IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 203
5595807

BETWTEEN	TRADEFOG GLOBAL CO LIMITED First Applicant
A N D	TRADEFOG INTERNATIONAL LIMITED Second Applicant
AND	CHRISTOPHER DAVID BARTHOLOMEUSZ Respondent

Member of Authority:	Helen Doyle
Representatives:	David Beard, Counsel for the Applicants Michael McDonald, Advocate for the Respondent
Investigation Meeting:	Determination on the papers
Application for Removal:	26 September 2016 Further submissions from applicants in support lodged 18 October 2016.
Statement in Reply:	9 October 2016
Date of Determination:	15 November 2016

DETERMINATION ON APPLICATION FOR REMOVAL TO THE EMPLOYMENT COURT

A The application for removal to the Employment Court is declined.

B Costs are reserved until after the substantive matter has been determined.

Employment relationship problem

[1] The first and second applicants apply for the removal of this matter to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act) for hearing and determination.

[2] The respondent opposes the removal of the matter to the Employment Court.

[3] By agreement the Authority is determining the matter on the papers.

Removal to the Employment Court

[4] The matter has already been the subject of an investigation meeting at which the Authority investigated and heard evidence about the employment relationship problem lodged by the respondent. Following the investigation meeting the Authority proposed joining the second applicant to the proceedings. After an opportunity for submissions, the Authority duly ordered that the second applicant be joined to the matter.[1] That determination is currently the subject of a challenge and, by agreement; the Authority has not determined the substantive matter pending the outcome of that challenge.

[5] The Authority has discretion to remove a matter, or any part of a matter, to the Court without first investigating it under s 178 of the Act. The grounds for removal are set out at s 178 (2) of the Act as:

(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.

[6] The application is made in reliance on all four grounds.

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[7] In this matter the Authority has conducted an investigation meeting and heard evidence from both parties. Section 178 refers to the words "without the Authority investigating it".

[8] Mr Beard refers the Authority to an Employment Court judgment in *Auckland District Health Board v. X (No.2)*[2] which concerned a discrete application for interim reinstatement that had been considered and determined. The substantive investigation meeting had not, at the time of that application, been held. Judge Colgan, as Chief Judge Colgan was at that time, stated that it could not have been Parliament's intention to exclude a party from applying for removal under s 178 of the Act because of the determination of an application for interim reinstatement but stated where the Authority's investigation is advanced:

> …I accept that there must come a time when the Authority's investigation of an employment relationship problem is so advanced that it would be a proper exercise of the discretion not to remove under s 178(2) even where one of the four particular grounds for removal have been established.[3]

[9] The proper approach I find is to consider the stage of the Authority investigation as part of the assessment and determination of the application for removal.

Important question of law

[10] An important question of law is one that arises other than incidentally. Former Chief Judge Goddard in *Hanlon v. International Education Foundation (NZ) Inc*[4] stated about the measure of the importance of a question of law:

> 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 for the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.[5]

[11] The employment relationship problem against which the Authority is required to measure the importance of the questions of law advanced by the first and second applicants is that the respondent says he was unjustifiably dismissed from his

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[2] [2005] ERNZ 551
[3] Ibid at [21]
[4] [1995] 1 ERNZ 1
[5] Ibid at [7]

employment. The reply to that is that there is a valid trial period in the employment agreement of the respondent in accordance with s 67A and s 67B of the Act and the employment was terminated within the 90 day trial period and the respondent is prohibited from bringing a personal grievance claim.

[12] Mr Beard refers to there being three important questions of law.

Wrong respondent

[13] I accept Mr Beard's submission that the identity of the employer could involve a limited question of law in the circumstances of this case because the respondent was dismissed by letter showing at its top right hand corner the name of the first applicant trading as the second applicant. Primarily however I find that the identity of the correct employer is a question of fact. Whether the Authority should have joined the second applicant to the proceedings is the subject of a challenge and I make no further comment about that matter.

Validity of a written Trial Period clause

[14] The trial provision which is at the heart of this employment relationship problem is found in clause 3 of the employment agreement. It provides:

> Trial period
>
> You are initially employed on a trial period of 90 days, in accordance with ss 67A and 67B of the Employment Relations Act 2000. The employer may, at any time during the trial period, choose to terminate your employment. If the employer terminates your employment during the trial period, the employer will give you notice of termination before the end of the trial period whether the termination is to take effect before or at the end of the trial period.

[15] The respondent's employment as set out in the letter of dismissal dated 17 September 2015 was terminated in reliance on clause 3 of his employment agreement.

[16] A central issue is the validity of the trial period in circumstances where the respondent says it is not valid because it does not comply with the requirements of s 67A (2) of the Act.

[17] Mr Beard submits that there is an important issue of law as to whether the wording in s 67A(2)(c) of the Act can be incorporated as a term of the employment agreement by the reference to s 67A in clause 3 of the employment agreement.

[18] The requirements for a trial provision in an employment agreement under s 67A and what it must state, or is to the effect, that [it states], have been the subject of a judgment of the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Ltd.*[6] This has been followed by the Authority in subsequent determinations about the requirements for a trail provision. I do not find that Mr Beard's submission about incorporation by reference to s 67A in clause 3 of the employment agreement gives rise to an important question of law.

[19] Mr Beard submits that the claim by the respondent that he has been humiliated and suffered indignity because he says one of the requirements of s 67A was not met is one of legal technicality and fiction. I do not find that question gives rise to an important issue of law. The claim made by the respondent that he was humiliated and suffered loss of dignity is in respect of his alleged unjustified dismissal.

Certain terms and intent

[20] Mr Beard submits an important question of law arises about certain terms and intent. He submits that clause 3 provides certain terms including, given the reference to s 67A, that the respondent is not entitled to bring a personal grievance in respect of his dismissal. He submits that there was intention on the part of the respondent to enter into an employment agreement containing a valid trial provision. This question overlaps with the earlier question of law advanced by Mr Beard in his submissions. For the reasons set out above I do not find that this gives rise to an important question of law.

Trial provision gives rise to option of fixed term employment

[21] Mr Beard submits that an important question of law arises as to whether the words in clause 3 of the employment agreement create a "contractual Employer Option of fixed term employment for a finite period". When the requirements of s 66 of the Act are considered with clause 3 of the employment agreement I do not find

[6] [2010] ERNZ 253 at [51] – [58]

arguably this gives rise to a question of law and, if it does, it is not, I find, an important question of law.

Section 103A of the Act

[22] Mr Beard's submission under this head is that the Authority must consider all the circumstances if it gets to the point of determining justification. That does not I find give rise to an important question of law.

[23] In conclusion I do not find that important questions of law arise in this matter other than incidentally. The ground under s 178(2) (a) of the Act is not made out by the first and second applicants.

Public interest to remove the case

[24] The applicants submit that it is in the public interest to remove the case. Mr Beard submits that small employers, such as the applicants, are affected by trial period clauses. Further he submits that the matter is "too complex for the Authority".

[25] I accept that there is public interest in the validity of trial provisions but I am not satisfied that the ground for removal under s 178(2) of the Act is made out. This case is not of such a nature or of such urgency that it is in the public interest that it be removed immediately to the Court. I am further not persuaded that the matter is too complex for the Authority.

[26] In conclusion the ground under s 178 (2) (b) of the Act is not made out.

The Court already has before it proceedings which are between the same parties and which involve same, similar or related issues

[27] The applicants have filed a challenge against the preliminary determination of the Authority for joinder of the second respondent.

Discretionary considerations – s 178(2)(d)

[28] The applicants say that the Employment Court should deal with the substantive matter.

[29] The applicants have challenged the Authority's joinder determination. The Authority has agreed with Mr Beard and Mr McDonald not to determine the substantive matter until the Employment Court has dealt with that challenge.

[30] To that extent that there is a very general statement in the applicants submissions in support of removal suggesting bias on the part of the Authority that is not accepted.

[31] This application for removal is brought at a very late stage. The Authority has already investigated and heard evidence and received submissions.

[32] The substantive matter is able to be determined without the need to hear further evidence or without the requirement for further submissions to be provided. It would be most unusual to remove a matter in those circumstances. The most cost effective process is for the Authority to determine the matter once the challenge to the joinder determination has been dealt with. Either party, if dissatisfied with the Authority determination, is able to seek a full hearing of the entire matter, a hearing de novo.

[33] I am not otherwise, under s 178(2)(d) of the Act, minded to remove the matter to the Employment Court. In the exercise of my discretion I have weighed the challenge to a preliminary matter but I find that given the advanced nature of the investigation the matter should remain in the Authority for it to make a determination.

Determination

[34] The application for removal to the Employment Court is declined.

Further steps

[35] I await advice from Mr Beard and Mr McDonald as to the challenge before the Employment Court.

Costs

[36] I reserve the issue of costs and these can be dealt with at the conclusion of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority