IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 191
ARC 35/13

IN THE MATTER OF	an application for special leave to remove proceedings to the Court
BETWEEN	PROFESSOR CHRISTOPHER OHMS Applicant
AND	VICE CHANCELLOR AUCKLAND UNIVERSITY OF TECHNOLOGY Respondent

Hearing:	24 September 2013 (heard at Auckland)
Appearances:	Rodney Hooker, counsel for the applicant Penny Swarbrick, counsel for the respondent
Judgment:	16 October 2013

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The applicant, Professor Christopher Ohms, currently holds the position of Professor of Law and Taxation at the Law School of the respondent, the Auckland University of Technology (AUT). In this proceeding he seeks special leave for an order that an employment dispute he currently has before the Employment Relations Authority (the Authority), be removed to this Court for hearing and determination without the Authority investigating it. The application, which is opposed by AUT, is made pursuant to s 178(3) of the Employment Relations Act 2000 (the Act).

[2] Application for removal was initially made to the Authority itself, but in a determination dated 13 May 2013,[1] the Authority declined to make an order for removal and indicated that it could conduct an investigation meeting in August or September 2013.

[3] An unusual feature of the case is the fact that in a minute dated 12 July 2013, Chief Judge Colgan raised for the parties' consideration questions about the professional relationships between the Auckland based Employment Court Judges and the AUT Law School. After hearing from counsel on the matter, the Chief Judge, in a subsequent minute dated 23 July 2013, ruled that it would be preferable if none of the Auckland based Judges dealt with this case.

[4] As indicated, the application is made pursuant to s 178(3) of the Act which, relevantly, provides that in determining an application for special leave the Court must apply the criteria set out in paras (a) to (c) of subs (2). Only the criteria in para (a) is relevant to the present application. It provides that removal may be ordered if an important question of law is likely to arise in the matter other than incidentally.

The "important questions of law"

[5] The statement of problem filed in the Authority is a lengthy document, encompassing over 118 paragraphs. In a memorandum filed on 5 August 2013, counsel for the applicant, Mr Hooker, identified and made submissions on what he contended were four important questions of law. In his oral submissions counsel "reframed" those questions as follows:

> **First Question**
>
> (a) Is it lawful for an employer to direct an employee to leave the workplace and to remain away from the workplace without prior consultation with the employee about his medical condition or without any medical advice where the employer has concerns about whether the employer is providing a safe work place for the employee?

[1] [2013] NZERA Auckland 187.

(b) Does an employee have a right to attend the workplace when he considers he is fit for work and/or when he is told by his medical practitioner that he is fit for work?

Second Question

Where an employee is directed to remain away from the workplace by the employer on sick leave because the employer is concerned that the employee may not have a safe work place at the employer's workplace is the employer entitled to regard the employee as on sick leave and debit the employee's daily absence against his sick leave entitlement?

Third Question

Is an employee Professor A, who performs the same duties as another Professor B, entitled to be paid the same as Professor B where the collective agreement sets the range of salary to be paid to the class of Professors or where the Professor B is paid more than the highest salary specified in the salary range?

Fourth Question

Can the Employer invoke clause 3.3.3 (a) when the medical practitioner for the Employee has stated that the Employee is fit for work in circumstances where the Collective Agreement states:

3.3.3. (a) If as a result of physical or mental incapacity the Employee is unable to perform the duties of the position the Employer:

(i) will consult with TEU on behalf of the Employee;

(ii) may require the Employee to undergo a medical examination, at the Employer's expense, by a registered medical practitioner nominated by the Employer, or if the Employee wishes, two registered medical practitioners, one nominated by the Employer and the other by the Employee;

If the Employee declines to undergo the medical examination as required by the Employer, can the Employer stop salary payments to the Employee?

[6] Counsel for AUT, Ms Swarbrick, claimed in her submissions that none of the questions posed by the applicant are important questions of law that will arise other than incidentally. Ms Swarbrick also stressed the fact that the parties are in an ongoing employment relationship and that, in those circumstances, it is best that the matter be dealt with by the Authority because, as counsel expressed it, "the Authority's informal investigative procedures are better suited to supporting a successful employment relationship."

The facts

[7] To understand the context in which the alleged important questions of law arise, it is necessary to briefly outline the factual background. It was clear from argument before me, however, that many of the factual issues will be keenly contested and for that reason I will endeavour to confine my observations to what essentially appears to be matters of common ground.

[8] Professor Ohms has been employed by AUT since October 2003. In April 2005 he was appointed to the position of Professor of Law and Taxation. His terms and conditions of employment include the Academic and Associated Staff Members Collective Agreement (the collective agreement) between the Tertiary Education Union and AUT.

[9] In late 2011, Professor Ohms became concerned about the implications of the appointment of another Professor specialising in tax law who was paid a higher salary than he was. The Authority noted that Professor Ohms believed the appointment was a precursor to his own redundancy. He was also concerned about alleged bullying by his immediate manager and he began to suffer from stress.

[10] On 2 March 2012, Professor Ohms consulted a doctor and was referred to a specialist for stress treatment. In its determination, the Authority outlined the subsequent developments in these terms:

> [4] ... He sought medical attention, and in March 2012 he made AUT aware both that he was seeking such attention and of the reasons for his stress. His written account of the reasons included a description of symptoms which he said were akin to post traumatic stress disorder. He believed, however, that he was fit for work.
>
> [5] The material led AUT to conclude an investigation was necessary. By letter dated 6 March 2012 it expressed concern that Professor Ohms' stress would be exacerbated if he remained at work. It required him to remain away from the workplace on paid sick leave while it obtained further information about the causes of the stress, and until it could be assured either that there was no risk to his health or the risk could be managed.
>
> [6] Professor Ohms says that, although he was fit for work as at 6 March 2012, subsequent difficulties and disagreements associated with his participation in the investigation caused his health to deteriorate. By about

early April he was no longer fit for work. He provided medical certificates to AUT in support of his lack of fitness to work.

[7] By letter dated 28 May 2012 AUT advised Professor Ohms of his current sick leave and annual leave entitlements. His outstanding entitlement to sick leave was exhausted on 6 June 2012. He has been absent on paid special leave since then.

[8] By letter to Professor Ohms' solicitors dated 7 June 2012 AUT sought: more information on the nature of Professor Ohms' current illness; and views on a proposal that he undergo a medical examination under clause 3.3.3.

[9] Professor Ohms had been attending on his own psychiatrist and general practitioner. On the information provided to it AUT was not satisfied as to his fitness to work or that his stressors had been dealt with so that the workplace was safe for him. The parties attended mediation in August and November 2012, but were unable to resolve the matter.

[10] In December 2012 AUT invoked clause 3.3.3 to require Professor Ohms to undergo a medical examination with a practitioner of its choice.

[11] Further exchanges between the parties over that matter led to the provision of further reports from Professor Ohms' doctors indicating Professor Ohms was fit to work. AUT considers the reports do not address important questions associated with Professor Ohms' health and safety in the workplace. It believes it does not have enough information to ensure his safety at work, and in turn considers it cannot allow him to return to work.

The Law

[11] The legal principles relevant to applications for special leave to remove are well established. They were summarised by this Court in *McAlister v Air New Zealand Ltd*:[2]

1. An applicant for special leave under s 178 of the Employment Relations Act 2000 carries the burden of persuading the Court that an important question of law is likely to arise in the matter other than incidentally, or the case is of such a nature and of such urgency that the public interest calls for its immediate removal to the Court.

2. It is necessary to identify a question of law arising in the case other than incidentally.

3. It is necessary to decide the importance of the question.

4. It is not necessary that the question should be difficult or novel.

5. The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or

[2] AC 22/05, 11 May 2005 at [9]-[10].

> employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It 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 the case or a material part of it.
>
> [10] Even if an important question is likely to arise, the removal of the matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of a challenge in any event.

[12] Counsel for the applicant also placed emphasis on the decision of this Court in *Lloydd v Diagnostic Medlab Services Ltd*,[3] where special leave was granted on the basis that the issue had "not been before the Courts directly in New Zealand" and there was therefore "no guiding authority."[4]

Discussion

[13] I will repeat and deal with each of the "reframed" questions in turn.

> **First Question**
>
> (a) Is it lawful for an employer to direct an employee to leave the workplace and to remain away from the workplace without prior consultation with the employee about his medical condition or without any medical advice where the employer has concerns about whether the employer is providing a safe work place for the employee?
>
> (b) Does an employee have a right to attend the workplace when he considers he is fit for work and/or when he is told by his medical practitioner that he is fit for work?

[14] The applicant submits that these interrelated questions raise important issues, particularly as regards the tensions between an employee's right to work, as recognised by the Court in *Auckland District Health Board v X (No 1)*,[5] and an employer's obligations to provide a safe working environment for its employees. Mr Hooker submitted:

---

[3] [2009] ERNZ 42.
[4] At [21].
[5] [2005] ERNZ 487.

> 24. In Counsel's submissions none of these matters have been considered by the Courts before. They are new and novel issues. They are important not only in this case but to employers and employees generally. The duty generally of employers is to provide safe working environment to employees. The issue of stress in the workplace is important. There is a duty concomitant on the employee to tell the employer if they are under stress. How the employer responds to the employee raising the aspect of stress and the duty to raise it, and the right to work and the competing duty of the employer to ensure the employee is not suffering stress and sending them home on sick leave are all factual considerations which will raise important legal issues in this case.

[15] Mr Hooker drew a comparison with the decision of this Court to grant leave in *Lloydd*. In that case, which involved issues regarding garden leave, the Court granted special leave to remove. Mr Hooker submitted that one of the issues that will arise in the present case is "whether the employer is using a right to restrict the employee from attending work for illegitimate purposes". He submitted that *Lloydd* "is an acceptance of the important question of law which is applicable to this case namely are there limits to the use of special leave to protect interests of the employer."

[16] In response Ms Swarbrick submitted that these questions are not questions of law, but rather "intensely factual" questions, requiring consideration of:

> (a) The circumstances surrounding the Applicant's leaving of the workplace,
>
> (b) Whether there was in fact consultation,
>
> (c) The nature of the safety concerns, and
>
> (d) The nature of the information from the medical practitioner and the basis for that.

[17] The respondent's counsel further submitted:

> 13. The questions of law identified by the Applicant in this scenario (whether the Applicant has a right to work or whether the Respondent's actions are lawful) arise incidentally to the key issue of what are the surrounding circumstances.

[18] In *The New Zealand King Salmon Co Ltd v Cerny*,[6] the Court refused an application for removal holding that the case did not involve an important question of law because the legal position in relation to the issue raised had been previously considered and determined by the courts, in particular the Court of Appeal. That decision was followed recently by Judge Perkins in *Hall v Westpac New Zealand Ltd*.[7] The interplay between an employer directing an employee away from the workplace pending receipt of its own medical advice and an employee's right to attend the workplace when he or she has received a clearance from their own medical practitioner to attend work, does not raise any novel issues. The issue was considered by this Court in *Radio New Zealand Ltd v Snowdon*[8] and leave to appeal Judge Shaw's judgment in that case was dismissed by the Court of Appeal in *Snowdon v Radio New Zealand Ltd*.[9]

[19] Moreover, on the facts and pleadings before the Court, there are uncertainties surrounding the scope of the questions posed by the applicant. It is unclear from the pleadings, for example, whether the respondent is acting in reliance on provisions in the Health & Safety in Employment Act 1992 or whether it claims some other basis for its actions such as workplace policy or provisions in the collective agreement. There should be no room for speculation as to the relevance of an alleged important question of law that is going to be determinative of the case. The statement of problem lists nine "causes of action" as well as a disadvantage grievance but none of them include any of the so-called "important questions of law" relied upon by the applicant.

[20] The submissions made and relied upon in relation to the judgment in *Lloydd* appear to be misplaced. The question upon which leave was granted by the Court in that case was not whether garden leave could be used for an illegitimate purpose of the kind the applicant asserts, but rather the extent to which a garden leave provision could be used to protect a legitimate proprietary interest of an employer, in a manner

[6] [2012] NZEmpC 195.
[7] [2013] NZEmpC 66.
[8] [2003] 1 ERNZ 12.
[9] [2005] ERNZ 43 (CA).

akin to a restraint of trade. This is something which was recently determined by this Court in *Air New Zealand Ltd v Kerr*.[10]

[21] I now turn to the second question:

> **Second Question**
>
> Where an employee is directed to remain away from the workplace by the employer on sick leave because the employer is concerned that the employee may not have a safe work place at the employer's workplace is the employer entitled to regard the employee as on sick leave and debit the employee's daily absence against his sick leave entitlement?

[22] The applicant submitted that a question arises as to who "owns the sick leave" and that "if it belongs to the employee then unless he claims his absence as to sickness then his sick leave can't be debited or removed by the employer".

[23] The respondent reiterated the concerns it raised in relation to the first question, namely, that the issue requires resolution of matters which are intensely factual, and that any question of law which may arise will do so only incidentally.

[24] I agree with the respondent's submission. The fact that this second question was initially framed as two separate questions, before being "reframed" as the one question, supports Ms Swarbrick's submission and my own conclusions that there are factual issues relating to the relevance of the sick leave provisions in the collective agreement which need to be considered and resolved before any alleged important questions of law can be accurately formulated. Further, even if there was an issue of wider significance, I have not been persuaded that it would be a matter that the Authority lacked the capacity to resolve perfectly adequately.

[25] The third reframed question reads:

> **Third Question**
>
> Is an employee Professor A, who performs the same duties as another Professor B, entitled to be paid the same as Professor B where the collective agreement sets the range of salary to be paid to the class of Professors or where the Professor B is paid more than the highest salary specified in the salary range?

[10] [2013] NZEmpC 153.

[26] The background to this question is elaborated on in the applicant's submissions. It is claimed that "Professor B" is the wife of the Dean of the Law School and that she is allegedly paid considerably more than the applicant despite allegedly working less hours and teaching fewer students.

[27] The applicant acknowledged that the question posed is strictly one of interpretation in so far as a salary scale is a recurrent feature in many collective agreements, but he submitted:

> 45. ... There are a large number of Collective Agreements in existence between employers and employees. Many have standard pay parity provisions. What is the impact if one employee is paid outside the scale and the agreement doesn't provide for this. These are all legal issues to be determined in the case.

[28] The respondent submitted that the question raised is an issue relating to the interpretation of the collective agreement and its resolution will only affect those employees of AUT who are employed pursuant to the collective agreement. To that extent its effects will be limited to the parties in the present dispute.

[29] The Authority found that the question of whether an employee has been correctly paid and the remedy available, if not, is "well within the range of matters properly dealt with by the Authority in the first instance."

[30] I agree with the Authority. The question raised is clearly a matter of interpretation rather than of an important question of law.

[31] I turn now to the final question:

> **Fourth Question**
>
> Can the Employer invoke clause 3.3.3 (a) when the medical practitioner for the Employee has stated that the Employee is fit for work in circumstances where the Collective Agreement states:
>
> *3.3.3. (a) If as a result of physical or mental incapacity the Employee is unable to perform the duties of the position of the Employer;*
>
> *(i) will consult with TEU on behalf of the Employee:*
>
> *(ii) may require the Employee to undergo a medical examination, at the Employer's expense, by a registered*

> *medical practitioner nominated by the Employer, or if the Employee wishes, two registered medical practitioners, one nominated by the Employer and the other by the Employee;*
>
> If the Employee declines to undergo the medical examination as required by the Employer, can the Employer stop salary payments to the Employee?

[32] The applicant referred to the statement of Judge Travis in *Lloydd*, that the importance of a question of law is to be measured in relation to the case in which it arises, and argued that a ruling on the correct interpretation of cl 3.3.3 will have significant ramifications for either party. The applicant also submitted that the clause needed to be "considered against the backdrop of the Bill of Rights."

[33] The respondent submitted that, as with the "third question" detailed above, the interpretation of a collective agreement was a question of fact. In counsel's words:

> 17. These are not important questions of law, as they will not affect large numbers of employees and employers and the effects are limited to the parties to this dispute.

[34] Again, I agree with counsel for the respondent. The questions posed are not questions of law but clearly matters of interpretation.

Other matters

[35] The applicant raised certain other matters which he claimed were relevant to the exercise of the Court's discretion, in particular difficulties he claims to have encountered in obtaining disclosure and production of relevant documents. Counsel submitted: "The jurisdiction of the Court is provided for in the rules but the Authority has no specific rules for production of relevant documents." The applicant also complained about delays on the respondent's part in complying with its obligations at different points.

[36] In response, Ms Swarbrick submitted that these "other matters" raised by the applicant were not relevant to an application for removal to the Court. She also submitted that there were no delays outside of the specified timeframes and that the

Authority was "well equipped to deal with any discovery issues". I agree with Ms Swarbrick's submissions on these issues.

[37] Ms Swarbrick raised certain matters on behalf of the respondent relevant to the exercise of the Court's discretion. First, as noted in [6] above, Ms Swarbrick submitted that this case is concerned with an ongoing employment relationship and, in those circumstances, resolution of the problem will best be achieved by the more informal procedures of the Authority. Reference was made in this regard to s 157 of the Act which defines the role of the Authority and, in particular, subs (1) of the Act which requires the Authority to resolve "employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities." Counsel also referred to the requirement in s 157(2) for the Authority to "support successful employment relationships" and "aim to promote good faith behaviour" which are not express requirements of the Court.

[38] I accept these submissions. In an ongoing employment relationship it is appropriate for the Court, in its consideration of a removal application, to recognise the merits of having an employment problem resolved speedily through the informal procedures adopted by the Authority rather than the more formal and structured procedures applied by the Court.

[39] Another matter, raised by Ms Swarbrick in oral submissions, was the point that in its statement of reply to the applicant's statement of problem, AUT had pleaded a counterclaim in respect of which it seeks various declarations and compliance orders against the applicant. Counsel stated that AUT does not consent to the counterclaim being removed to the Court under s 178 of the Act.

[40] It seems to me that the existence of a counterclaim would not preclude the Court from ordering the removal of the whole matter should it be satisfied in terms of the criteria for removal set out in s 178(2) of the Act. The respondent's objection to removal however, based on the existence of a genuine counterclaim, is no doubt a factor which can properly be taken into account in the exercise of the Court's

discretion, particularly in terms of its equity and good conscience jurisdiction under s 189(1) of the Act.

[41] The other matter, of particular relevance to the exercise of the Court's discretion in this case, is the claim made by Ms Swarbrick that the resulting delay from the granting of the application would be injurious to the respondent because the applicant has been receiving his full remuneration since being placed on special leave without pay on 7 June 2012. The "delay" referred to is the anticipated delay in having the substantive case heard in this Court. It partly results from the direction referred to in [3] above.

[42] From my inquiries of the Registrar, if the application is granted, it is unlikely that the case could be heard in this Court before April 2014. On the other hand, I was informed from the Bar that the Authority has pencilled in 9 December 2013 for its investigation should the proceeding remain within its jurisdiction. I find that submission compelling.

Conclusions

[43] For the foregoing reasons, the applicant's application for removal of this matter to the Court from the Authority is declined. Mr Hooker indicated that he may receive instructions to challenge the ongoing participation of the Authority Member who has dealt with this case to date. His reasons included her alleged close professional relationship with counsel for the respondent. It was claimed that they had both published a textbook on employment law. For her part, Ms Swarbrick said that the claim was incorrect. In all events, if the applicant does intend to pursue a recusal application, it is important that he does so promptly so as to enable the Authority to deal with the matter in a timely way prior to the scheduled investigation date.

[44] Costs are reserved.

A D Ford
Judge

Judgment signed at 2.45 pm on 16 October 2013