

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2015] NZEmpC 226
EMPC 358/2015**

IN THE MATTER OF an application for special leave to remove
proceedings to the Employment Court

BETWEEN PAMELA KAYE SHEATH
Applicant

AND THE SELWYN FOUNDATION
First Respondent

AND SELWYN CARE LIMITED
Second Respondent

Hearing: On the papers and submissions made at directions conference
on 2 December 2015

Appearances: T Drake, counsel for the applicant
S Langton, counsel for the respondents

Judgment: 15 December 2015

JUDGMENT OF JUDGE M E PERKINS

[1] The applicant, pursuant to s 178(3) of the Employment Relations Act 2000 (the Act), seeks special leave of the Court for an order that proceedings presently before the Employment Relations Authority be removed to the Court.

[2] On 12 May 2015 the Employment Relations Authority issued a determination involving the same parties to the present application.¹ In that determination, Ms Pamela Sheath's claims to wage arrears and a personal grievance for unjustified disadvantage were dismissed. Costs were reserved. Ms Sheath filed a challenge against that determination in the Court, which is filed under EMPC 154/2015. That challenge is yet to be heard.

¹ *Sheath v The Selwyn Foundation* [2015] NZERA Auckland 134.

[3] Following the filing of the challenge, Ms Sheath was dismissed from employment by the first and/or second respondents on the grounds of redundancy. She filed a statement of problem with the Authority raising a personal grievance arising out of that dismissal. In view of the fact that the challenge in respect of the earlier proceedings is already before the Court, Ms Sheath applied to the Authority for an order removing to the Court her personal grievance for unjustified dismissal. The respondents consented to such an order.

[4] In a determination dated 23 November 2015, the Authority refused Ms Sheath's application for removal.² The grounds for such refusal were that any question of law arising in the proceedings was not an important question of law arising other than incidentally.³ It was determined that the question of law posed was one primarily requiring resolution of disputed facts.

[5] The second ground for refusing the removal was that while the parties in both proceedings are the same, the separate proceedings do not involve the same or similar matters.

[6] Thirdly, even if an important question of law arose or there were the same or similar issues in both sets of proceedings, the Authority determined it would still not exercise its ultimate discretion to grant removal. This was because the new case was considered to turn on a number of disputed facts that can be more properly and quickly dealt with by the Authority rather than the Court. The Authority claimed to be seized of the background to the case by virtue of the previous proceedings now under challenge. The determination stated that the hearing could, therefore, be more focussed and of less hearing time as a result.

[7] Finally, the determination stated that in view of the current matter before the Court under challenge, it was likely the unsuccessful party in the new proceedings would file a challenge at a later date, especially if the determination is given prior to the Court hearing the existing challenge.

² *Sheath v The Selwyn Foundation* [2015] NZERA Auckland 364.

³ S 178(2)(d) of the Act.

[8] The Authority also found that even though the respondents consented to the order for removal, as they have in respect of the present application, that is not determinative.

[9] The grounds upon which the present application to the Court for special leave is made are:

- a) That the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.
- b) That an important question of law is likely to arise in the matter other than incidentally. That question is as follows:

Was there a bona fide redundancy situation at the time of the dismissal in the circumstances where the position which the employee held had not become surplus to the employer's requirements, the duties and responsibilities of the position were to remain unchanged, and the employer's objective was to make changes to the accommodation and remuneration entitlements the employee had?

- c) That in all the circumstances the Employment Court should determine the matter.
- d) As appearing in the affidavit of the Ms Pamela Sheath sworn in support of the application.

[10] In her affidavit in support of the application, Ms Sheath sets out the background not only to the proceedings already subject to challenge but also to the circumstances surrounding her being made redundant by the respondents. It is not in dispute that the position which Ms Sheath held as Chaplain has not become surplus. Ms Sheath was in fact replaced by another Minister of the Anglican Church to perform the same duties and responsibilities of the position of Chaplain at Selwyn Village in Point Chevalier that she formerly occupied. The allegation is that the

redundancy was made for the sole purpose of removing employment entitlements which Ms Sheath enjoyed in the position.

[11] It is a rare circumstance for the Authority to decline to remove proceedings to the Court where the Court is already seized of proceedings involving the same parties, usually by way of a challenge to an earlier determination of the Authority. In circumstances where there is an attempt to have the Authority or subsequently the Court remove proceedings from the Authority where there are not already existing proceedings in the Court between the same parties, the Authority or the Court will be reluctant to order removal, unless there are strong grounds for doing so. Principles which the Authority and the Court will adopt in dealing with such an application are now well established by authorities such as *NZEMPU v Carter Holt Harvey Limited*⁴ and *Air New Zealand v Kerr*.⁵ Generally such cases will turn on the issue of whether there is an important question of law likely to arise in the matter other than incidentally.

[12] The basis upon which the Authority or alternatively the Court may consider removal is set out in s 178(2) of the Act. In this case the applicant relies upon s 178(2)(a) and (c) of that section.

[13] It seems to me that in this particular case there may be an important question of law which is likely to arise other than incidentally in the proceeding. It is not possible to say definitively until the case is presented and argued. As Mr Drake submitted during the directions conference in which the present application was discussed, the question posed does go to the heart of the meaning of a redundancy and whether a dismissal on such grounds can incorporate the considerations which appear to have come into play in this case. For these reasons I do not agree with the Authority's determination on this point.

[14] I also do not agree with the determination of the Authority that even though the parties in both sets of proceedings are the same an order for removal should not be made because they do not involve the same or similar matters. The terms and

⁴ *NZEMPU v Carter Holt Harvey Limited* [2002]1 ERNZ 74 at [36]-[38].

⁵ *Air New Zealand v Kerr* [2013] NZEmpC 114.

conditions of the Ms Sheath's employment, which were the subject of the wage arrears claim and personal grievance in the first set of proceedings, are likely to come up for consideration in the personal grievance claim arising from the dismissal for redundancy. The issues are related. That is a criterion contained in s 178(2)(c) which the determination failed to consider. For these reasons one of the grounds of the present application clearly comes within the criteria contained in s 178(2)(c), namely that the existing proceedings before the Court involve the same or similar or related issues to the proceedings for which removal is now sought.

[15] In some ways the determination of the Authority has conceded a relationship between the two claims by stating that one of the advantages of retaining the new proceedings before the Authority is that the Authority is already aware of the background of the case by virtue of the previous proceedings now under challenge to the Court. That seems to me to raise a somewhat inconsistent approach in the determination declining removal.

[16] I agree that the Authority must exercise caution in dealing with any application for removal. The careful approach required in such applications is well set out in the *Carter Holt Harvey* case.⁶ Nevertheless, by inference, s 178(2)(c) of the Act does require the Authority and the Court to give consideration to matters such as convenience and cost to the parties in the litigation. This includes considering whether it is appropriate to require the parties and their witnesses to have to appear and give evidence in two separate proceedings when the issues involved can be adequately dealt with at one hearing. The section does not require the issues between the parties to be the same in both sets of proceedings. It is sufficient that the issues are similar or related and in my view in the present case, they are.

[17] In this case it is appropriate that there be an order for removal of the present proceedings before the Authority to the Court. It needs to be emphasised, however, that both the Authority and the Court must be vigilant in ensuring that there are adequate grounds established for orders for removal. This is particularly so on the basis that the Authority has been established for the purposes of providing speedy

⁶ *NZEMPU v Carter Holt Harvey*, above n 3 at [38].

and inexpensive first instance hearings of disputes and the fact that an order for removal by its very nature deprives the parties of a step in the appeal process. Each case will be decided on its own circumstances. The present case is, however, an instance where an order for removal should be made. The applicant, Ms Sheath, is accordingly granted special leave of the Court for an order removing the proceedings to the Court.

[18] Costs are reserved.

[19] Once the proceedings are removed to the Court they can be consolidated with the present challenge under EMPC 154/2015. Ms Sheath is to file and serve an amended statement of claim dealing with the consolidated actions on or before 4pm on 15 January 2016. The statement of defence to that amended statement of claim is to be filed and served on or before 4pm on 29 January 2016. Once the pleadings are attended to, a further directions conference is to be convened for the purposes of dealing with any further interlocutory matters or setting the proceedings on a course towards a substantive hearing.

M E Perkins
Judge

Judgment signed at 4.15 pm on 15 December 2015