IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 159
EMPC 175/2016

IN THE MATTER OF	Proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application to state a case for the Court of Appeal
BETWEEN	DAVID LUMSDEN Plaintiff
AND	SKYCITY MANAGEMENT LIMITED Defendant

Hearing:	On papers filed on 7 and 23 November 2016
Appearances:	Plaintiff in person K Dunn, counsel for defendant
Judgment:	28 November 2016

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] David Lumsden has applied, by interlocutory application, for an order that the Court state a case for the Court of Appeal on a question of law arising in his proceeding, but which excludes any question as to the construction of an employment agreement.[1]

[2] The question of law that Mr Lumsden proposes the Court state is as follows:

> Does a contract purporting to provide full and final settlement of all matters arising out of an employment relationship amount to an attempt to contract out of the Employment Relations Act 2000 insofar as it purports to prevent the effect of Part 9 of the Act on that relationship?

[3] The defendant opposes the Court taking this course, pointing out that a fixture of Mr Lumsden's claims is in the process of being set down by the Registrar

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1 See Employment Relations Act 2000, s 211.

to take place before March 2017 and pointing out that, in any event, Mr Lumsden has advised the Court that he will be unable to return to New Zealand until August 2017 and is unable to participate personally in a hearing before then. The Court has suggested, provisionally, that Mr Lumsden may be able to participate in the hearing of his case in this Court by video conference link from Australia. The case now has a tentative fixture for early February 2017.

[4] Ms Dunn, counsel for the defendant, was unable to identify any cases in which the Court had stated a case for the Court of Appeal under s 211 of the Employment Relations Act 2000 (the Act). There are, however, three instances in which this was done under the equivalent section of the Employment Contracts Act 1991, s 122.

[5] In *Ports of Auckland Ltd v NZ Waterfront Workers Union*,[2] this Court considered that s 122 of the 1991 Act did not contemplate the seeking of an opinion on a question of law before the hearing of a case in this Court but, rather, the submission of a question once the case had been heard, at least in part. If that amounts to a jurisdictional conclusion that no case can be stated now under s 211 unless and until the proceeding has been heard by the Employment Court, wholly or in part, then I respectfully disagree. There is nothing in the legislation to so confine when a case may be stated. The only requirement is that the matter must be "before the court". Once a proceeding has been filed or removed to the Employment Court, it is "before the court". Although many cases may benefit from a hearing before a question of law is stated for the Court of Appeal, in some cases the question may be so fundamental or determinative of the case that it will be appropriate to do so at the outset.

[6] Next, in *Reid v New Zealand Fire Service Commission* the Employment Court again declined to state a case to the Court of Appeal and considered that the discretion under former s 122 was to be exercised "sparingly, exceptionally and for

[2] *Ports of Auckland Ltd v NZ Waterfront Workers Union* AEC18/96, 16 April 1996 (EC).

clear reason".[3] I agree with that statement and also with the following passage from the judgment:[4]

> I also have regard to the circumstance that the Court of Appeal will be disadvantaged if it does not have before it, if and when it comes to hear this case, an expression of this Court's views about the applicable law in the particular circumstances in which the parties find themselves and generally in relation to the powers of the Employment Tribunal to make orders staying proceedings pending the provision of security for costs.

[7] Finally, in *Britain v Telecom Corporation of New Zealand* the Employment Court did state a case for the Court of Appeal in circumstances where that Court had before it an appeal dealing with the same question and which was purely a question of law requiring no preliminary findings of fact.[5] The benefits of stating a question of law in that case included saving the parties the time and expense of arguing the matter at two levels.

[8] The defendant's next submission is that to state the question proposed by Mr Lumsden (set out earlier in this judgment) at this point in the litigation would be to pose a hypothetical without a factual foundation. Ms Dunn submitted that the question must necessarily be about the interpretation of the settlement agreement between Mr Lumsden and Skycity Management Ltd (Skycity), which was certified and signed off by a mediator.

[9] I do not consider that this necessarily disqualifies an appropriate question of law being stated for the opinion of the Court of Appeal. It may well be common ground that the mediated settlement agreement was, as these things frequently are, said to be in full and final settlement of any further claims by Mr Lumsden against Skycity. If that were so, the question of law could be postulated on the basis that such a full and final settlement, certified by a mediator under s 149 of the Act, could be the subject of a subsequently raised personal grievance dealing with the subject matter of the earlier settlement, by application of s 238.

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3 *Reid v New Zealand Fire Service Commission* [1995] ERNZ 608 (EC) at 609.
4 At 609–610.
5 *Britain v Telecom Corporation of New Zealand* [2000] 2 ERNZ 143 (EC).

[10] Nor do I agree with Ms Dunn's next submission that, following *Reid*, this is not an exceptional case which contains issues warranting the statement of a question of law for the Court of Appeal. The interpretation and application of s 238 to agreements or contracts made pursuant to other sections of the Act specifically authorising them, has not, to my knowledge, been advanced previously at the forefront of a case as Mr Lumsden places it in this. It is, in that sense, an exceptional case. I do, however, agree with Ms Dunn's submission that the Court of Appeal may benefit in having the Employment Court's views on this question which Mr Lumsden may be entitled to take on appeal if leave is granted by the Court of Appeal following a substantive decision by this Court.

[11] The following summary of the nature of the case is necessary to determine Mr Lumsden's application.

[12] The latest pleading filed by the plaintiff is his amended statement of claim dated 4 October 2016. This arises out of the removal of the case by the Authority to the Court under s 178 of the Act. Mr Lumsden persuaded the Authority that an important point of law would arise other than incidentally in his claims in that forum. The Authority removed the proceedings by a determination issued on 19 July 2016.[6] The important question of law which the Authority identified in its determination, and which Mr Lumsden seeks to argue, is "… in respect of the interrelationship between s 149 and s 238 of the Act which has not been fully explored by the Court [and which] was recognised by the Court in its decision."[7]

[13] Mr Lumsden's claim is that he was improperly induced into resigning from Skycity's employment in the course of a mediation held in an attempt to resolve an earlier dispute between the parties. He claims, also, that Skycity breached the terms of the settlement agreement by improperly refusing to re-employ him in circumstances where it had expressly said in the settlement agreement that he might be re-employed.

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6 *Lumsden v Skycity Management Ltd* [2016] NZERA Auckland 242.

7 At [19], referencing the earlier decision of the Employment Court relating to a preliminary aspect of Mr Lumsden's case. See *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225.

[14] I understand the essence of Mr Lumsden's claim is that the mediated settlement of his original dispute with Skycity does not preclude him from bringing a personal grievance in relation to that, because s 238 of the Act, properly interpreted and applied, means that employees cannot contract out of their statutory entitlement to bring personal grievances including for unjustified dismissals.

[15] Despite a very long history of this and equivalent provisions in earlier legislation, this question has not apparently arisen previously for decision by this Court or its predecessors. It is arguable that the settlement of personal grievances, including by statutory mediation, is one of the Act's ways of settling employment relationship problems so that such settlements and their binding effect do not amount to a contracting-out under s 238. That is arguably recognised in s 101(ab) which sets out, among the object of pt 9 of the Act, that it is "to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship". Further, the statutory language refers to "settling" grievances which may contemplate both a variety of ways of doing this and that a "settlement" of a personal grievance, including by the statutory mediation process under s 149, resolves finally the relevant grievance or grievances so that it or they cannot be re-litigated. So, too, does s 144 of the Act relating to mediation services, which includes the provision of these, "… that assist persons to resolve, promptly and effectively, their employment relationship problems."[8]

[16] Section 149 ("Settlements"), at the heart of Mr Lumsden's case, itself provides:

> (1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—
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> …
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> (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—
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> may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

8 Employment Relations Act 2000, s 144(2)(d).

[17] Section 149(3) (the consequences of which must be explained to the parties) include that "those terms are final and binding on, and enforceable by, the parties; and … the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979 …".[9] In light of that legislative scheme, s 238, which Mr Lumsden seeks to invoke, may arguably be interpreted to be subject to such express provisions relating to mediated settlements.

[18] Although entitled "No contracting out", the body of s 238 provides: "The provisions of this Act have effect despite any provision to the contrary in any contract or agreement." Section 238 applies, of course, to the mediation and settlement provisions of the Act.

[19] The real issue in this case strikes me as being not whether s 238 of the Act prohibits settlements of personal grievances having the effect of preventing litigation or further litigation about the subject matter of those agreements. That is illustrated when the operative provisions of s 238 are examined. Section 238 does not encompass, as a prohibited vehicle by which the application of the personal grievance parts of the Act may apply, other provisions in the statute. It does not purport to trump other sections of the Act but, rather, it affects contracts and agreements, for hypothetical example by imposing a maximum level of wage loss compensation or excluding access to the Act's disputes procedures. Thus, it may be seen that the appropriate nature of Mr Lumsden's question is whether s 238 of the Act is inconsistent with the settlement of a personal grievance in mediation so that the former trumps the latter. That may be a matter of statutory interpretation, rather than so-called "contracting out".

[20] There is, at this preliminary stage at least, a respectable argument that ss 149 (and its consequences arising out of settlements) and 238 can co-exist, as indeed they appear to have done for many years. Second, and not unassociated with this, the Court of Appeal has often expressed a preference to consider questions of law not in the abstract but both in a factual context and with the benefit of the specialist institutions' views about the interpretation of the legislation under which they

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9 Section 149(3)(a)-(ab).

operate. That course will be open to Mr Lumsden (that is, by an appeal) if he is unsuccessful in his arguments, already foreshadowed, to this Court.

[21] In all of these circumstances, and for the foregoing reasons, I decline to refer the question of law posed by Mr Lumsden to the Court of Appeal under s 211 of the Act.

[22] The defendant is entitled to costs on the plaintiff's unsuccessful application but I reserve the amount of these to be determined by the trial Judge as part of any costs exercise.

GL Colgan
Chief Judge

Judgment signed at 4 pm on 28 November 2016