

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 63/10  
5144085

BETWEEN                      GERRIT REMMELZWAAL  
   Applicant  
  
AND                                CRANE DISTRIBUTION  
   NEW ZEALAND LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              C Patterson, counsel for applicant  
   R Towner, counsel for respondent  
  
Determination:                12 February 2010

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**DETERMINATION OF THE AUTHORITY (No 2)**

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**Employment relationship problem**

[1]     The parties applied by consent for the removal to the Employment Court under s 178 of the Employment Relations Act 2000 of part of an employment relationship problem. The Authority addressed the application in terms which reflected the contents of a consent memorandum filed by the parties in support (the first consent memorandum), and issued a determination under s 178 removing part of the problem in the terms defined by the parties<sup>1</sup> (the original determination).

[2]     The consent application for removal was expressed to have been made under s 178 on the grounds that:

- a. an important question of law had arisen other than incidentally; and
- b. the parties believed the ruling of the Employment Court would assist in resolving their employment relationship problem.

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<sup>1</sup> **Remmelzwaal v Crane Distribution New Zealand Limited**, AA 158/09

[3] A difficulty arose when a hearing commenced in the court, and I understand the hearing was adjourned. The difficulty did not lead to any exercise of the court's powers under s 178.

[4] The matter came back to the Authority's attention when a further application for removal was made under s 178. It was impossible to address the application in the form in which it was framed, since it was a bare request under s 178 for an order for the removal of 'the facts'. However there remained a difficulty since, as I understand it, the court was of the view that any resolution of the matter arising before it was in the hands of the Authority. Indeed Mr Patterson has recently advised that he suggested to the court that the matter be placed before the Authority.

[5] Because part of the employment relationship problem was still before the Authority in any event, it attempted to identify how the matter could best be resolved. In doing so it attempted to ascertain the nature of the difficulty in the court, and what jurisdiction (if any) the Authority had to act further. It also sought a more appropriate application from the parties, as well as comments or submissions as necessary, culminating in a conference call between the Authority and the parties on 11 February 2010.

[6] The outcome was that a further application for 'transfer' of the proceedings has been made by consent expressly under s 178, and accompanied by a consent memorandum (the second consent memorandum). This time the application was for the 'transfer' of the entire matter before the Authority.

### **Whether matter referred under s 177 or removed under s 178**

[7] The second consent memorandum asserted that the Authority had found it proper to transfer a question of law to the court. That was not the case. The Authority cannot 'transfer' questions of law. It can remove a matter or part of a matter under s 178 on the ground that a question of law is likely to arise other than incidentally, or it can refer a question of law to the court for its opinion under s 177.

[8] The original determination did not refer a question of law under s 177. On the application of the parties the Authority removed part of a matter under s 178. It

understood that, having done so, the matter would be re-pleaded in the court. Any further arrangements, including the method of presentation of the facts, would be for the court and the parties and were no longer before the Authority. The parties advised during the conference call on 11 February 2010 that the matter was re-pleaded in the court, and was to proceed with reference to an agreed statement of facts which was duly prepared. I have not seen the agreed statement of facts, but understand that the difficulty which arose in the court was associated with it. I know nothing of what area of the facts caused the difficulty.

[9] Confusion may have arisen because the part of the employment relationship problem which was removed under s 178 was defined solely with reference to the important question of law likely to arise in association with it. The two were conflated in the first consent memorandum and in the resulting determination, and possibly in the pleadings in the court which I have not seen.

[10] The problem was exacerbated because, as I understand it, the parties were indeed seeking an answer from the court to the question of law as they had framed it, but were not seeking to air the associated grievance before the court in its entirety and were certainly not seeking a decision from the court regarding remedies.

[11] Since the same approach underlay the parties' very brief second consent memorandum I now depart from the terms of both consent memoranda.

[12] I understand from the statements of problem and in reply that:

- a. the applicant has raised a personal grievance on the ground that he was disadvantaged in his employment (or as the statement of problem further described it, his employment agreement was breached) by the respondent's failure to complete a review of his position three months prior to the end of his fixed term employment agreement; and
- b. the applicant has raised a personal grievance on the ground of his unjustified dismissal, in that his fixed term employment agreement was terminated prior to the end of the term and the respondent failed to pay him for the balance of the term.

[13] The grievance identified in (a) above was not identified in the application to remove part of a matter to the court. That grievance remained before the Authority.

[14] The application for removal concerned the grievance identified in (b) above. That grievance underpinned the part of the employment relationship problem for which removal was sought, but the part for removal was further limited in that the parties sought only to obtain an answer to the question of law they had posed. The application relied (by implication) on the ground set out in s 178(2)(a), namely that an important question of law was likely to arise in that matter other than incidentally. In hindsight I would say that the entire matter has suffered from failures to properly define the part of the matter for removal, and to frame it so that it accurately reflects the contents of s 178(2)(a).

[15] The substance of the grievance concerned the fact that the applicant commenced employment with the respondent on 1 November 2006 under what he said was an agreement expressed to be for a fixed term of three years. His employment was terminated on the ground of redundancy, and with three months' notice, on or about 6 August 2008. He says the respondent was not entitled to terminate the employment early, and without paying his salary in respect of the balance of the fixed term. Accordingly, among other things he seeks the balance of the salary owed to the date of expiry of the fixed term.

[16] The respondent denied liability for such a payment, saying in the statement in reply that 'the employment agreement between the parties and the letter of appointment contemplated that the Applicant's employment could be terminated for good cause prior to the expiry of the agreement's term.' Neither the statement of problem, nor the statement in reply nor either of the consent memoranda expressly identified the relevant provisions.

[17] It may not be appropriate for me to attempt to do so, but from the material filed the relevant provisions would appear to be:

"2. Fixed term

This agreement is for a fixed term period as the company has a genuine reason to (sic) offering you a fixed term contract. The reason is to assist in the successful transition of the Hydrotech

Sanitar business to the ownership and management of Crane Distribution NZ Limited and your position as Division Manager will terminate on completion of this project.

A review of the position will be completed 3 months prior to the end of the term which will be three years' duration.

You understand that the way in which this employment agreement will end is for the reason stated above and that the employment will terminate when the specified duration of the employment is reached. ..." [Letter of appointment dated 1 October 2006]

"6. Termination

In lieu of the termination provisions of the Employment Agreement three months' notice of termination of employment is required except that dismissal without notice may occur in the case of serious misconduct." [Letter of appointment dated 3 November 2006]

"Termination

Unless a different period of notice is specified in your appointment letter, no more and no less than three months' notice of termination of employment in writing is required, but dismissal without notice shall apply in the case of serious misconduct.

...

Your employment may also be terminated by giving the notice set out above if as a result of mental or physical illness you are rendered incapable of the proper ongoing performance of your duties under this agreement. [Employment Agreement]

[18] I have no information about those provisions beyond their presence in the documents filed.

### **The framing of the question of law arising**

[19] The question of law which the parties identified in the first consent memorandum was reproduced and relied on in the original determination. I was made aware only by accident and in passing during the conference call of 11 February 2010 that the court had reframed the question and set it out in a minute to the parties. It is now clear why the court did so. I do not accept counsel's statement to me that the reframing was subtle, and would have taken a very different view of the nature of the question of law arising in the matter had the relevant provisions been properly drawn to my attention.

[20] I have not seen the minute of the court, but am advised that the question has been reframed as follows:

“Does the early termination by an employer of a fixed term agreement which contains a general right of termination on notice which is complied with, amount to a breach of contract where justification for a dismissal is said to be redundancy.”

### **Determination**

[21] I resolve the further application for removal as follows.

[22] The Authority did not remove part of the matter before it under s 178 in error. It removed part of the matter under s 178 and in the terms put to it in the first consent memorandum of the parties.

[23] Beyond that, the removal was flawed for the reasons set out above. This has contributed to difficulty, delay and confusion. If I sought to correct the basis of the original removal (and if I could since the matter is before the court under s 178) the parties would be no closer to an overall resolution because part of the employment relationship problem would in any event remain before the Authority.

[24] The parties' reference in the second consent memorandum to s 178 means I consider the Authority to have been asked to remove the entire matter before it. In all of the circumstances I now do so under s 178(2)(d).

R A Monaghan

Member of the Employment Relations Authority