



Employment Court of New Zealand

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Visagie v Worksafe New Zealand [2020] NZEmpC 8 (18 February 2020)

Last Updated: 26 February 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2020\] NZEmpC 8](#)

EMPC 447/2019

IN THE MATTER OF an application for special leave to
 remove a matter to the Employment
 Court
BETWEEN THOMAS VISAGIE
 Applicant
AND WORKSAFE NEW ZEALAND
 Respondent

Hearing: On the papers

Appearances: A Sharp, counsel for applicant
 G Cain and JA Taylor, counsel for
 respondent

Judgment: 18 February 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] The [Employment Relations Act 2000](#) (the Act) requires grievances to be filed in the Employment Relations Authority. Generally, they are to be dealt with in that forum with rights of challenge to the Court. Mr Visagie wants his grievance to be heard by the Court at first instance. The Authority declined an application to remove the matter to the Court.¹ He now seeks special leave to remove under [s 178\(3\)](#) of the Act. The application is opposed by WorkSafe New Zealand (WorkSafe). It was agreed that the application could be dealt with on the papers. Some urgency attaches to it as the Authority's investigation meeting is scheduled to commence on 23 March 2020.

[2] The application in this case is advanced on the grounds that:

1 *Visagie v WorkSafe New Zealand* [\[2019\] NZERA 637](#).

(a) an important question of law is likely to arise other than incidentally;

(b) a hearing in the Authority is likely to pose substantial risk to the applicant's psychiatric state;

(c) any determination in the Authority is likely to result in a challenge; and

(d) the applicant has limited financial resources.

[3] The approach to applications of this sort is now well established and can be summarised as follows.² There is no presumption in favour of, or against, removal. In exercising its discretion, the Court must have regard to three factors, namely, whether an important question of law is likely to arise in the matter other than incidentally; whether the case is of such a nature and of such urgency that it is in the public interest that it be removed to the Court immediately; and whether the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.³ The Court has a discretion to refuse leave, even where one or more of these factors is made out.

[4] A question of law does not need to be complex, tricky or novel to justify the adjective ‘important’. As has previously been observed,⁴ a question of law may be important because the outcome will be decisive of the case or the answer to it is likely to have a broad effect or assume significance in employment law generally. It need not be important beyond the parties.

[5] The collective agreement in this case provides that WorkSafe will “work in partnership” with the employee and the union to “strive to ensure that everybody who comes to work goes home safe and healthy at the end of each day” and that it has an “absolute commitment to ensuring the wellbeing, health and safety of all workers.” The applicant says that the scope of these obligations and/or duties raises important

2. See, for example, *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894; *Megan Jaffe Real Estate Ltd v Kelland* [2018] NZEmpC 28; *Kazemi v RightWay Ltd* [2018] NZEmpC 3.

3 [Employment Relations Act 2000, s 178\(2\)\(a\)–\(c\)](#).

4 *Kazemi*, above n 2, at [11], citing *Johnston*, above n 2.

legal questions and, if found to have been breached in this case, would raise further important legal questions as to the nature and scope of any relief.

[6] I accept that determination of Mr Visagie’s claim will involve analysis of the meaning of particular words and phrases adopted in the collective agreement, including working in “partnership” and an “absolute commitment to ensuring [Mr Visagie’s] wellbeing, health and safety”. It will also involve analysis of the scope of the obligations/duties that the employer agreed to take on when entering into the agreement. That is because there will need to be a platform against which Mr Visagie’s allegations of breach can be assessed.

[7] WorkSafe contends that resolution of these definitional issues will be straightforward, essentially because the meaning of the terms used in the collective agreement is well established and self-evident. While numerous cases have dealt with the scope and application of duties under the Health and Safety at Work Act 2015, the statutory duty of good faith in the [Employment Relations Act](#), and the implied duty to provide a safe workplace, there appears to be no case where the nature and extent of the obligations WorkSafe agreed to take on (including a “partnership” and an “absolute commitment” to ensuring wellbeing, health and safety) has been examined. I am not immediately drawn to the submission that no question of law arises in respect of the inclusion of these terms in the collective agreement because they add nothing to the well-defined duties on an employer. Rather, questions will inevitably arise as to what the collective agreement requires and whether, in entering into the agreement, WorkSafe took on more heightened obligations than it might otherwise have been required to meet. Resolution of the meaning of these terms, which will be a necessary first step in determining Mr Visagie’s claim, has the potential to impact more broadly on other employees.

[8] Mr Visagie also contends that an important question of law arises in relation to remedies, in particular the availability of damages for breach of good faith. Issues relating to the availability of damages for breach of good faith have recently been touched on in *Kazemi* (although not ultimately determined). I accept, for reasons set out in the special leave judgment in that case, that whether damages are available for a breach of good faith is an important question and one that may benefit from further

consideration by the Court. However, a question relating to remedies may be important but not one that will end up having to be answered in the present case.

[9] While I accept that the matter raises important questions of law as to the interpretation and application of provisions of the collective agreement, and may (depending on whether a breach is found) raise important questions as to remedies, I do not consider it appropriate to exercise my discretion to grant leave. I am satisfied that the Authority is well placed to consider the issues raised in the first instance; indeed, interpretation of employment agreements and deciding on the consequences of breaching them are two matters specifically referred to in s 161 of the Act (Authority’s jurisdiction).⁵ I also note the importance of preserving the parties’ rights of challenge, including by way of non-de novo hearing.⁶ I would decline the application on this basis.

[10] For completeness, I deal with the remaining grounds identified on behalf of Mr Visagie: impact on his mental health; cost; and inevitability of challenge. I accept that going through an Authority process may be stressful and have an adverse impact on Mr Visagie, given the matters referred to in the affidavit evidence filed in support of his application. I accept too that if the matter was removed, he would not have to face the prospect of giving evidence in the Authority. He would, however, have to go through the adversarial processes of the Court. I infer that his point is that if removal was ordered, he would have to deal with one process rather than two. I accept that such an outcome would likely pose less risk to his mental health. Having said that, the Authority has a number of mechanisms at its disposal to deal with concerns of this sort. Issues relating to the potential impact on Mr Visagie of one hearing, rather than two, need to be weighed against WorkSafe’s interests, and the fact that if leave was granted, it would lose its right of a first instance hearing in the Authority, with challenge rights to the Court.

[11] Further, I am not unsympathetic to the issues of cost which Mr Visagie has raised. His basic point is that he has limited financial resources and he would rather apply them in the Court than the Authority. The Authority was designed as a low-

5 [Employment Relations Act 2000, s 161\(a\)–\(b\)](#).

6 See *Owen v Chief Executive of the Department of Corrections* [2014] NZEmpC 215 at [15].

level, non-technical, cost-effective forum in which parties could readily access a speedy determination of their employment disputes. As Judge Perkins recently observed (in finding that a matter had been erroneously removed to the Court), the scheme and purpose of the Act plainly envisages that most matters will be dealt with at first instance in the Authority and removal applications need to be dealt with against that context.⁷

[12] While it may be that one or other of the parties will challenge the Authority's determination, in *Kelland* it was said that:⁸

[32] 'Challenge-[inevitability]' is not one of the grounds provided for in s 178(3). Rather, the provision refers (in terms of the Court's powers to deal with an application for special leave) back to the grounds specified in s 178(2)(a)–(c). The broader grounds in s 178(2)(d) are notably absent.

[13] The same point can be made in respect of cost and potential impact on an applicant in going through the Authority's processes as a precursor to pursuing a claim in the Court. Applying *Kelland*, I do not consider that factors such as challenge-inevitability, cost and potential psychological impact provide stand-alone grounds for granting an application under s 178(3). However, I accept that these factors may be part of the mix when deciding whether or not to grant leave where, as here, one of the three listed grounds in s 178(2)(a)–(c) is made out (the residual discretion). In the present case, while important questions of law are likely to arise, a number of those questions will only require determination if the applicant can establish a breach. Establishing a breach will be an intensely factual inquiry. While there are some factors which would otherwise weigh in favour of removal, I am nevertheless satisfied that the Authority is well placed to deal with this matter at first instance.

7 *Rauland NZ Ltd v Delvo* [2019] NZEmpC 169 at [12]–[14].

8 *Kelland*, above n 2.

[14] The application for special leave is dismissed. If costs cannot be agreed, I will receive memoranda.

Christina Inglis Chief Judge

Judgment signed at 4.45 pm on 18 February 2020