IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 114
ARC 38/13

IN THE MATTER OF	Proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application under s 178(5) of the Employment Relations Act 2000
BETWEEN	AIR NEW ZEALAND LIMITED Plaintiff
AND	GRANT KERR Defendant

Hearing: 21 June 2013
(Heard at Auckland by telephone conference call)

Appearances: Jennifer Mills and Christie Hall, counsel for plaintiff
Peter Chemis and Jennifer Howes, counsel for defendant

Judgment: 21 June 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This interlocutory judgment, heard and decided urgently, deals with the question whether the Employment Relations Authority properly removed this proceeding to the Court for hearing at first instance.[1]

[2] The plaintiff, which opposed removal from the Authority, has filed an application pursuant to s 178(5) of the Employment Relations Act 2000 (the Act) which provides:

> (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.

[1] [2013] NZERA Auckland 241.

[3] The plaintiff has not filed a challenge to the Authority's determination under s 179 of the Act as it is, on the face of the legislation, entitled to do. The first question for decision is whether s 178(5) permits a party to make such an application and, if so, how that is to be dealt with.

[4] Challenges to Authority determinations under s 179 are broadly available to parties who are dissatisfied with Authority determinations including a determination under s 178 either removing the matter to the Court or declining to do so.

[5] Section 178(3) provides an alternative mechanism to a dissatisfied party but only in circumstances where the Authority has declined to remove the matter to the Court. So, an application for special leave under subs (3) is not available to the plaintiff in these circumstances.

[6] On that basis, the plaintiff invokes the observations of Judge Couch in a 2008 case, *Vice-Chancellor of Lincoln University v Stewart (No 2).*[2] That was also a case in which the Authority had removed proceedings to the Court against the wishes of one party which then sought to contest that by filing a challenge electing a hearing de novo under s 179. So, it was not a case in which s 178(3) was applicable and, therefore, in which potentially alternative appellate pathways existed. In this case, and as Judge Couch acknowledged in *Stewart*, it was open to the party dissatisfied with the Authority's determination to remove, to challenge in the conventional way under s 179. The judgment in *Stewart* does not really deal with the preliminary issue in this case, whether s 178(5) gives jurisdiction to the Court to review the Authority's determination and, if it considers that the matter referred, or any part of it, was not properly removed, remit it to the Authority by ordering the Authority to investigate it.

[7] The plaintiff relies particularly on [19] of Judge Couch's judgment in *Stewart* which is as follows:

> [19] In my view, it is clearly preferable that a party dissatisfied with the Authority's determination of an application for removal should proceed under the particular provisions in s 178(3) and s 178(5) rather than the

[2] [2008] ERNZ 249.

> general right of challenge under s 179. Given the clear words of s 179, however, it would be wrong to construe them as excluding a challenge to such a determination, I adopt in this context the view of the full Court in *NZ Baking Trades Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305 at 307, where, dealing with an analogous situation under the Employment Contracts Act 1991, they said:
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> > *We should not be taken as having decided that an appeal does not lie from such a decision, but only that despite the fact that the right of appeal to this Court is expressed generally to encompass any decision of the Tribunal, some very good reason would need to be advanced for not following the procedure provided for by s 94, which has been expressly enacted with this kind of situation in mind.*

[8] I conclude that s 178(5) does allow a party to apply to the Court to exercise its discretion to remit a matter to the Authority and that there is no statutory restriction upon when such an application can be made and/or decided. That said, however, Parliament must have intended that the Court's power to make an order under s 178(5) would be exercised on a potentially narrower basis than in the circumstances applicable to a challenge under s 179. A more general right of challenge under s 179 (especially by hearing de novo) permits new evidence or issues to be considered by the Court whereas an application under s 178(5) focuses on the correctness of the Authority's determination which, in turn, will encompass the potentially narrower range of evidence or issues that were then before it.

[9] Ms Mills accepted in argument that the Court must focus on the correctness of the Authority's determination at the time it was given. It would not be possible, therefore, for a party relying solely on an application under s 178(5), to adduce updated relevant information or material that may have, for any reason, not been considered by the Authority. The plaintiff has not, I should add, attempted to do so in this case. It is content to re-argue the same points it did before the Authority and to persuade the Court the Authority was wrong.

[10] Section 178(2)(a) on which the case turns is as follows:

> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
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> (a) an important question of law is likely to arise in the matter other than incidentally;

[11] The Authority's determination concluded[3] that the following question met the statutory test: "… whether garden leave should be treated in the same or a similar manner as a restraint of trade." A related question was said to be "whether a garden leave period is, in fact, a restraint of trade and how and to what extent it can be taken into account when determining the reasonableness of a post-employment restraint." At [30] the Authority summarised the issue of law as: "Can the enforced garden leave be seen as an additional restraint that can be added to the post-employment restraint, and thereby make the overall restraint period unreasonable?" The Authority concluded that not only is this an important question of law in the case with consequences for the parties, but it will probably have a more general application in other cases of garden leave combined with post-employment restraints and, more particularly, where these elements are combined expressly in employment agreements of senior managerial employees.

[12] The consequence in law upon a subsequent restraint of an express provision in an employment agreement that the employer may treat an employee's notice of resignation period as gardening leave, has not been the subject of recent authoritative judicial decision in New Zealand. Without intending any disrespect to the Employment Relations Authority, its determinations which may have touched upon this issue are not included within what Parliament intended to be the resolution of important questions of law arising out of that incidentally in proceedings. The only authoritative case on the issue cited by counsel is now almost 30 years old[4] and the relevant law has changed in a number of respects over that period. The only judgment of this Court, addressing an associated question about whether gardening leave could amount to a period of restraint, accepted that it was an important question of law which arose in a not materially dissimilar case other than incidentally, and warranted the case's removal to the Court although, in the event, the proceeding was settled before trial.[5]

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[3] At [13].
[4] *Rank Xerox New Zealand Limited v U-Bix Copiers (NZ) Limited*, HC Auckland A1407/85, 20 December 1985.
[5] *Lloydd v Diagnostic Medlab Services Ltd* [2009] ERNZ 42.

[13] Nor do I think it can be said that the recent judgment of this Court in *Transpacific Industries Group (NZ) Limited v Harris*[6] determined the question now at issue. The *Transpacific* case was decided on other grounds and any observations that the Court may be thought to have made about the question of law advanced in this case are just that, observations. Ms Mills accepted this proposition in argument.

[14] Ms Mills accepted in argument that there really is very little, if any, authoritative New Zealand case law on the issue although, as the Authority identified in its determination, there are a number of pertinent United Kingdom and Australian cases on the topic.

[15] The question or questions of law for decision at trial, of which the plaintiff says the defendant's proposed s 178(2)(d) questions are simply factual elements, are not, as the plaintiff categorises them, simply whether the restraint is necessary to protect the employer's legitimate proprietary interests. That is an important element in the question for decision by the Court but it is broader than that and more in the nature of a balancing exercise. There is little doubt that the law is still that such restraints are, prima facie, unlawful at common law but may be validated to the extent that they are reasonable. That assessment involves not merely consideration of the extent necessary to protect proprietary legitimate interests, but also the rights of persons to work and the interests of the community (public policy) in these factors. It may not be without significance that the ability of the employer to resort to a gardening leave arrangement upon receipt of a notice of resignation, was included expressly in the parties' employment agreement and, therefore, a factor known when the restraint was entered into, and so relevant to the assessment of its reasonableness.

[16] Further, the phrase "gardening leave", generally, is a shorthand but imprecise one. So-called gardening leave may cover a spectrum of directions from not performing the employee's obligations under the employment agreement at all at one end of the spectrum through a partial or selective performance of those obligations to, at the other end of the spectrum, a substantial performance of the obligations but omitting activity that might advantage a competitor. What gardening leave means in

[6] [2013] NZEmpC 97.

a particular case may influence not only the duration but, more broadly, the lawfulness and reasonableness of a restraint subsequently undertaken in any particular case. That is another (or at least associated) potentially important but unsettled question of law.

[17] Even taking the passage from the early judgment of this Court in *Hanlon v International Education Foundation (NZ) Inc*,[7] this issue is not only a question of law that may be decisive of the case or some important aspect of it, but may include a question of law that is strongly influential in bringing about a decision of it or a material part of it. I am satisfied that the matters identified as questions of law for the purpose of s 178(2)(d) meet that test.

[18] As to the plaintiff's argument that the Court should not exercise its discretion to leave the case now before it because this will deprive the parties of a valuable right of appeal, while that is in one sense correct, in this case I must assess whether that right of appeal is a real one in practice.

[19] Mr Kerr gave six months' notice of his intention to resign on 4 February 2013. His employment with Air New Zealand will, therefore, end on 5 August 2013. That is the date upon which he intends to take up employment with Jetstar unless restrained by injunction from doing so. That is about six weeks hence. This Court is scheduled to hear these proceedings substantively on 31 July and 1 August 2013. They are of such a nature that, almost inevitably, the trial Judge will need to reserve his judgment and deliver that in writing with reasons. That is very likely to occur some time after 5 August 2013.

[20] The Authority set aside time to investigate the proceeding when it was before it, on 4 and 5 July 2013, but, counsel has advised me, these dates are no longer available in the Authority. Although, literally during the course of today's hearing, the plaintiff advised that the Authority may be able to investigate the case in the week of 22 July 2013, that is only about a week before the Court is scheduled to do so.

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[7] [1995] 1 ERNZ 1.

[21] I assume that, like the Court, the Authority would almost inevitably reserve its determination for subsequent delivery. Any right of appeal to this Court would then only arise during the period of the restraint and would be unlikely to be heard and decided much before its expiry even if it is fully valid. In the particular circumstances of the case, therefore, the right of appeal necessarily removed by the Authority's order under s 178 would be, if not illusory, then significantly compromised in practice. So, whilst a factor to weigh in the balance, I do not assess it to be certainly decisive or even a significant factor in the particular circumstances of this case.

[22] For the foregoing reasons, I am satisfied that the Authority did not remove this proceeding to the Court improperly under s 178 and I decline to remit it to the Authority. The plaintiff's application under s 178(5) is dismissed.

[23] The defendant is entitled to costs irrespective of the outcome of the substantive proceeding. I consider that the parties should have the opportunity to settle costs between them but that, even if they cannot do so, fixing Mr Kerr's costs should be done at the same time as any other costs at issue in the proceeding are dealt with and I see no reason why that could not be by the trial Judge. This issue has been dealt with economically on both sides: they have filed written memoranda, there has been a short telephone directions conference, and a longer telephone conference call for the substantive hearing.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on Friday 21 June 2013