wood

Paul McBride for the Applicant
David Burton and Charles McGuinness for the Respondent

On the papers

By 25 March 2011
25 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent (WIAL) seeks the removal of that part of the employment relationship problem between the parties relating to the admissibility of evidence of, and in reliance on, visual images recorded of the applicant, Mr Ravnjak, at his place of work. WIAL claims that this part of the employment relationship problem should be removed to the Employment Court because there is a question of law likely to arise other than incidentally. Mr Ravnjak opposes the application on the basis that there is no important question of law, that the application relates only to the procedure that the Authority is intending to follow and that in any event the Authority ought not to exercise its discretion to remove the matter because it can deal with it more promptly than the Court.

Factual discussion

[2] In preparation for an investigation meeting that was due to be held with urgency today, a witness statement was provided on 15 March from a private investigator and security guard (who is also an employee of WIAL) concerning the installation and monitoring of the visual images recorded. It was not until that date that either Mr Ravnjak or the Authority became aware that the installation and monitoring may have been carried out by a private investigator.

[3] Having received this witness statement, Mr Ravnjak then applied, on 18 March, to have not only the recordings be determined as inadmissible, but also any evidence based on that illegally obtained evidence, namely *the fruit from the poisoned tree.*

[4] Mr Ravnjak claims that because WIAL engaged a private investigator (albeit an employee of WIAL but in his submission not doing the work as part of his employment duties, which involved car parking facilities), the recording was in breach of s.52 of the Private Investigators and Security Guards Act 1974, which provides that private investigators are not to make cinematographic pictures or videotape recordings of other persons without their prior consent in writing. Specifically, s.52(2) provides that:

No photograph or cinematographic film, or videotape recording taken or other recording, or other recording made, in contravention of subsection (1) of this section shall be admissible as evidence in any civil proceedings.

[5] Mr Ravnjak therefore sought an order declaring that all the evidence flowing from the recordings should be inadmissible as unlawfully and/or unfairly obtained. Further issues were said to arise over whether an employer could itself in law rely on such recordings to pursue disciplinary proceedings. I note that in any event it was clear that if successful, such an application would be strongly influential over material parts of the case.

[6] A case management conference call was urgently convened that day, 18 March, during which it was determined to allow both parties to make submissions on the issue by 24 March, but that should either party wish to make an application for removal of any part or all of the employment relationship problem, it should do so by 10 am on 21 March. The parties were also able to make submissions on whether or not they considered that the Authority ought to refer a question of law to the Court. Further mediation was also discussed and it was left to the parties to decide on the value of that.

[7] WIAL did make a removal application (albeit late), which led to a further conference call and a further timetable for submissions, given WIAL's inability to argue the removal application on the call.

[8] On behalf of Mr Ravnjak, Mr McBride submitted in relation to admissibility:

For purely logistical reasons, the applicant does not seek removal of the matter to the Employment Court under s.178. While qualifying criteria may well be made out, the ensuing substantial delays in resolution count against such a course.

In terms of stating a case (question of law under s.177) for the Court, the applicant again notes the delays in that regard, but would abide the Authority's decision were it minded to state a case on an urgent basis.

[9] WIAL has raised a number of issues concerning the admissibility issues, some of which are evidential (such as whether the witness was acting as a private investigator at the time), some of which appear to be of mixed fact and law (such as

whether his actions were covered by the scope of the legislation) and some of which appear purely legal (such as whether the Authority has the power to accept otherwise illegally obtained evidence).

[10] Inquiries by Mr McBride indicated that as at a week ago, the Employment Court would be able to consider an urgent matter from about mid-April.

[11] This determination deals with the application for removal only.

Submissions

[12] On behalf of WIAL, Mr Burton submitted that there were important questions of law in relation to whether WIAL could rely on the recordings, whether the recordings could be admitted in the Authority, and further whether any evidence seen as *fruit from the poisoned tree* could be admitted. Furthermore, whether the Authority's ability under s.162 to *take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not* could override the provisions s.52 of the Private Investigators and Security Guards Act was also said to be an important question of law.

[13] Mr Burton also submitted that this was a matter of law and not procedure. The determination on admissibility had *the potential to change the basis of the respondent's case and the outcome of the Authority's investigation.* He noted that the interpretation of the various sections were clearly legal questions, rather than a determination about process. He also noted that the applicant had previously indicated that *qualifying criteria may well be made out.*

[14] Mr Burton submitted that a conclusive determination of the admissibility issues would be the most effective way to resolve the question as

- it would stop further legal challenge, which appeared highly likely;
- the matter could be dealt with relatively promptly by the Court; and
- damages would be an adequate remedy for Mr Ravnjak should his application prove successful.

[15] In response, Mr McBride submitted that there is no important question of law, as s.52(2) is very clear and that a specific provision in one Act could not override a general provision in another. He also submitted that the admissibility of evidence was a procedural matter and referred to *Oldco PTI (New Zealand) Ltd v. Houston* (unreported, Couch J, 28 March 2006, AC18/06). He also noted that because the Private Investigator and Security Guards Act was to be repealed next month, if there was a question of law it was not important.

[16] Mr McBride submitted that the Authority ought not to apply its discretion to remove the matter in any event because the respondent had delayed matters, despite this being an urgent matter, by filing its application for removal late and not being prepared to progress its own application on 22 March when both the Authority and he were ready to proceed. He also relied on the relative unimportance of the question of law, even if deemed to be important. Finally he noted that there was no certainty about when the Court could hear and determine the matter, but by contrast the Authority was well versed in all the issues, and that removal would lead to further cost, inconvenience and delay for the parties.

[17] In reply, Mr Burton submitted that much of the delay in relation to these issues stemmed from Mr Ravnjak, who delayed raising the initial issue for three days.

The law

[18] Section 178 provides:

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.

[19] The leading case on what constitutes an important question of law is *Hanlon v. International Educational Foundation (NZ) Inc* [1995] NZEmpC 2; [1995] 1 ERNZ 1. It was held at p.7:

First, it is necessary to identify a question of law arising in the case otherwise than incidentally; and secondly to measure the importance of that question ...

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s.94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequence of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous . It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[20] The issue of the exclusion of the Authority's procedure from the Court's scrutiny (albeit under s.179 rather than s.178, but with the wording being exactly the same in both sections the same principles should apply) was addressed in *Oldco.* Furthermore, this analysis was repeated by the same Judge in *Rawlings v. Employment Relations Authority* (unreported, CC8/06, 23 August 2006) and it appeared to be approved by the Court of Appeal on appeal, see [2008] NZCA 15. It was held in *Oldco* at paras.[46]ff:

[46] It is important to emphasise that the scope of s.179(5) does not depend on the nature of the power being exercised by the Authority in its determination but rather on the effect of the determination itself. That effect must be analysed in order to decide whether or not the determination falls within the restriction imposed by s.179(5) on the right of challenge ...

[47] The effect of determinations of the Authority will generally fall into three categories - substantive, procedural, and jurisdictional.

[48] A substantive determination is one which affects the rights and obligations of the parties. It may be interim or final. Usually, its effect will be limited to the rights and obligations of the parties with respect to each other but may, in some cases, extend to the obligations of the parties with respect to non-parties. Where a substantive determination is final, the doctrine of res judicata *will prevent the same issue being determined again between those parties.*

[49] A key indication of whether a determination is substantive will be whether it affects the remedies sought by the parties or otherwise forms part of the resolution by the Authority of the employment relationship problem between the parties. If it does, the determination will almost certainly be a substantive one.

[50] A procedural determination will direct the manner in which the employment relationship problem between the parties is resolved or determine the environment in which the investigation process takes place.

[51] A jurisdictional decision will determine whether the Authority has the power to make a particular substantive or procedural determination.

[52] If a determination is substantive or jurisdictional, it will be outside the scope of s.179(5) and open to challenge under s.179(1). If it is neither substantive or jurisdictional, it is likely to be "about the procedure" of the Authority. Section 179(5) will then apply and no right of challenge will be available.

Section 178(6)

[21] I conclude, following *Oldco,* that while admissibility of evidence issues are ordinarily procedural, issues of whether or not the Authority has the power or jurisdiction to make determinations on the admissibility of evidence are jurisdictional in nature. It therefore follows that the admissibility question in relation to whether the Authority has the power to over-ride s.52 of the Private Investigators and Security Guards Act, and whether the Authority has the power in particular to decline to admit evidence that is said to be *fruit from the poisoned tree,* are jurisdictional decisions, albeit about procedure. I am strengthened in this conclusion because of cases such as *Jesudhass v. Just Hotel Ltd* [2006] NZEmpC 23; [2006] ERNZ 173 and *Rose v. The Order of St John*
[2010] NZEMPC 163, where the Court dealt with issues that related to the admissibility of evidence after they had been removed to it.

Important question of law

[22] The arguments based on whether or not the witness was acting as a private investigator at the time are clearly not questions of law. Similarly, issues of alleged consent by reference to the employment agreement and the staff handbook are not questions of law.

[23] By contrast, clearly the issues in respect of jurisdiction are questions of law. However, issues about whether the recordings were covered within the scope of s.52 and indeed the interpretation of s.52 itself are not important questions of law worthy of removal because the Act is to be repealed next month, particularly given the Authority's discretion to remove a matter or not.

[24] While the determination of such matters above may well be strongly influential in bringing about a material part of the case *(Hanlon* applied) these are either evidential rather than legal, or relate to an Act about to be repealed and/or are questions of law (such as whether the Authority can use its general provisions to admit evidence and information in the face of an express section in another Act which does not provide for that) that I conclude have already been determined by the Employment Court. Such matters are matters that can, and should, be determined ordinarily by the Authority, relating as they do to ordinary questions of admissibility.

[25] There remains therefore only one matter which I consider to be an important question of law worthy of removal, as it is likely to impact on employment law generally, and that is the issue of *the fruit from the poisoned tree.* That is particularly because I am not aware of, nor have I been referred to, any cases where the principle of *the fruit from the poisoned tree* has been applied in these types of proceedings. Furthermore, the impact of the more wide-ranging of the orders sought by Mr Ravnjak would be of such import as to make it far more difficult for WIAL to justify its dismissal of him and thus likely to be strongly influential on the outcome of the case.

Residual Discretion

[26] I conclude that this application should succeed in its entirety, as the Court is best placed to decide all the issues relating to admissibility, albeit that only one important question of law has been found, as it would be extremely inefficient to separate the admissibility issues out as between the Authority and the Court. First, there is a useful purpose in removing the matter in that the issues of admissibility can then be definitively determined. Second, if I were to determine the removal issues in Mr Ravnjak's favour there would inevitably be a delay, until May at least, because of the strong desirability for another Member, who has not seen the visual recordings, to investigate and determine the matter. Third, the delay does not appear that substantial. Here I have concluded that is not appropriate for either party to blame the other for any delays in this matter. I accept that both parties have, by contrast, responded with commendable speed given the complex issues involved, albeit that parties would often prefer to deal with a matter more speedily than usually proves possible. Fourth, any issues over interim relief that Mr Ravnjak may wish to pursue, given the delays, are able to be dealt with in the Court as easily as in the Authority, because the Authority has already determined the claim for interim reinstatement within the last 28 days. Thus, either the Court or the Authority can deal with any changed circumstances as a result of the removal and admissibility issues. Then the Authority can hear and determine the case on the usual principles.

[27] Given the importance of the question of law in relation to the admissibility of evidence (being *the fruit from the poisoned tree)* and the apparent ability of the Court to deal with that issue reasonably promptly, I determine that the residual discretion favours the removal application made by WIAL.

[28] I therefore remove that part of the employment relationship problem (relating to the admissibility of evidence) between Mr Dieter Ravnjak and Wellington International Airport Limited (filed as 5332049) to the Employment Court for the Court to hear and determine, without the Authority investigating that part of the matter.

Costs

[29] Costs are reserved.

G J Wood

Member of the Employment Relations Authority
