IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 66
ARC 82/12

IN THE MATTER OF	an application for special leave to remove proceedings to the Court
BETWEEN	GREGORY DOUGLAS HALL Applicant
AND	WESTPAC NEW ZEALAND LIMITED Respondent

Hearing:	11 April 2013 (Heard at Auckland)
Counsel:	Tony Drake, counsel for applicant Phillipa Muir, counsel for respondent
Judgment:	24 April 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The applicant and respondent are parties to proceedings before the Employment Relations Authority (the Authority) in respect of a personal grievance referred for determination. The applicant has made an unsuccessful application to the Authority Member to have the proceedings removed to the Court for hearing and judgment. In view of the fact that the Authority declined to remove the matter the applicant now seeks special leave of the Court for an order removing the proceedings to the Court. This application is made pursuant to s 178(3) of the Employment Relations Act 2000 (the Act).

[2] The sole ground raised pursuant to 178(2) is that important questions of law are likely to arise in the matter, other than incidentally.[1] The decision of the Court with such an application is discretionary.

Factual position

[3] The parties have filed affidavits in support, answer and reply setting out their respective positions. Mr Hall was formerly employed by the respondent (Westpac). Westpac had a Career Break and Time Out Policy and after a lengthy period of employment Mr Hall and Westpac agreed that he could take 12 months leave of absence under that policy without pay. That 12 month period was due to expire on 5 January 2012. Over the period Mr Hall's roles had been reorganised and there was no position immediately available for him at the time of his indicated return. Substantive issues arose from the circumstances, which occurred at that time. There was a brief extension of the return date. Mr Hall remained employed by Westpac. On 10 April 2012 he raised a personal grievance claim and mediation occurred. Finally Mr Hall alleges that the position became intolerable. On 23 May 2012 he resigned on the basis that he had been constructively dismissed. He has commenced personal grievance proceedings in the Authority.

Grounds of application for removal

[4] As indicated Mr Hall maintains that there are important questions of law likely to arise other than incidentally in this matter. Mr Drake, on his behalf, submitted that any one of the questions could satisfy the statutory test under s 178(2)(a) of the Act. The questions of law are set out in a schedule attached to the application and are as follows:

> 1. Was there implied into the contract of employment a term pursuant to which the applicant had a right to work and, if so, were the actions of the respondent a breach of or repudiation of the respondent's obligations under the contract?
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> 2. Was it lawful and justifiable, pursuant to the Career Break and Time Out policy:

[1] Employment Relations Act 2000, s 178(2)(a)

(a) for the period of 12 months unpaid leave to be extended;

(b) for the applicant's entitlement to remuneration under the contract of employment to be suspended as from:

(i) 5 January 2012; or

(ii) 29 February 2012;

(c) for the redundancy policy and the redundancy provisions in the contract of employment to be treated as not having come into effect or having to be observed?

3. Are exemplary damages able to be awarded to the applicant?

[5] Mr Drake submitted that the question of whether there was an implied term in the contract of employment requiring the respondent to allow Mr Hall to return to work at the end of the period of approved leave, would have to be determined at the substantive hearing. If it was a term of the applicant's contract of employment and the respondent breached it or repudiated the contract, then Mr Drake submitted that, on that ground alone, that would constitute an unjustified constructive dismissal both substantively and procedurally.

[6] This issue of the implied term of a right to work can easily be resolved in view of a concession in Ms Muir's submissions on behalf of Westpac. She submitted that no important question of law arises in respect of this issue as the right to work has been long established as an implied term in an employment contract.[2] In view of that Ms Muir submitted that there was no need for a separate issue on this point to be determined. It is not in dispute, and it will arise incidentally during the course of the hearing along with the consideration of the facts surrounding the issue of Mr Hall's intention to return. The member of the Authority, in her determination refusing an order for removal to the Court, came to the same conclusion.

[7] As far as the second question is concerned, Mr Drake submitted that the circumstances arising under the Career Break and Time Out Policy, in this case, are inextricably linked with Westpac's redundancy policy and the redundancy provisions in the contract of employment. Indeed the question is couched in that way. He submitted that the issues of interpretation of the policies and provisions are questions

[2] See: *Hill v New Zealand Rail Ltd* [1994] 1 ERNZ 113; *Auckland District Health Board v X (No 1)* [2005] ERNZ 487.

of law and these will require an authoritative interpretation before a consideration of the factual position is made.

[8] In respect of this particular submission, Ms Muir responded that the question simply raises a combined matter of interpretation and factual issues and that no important question of law arises. The issue of interpretation would not satisfy the criterion of 'importance'. She submitted that leaving these issues to the Authority to determine is consistent with the principles of the Act and the scheme under it for determining personal grievances.

[9] Mr Drake spent more time on the third question. Mr Hall seeks exemplary damages. Mr Drake conceded that there are authorities of the Court of Appeal, notably *Paper Reclaim Ltd v Aotearoa International Ltd*[3] and the decision of this Court in *Prins v Tirohanga Group Ltd*[4] which held that the remedy of exemplary damages is not available in respect of a contractual breach including breach of an employment contract. Mr Drake submitted that this position should be revisited insofar as employment law is concerned on the basis that consideration has not been given to the distinction between an ordinary commercial contract and an employment contract where the obligation of good faith and the protection from unjustifiable dismissal provide a statutory overlay. In his submissions, he referred to a Canadian authority[5] which held that exemplary damages are available in respect of a breach of an insurance contract claim. He also referred to the New Zealand decision of *State Insurance v Cedenco Foods Ltd*[6] where, obiter, the Court of Appeal surmised that exemplary damages might in some circumstances be available for the breach of the duty of utmost good faith. In view of those authorities, Mr Drake's overall submission was that it is arguable that employment contracts in New Zealand governed by statutory good faith obligations should be regarded as special classes of contract. As they have similarities to contracts of insurance, where the duty of utmost good faith applies and where obligations of confidence exist between the parties, exemplary damages should be available as a remedy for breach.

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[3] [2006] 3 NZLR 188.
[4] [2006] ERNZ 321.
[5] *Whiten v Pilot Insurance Co* (2002) DLR (4th) 257; [2002] 1 SCR 595.
[6] (CA 216/97, 6 August 1998).

[10] Ms Muir's answer to this was that the question of availability of exemplary damages is not one that gives rise to any important question of law. Again she submitted that because it is relevant only to remedies and not decisive of the proceedings or strongly influential in determining the case, it does not satisfy the criterion of "important". Further, she submitted that the point has already been determined and is therefore settled law. She further pointed to the fact that breach of good faith obligations already give rise to a penalty under the Act[7] and it is therefore unnecessary for the Court to revisit the question of whether exemplary damages are available. She submitted that in any event the substantial remedy of compensation involves considerations similar to those which might give rise to the remedy of exemplary damages and, accordingly, a remedy is already available under the Act,[8] therefore negating the need for review.

[11] Finally, in respect of the residual discretion Mr Drake submitted that there are no factors in the present case to warrant an exercise of the discretion against removal to the Court. However, Ms Muir submitted that the Court should exercise its discretion against removal on the basis that no useful purpose would be served as it involves factual disputes more appropriately determined by the Authority at first instance, that the applicant will have a right to challenge the substantive determination of the Authority if dissatisfied with it, that granting the application would deprive the respondent of an important right of appeal and that increased costs to the parties would be incurred and that there would likely be a delay in the allocation of the hearing.

[12] Mr Drake submitted in reply that the right to challenge arises in every application before the Authority and that was not a relevant consideration against removal if the criteria under s 178(2) were satisfied. As to the loss of the right of appeal, Mr Drake submitted that the respondent would have a right of appeal to the Court of Appeal on questions of law with leave. Insofar as increased costs and delay in hearing are concerned, Mr Drake submitted that in fact the costs overall were likely to be significantly higher if the matter remained with the Authority and was

[7] At s 4A.
[8] At s 123(1)(c).

subsequently challenged. In any event a final resolution of the grievances is likely to be more speedily reached if removal is granted.

Legal principles - discussion

[13] Both counsel referred me to relevant authority. In respect of the of the identification of an important question of law it is sufficient to refer to *McAlister v Air New Zealand Ltd*,[9] which in turn relied upon *Hanlon v International Education Foundation (NZ) Inc.*[10]

[14] In paragraphs 9 and 10 of the decision, Judge Shaw stated as follows:

> [9] The principles to be applied in such an application were discussed by the Chief Judge in *Hanlon v International Educational Foundation (NZ) Inc*. In summary these are:
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> 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.
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> 2. It is necessary to identify a question of law arising in the case other than incidentally.
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> 3. It is necessary to decide the importance of the question.
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> 4. It is not necessary that the question should be difficult or novel.
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> 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 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.
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> [10] Even if an important question is likely to arise, the removal of a 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

[9] AC 22/05, 11 May 2005.
[10] [1995] 1 ERNZ 1, a decision of Chief Judge Goddard decided under the Employment Contracts Act 1991.

> whether this is a case which will inevitably come to the Court by way of a challenge in any event.

[15] These decisions have been subsequently applied by this Court in *Lloydd v Diagnostic Medlab Services Ltd*[11] and *NZ King Salmon Company Ltd v Cerny and Moretti.*[12] In *Lloydd* Judge Travis allowed the application because the point of law raised passed the test under s 178(2)(a) on the basis that there was no direct authority in New Zealand on that point. The ultimate discretion was exercised in favour of the applicants. In the *King Salmon* case Judge Ford declined the application on the basis that he was not persuaded that there was no guiding authority on the issue raised as it had been considered by the Court of Appeal. In addition he considered that the factual situation was relatively complex and eminently suited to an investigation by the Authority.

[16] In respect of the issue of the implied condition on a right to work, there is no need to analyse the decisions. Ms Muir has indicated that the defendant does not dispute that such a condition may be implied into an employment contract, but to be tried upon a factual analysis is whether the condition has been breached.

[17] As to the second question, Mr Drake submitted that the legal issue will require the Court to interpret the contractual provisions, the Career Break and Time Out Policy and the redundancy policy. Ms Muir submitted that this will arise incidentally in the factual analysis.

[18] On both of these points, the member of the Authority determined that questions of law merely arose incidentally in the factual considerations.

[19] Insofar as the third question of law relating to exemplary damages is concerned, I have already considered the legal authorities and the basis upon which Mr Drake is endeavouring to distinguish this case from them, thereby establishing a point of law which may not have been specifically determined by the Courts.

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[11] [2009] ERNZ 42 at [20].
[12] [2012] NZEmpC 195.

[20] It is not for me in this short decision to resolve the point of law raised or to determine whether any measure of damages arises in this case. The issue of whether exemplary damages may arise from contractual breach has been the subject of decisions of a Court of high appellate jurisdiction and followed by this Court. It is true that with employment contracts there is the statutory overlay, but that very statute I perceive to contain remedies for the very type of behaviour which in other circumstances might give rise to exemplary damages. However, those will be issues which the applicant wishes to have for reconsideration.

Conclusions

[21] I have carefully considered the submissions of counsel in the context of the circumstances of this case. I have also considered the well reasoned determination of the member of the Authority in declining removal. I find that I am in agreement with that reasoning and the submissions of Ms Muir.

[22] In respect of the first two points of law raised by the applicant, the first is conceded by the respondent but now requires a factual determination. The second will involve a consideration of contractual and company policy provisions that must be incidentally connected with the overall factual matrix. That consideration cannot involve an important point of law even though it may have ramifications for a wider group of employees of the respondent.

[23] The third issue arising from the claim for exemplary damages has to be considered against the prevailing circumstances that, even if successful, the claim would result in comparatively minor damages. Mr Drake himself conceded that in answer to my own questions. Quite apart from this consideration, however, and applying the provisions of the section in the way adopted in the *Lloydd* and *King Salmon* cases, the point of law has been effectively determined by the Court of Appeal and also by this Court in circumstances where the distinction which Mr Drake endeavours to raise would have been clearly apparent. In the light of these decisions it is not a point of law capable of being characterised as important and certainly not one beyond the Authority to determine. In addition, the point of law

will not be considered in isolation from the determination as to whether there is, in any event, a factual basis for such damages to be awarded.

[24] Turning to the issue of the exercise of the residual discretion. If the matter remained to be determined on the residual discretion I consider that Ms Muir made valid points as to why that discretion should not be exercised in this case. While it is true that the Authority has not yet commenced the investigation into the substantive claim as submitted by Mr Drake, I can see no useful purpose to be served by ordering the removal of the proceedings when the primary issues involve factual disputes more appropriately to be determined by the Authority at first instance. It would then be open to the parties to challenge the Authority's substantive determination if they were dissatisfied with it. By granting the application both parties would lose a substantial appeal right. Mr Drake submitted that the respondent would nevertheless, have a right of appeal from the Court decision on a point of law with leave. However, the entitlement provided by the Employment Relations Act to bring a de novo challenge against first instance factual findings is a substantial right of appeal, which should not lightly be deprived.

[25] In this respect I also have regard to s 143(f) and (fa) setting out two of the objects of Part 10 of the Act as they relate to the institutions established by it. With those objects, the Legislature recognised that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements and to ensure that investigations by that specialist decision-making body are generally concluded before any higher court exercises its jurisdiction in relation to the investigations.

[26] That is not to say that there will not be cases where removal to the Court is justified. However, in keeping with the objects and the specific distinctions between the jurisdiction of the Authority and the Court as set out in ss 161 and 187 of the Act, such removal should not be made without good reasons to do so. The semi-inquisitorial process adopted in the Authority provides a unique and well trusted first instance method for determining disputes in the employment environment.

[27] Ms Muir, therefore, made a valid point in submitting that by granting the application for special leave, the Court would effectively deprive the parties of appeal rights against first instance factual findings. As to whether there would be increased costs for both parties is a moot point. Obviously if the parties accepted a determination of the Authority without seeking to challenge the decision, then the dispute would end at that point, with a substantial saving in costs. It would also appear to be correct that removing the matter to the Court would result in a later hearing date.

[28] For these reasons I would have declined to exercise the residual discretion if I had needed to do so. The application is therefore dismissed. The parties will no doubt wish to return to the Authority to ensure that the earliest possible date for the investigation is set.

M E Perkins
Judge

Judgment signed at 2 pm on 24 April 2013