IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 31
EMPC 216/2016

IN THE MATTER OF	of an application for special leave to remove Employment Relations Authority proceedings to the Court
BETWEEN	ROBERTA RATU Applicant
AND	AFFCO NEW ZEALAND LIMITED Respondent

Hearing:	On the papers 1 and 29 September 2016, accompanying documents and submissions of counsel 5 and 13 December 2016
Appearances:	S Mitchell, counsel for applicant M Williams, counsel for respondent
Judgment:	17 March 2017

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The applicant and the respondent are parties to proceedings before the Employment Relations Authority (the Authority) in respect of a personal grievance referred for determination. The applicant made an application to the Authority to have the proceedings removed to the Employment Court for hearing and judgment. In a determination dated 15 August 2016 the Authority dismissed the application.[1]

[2] 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).

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1 *Ratu v AFFCO NZ Ltd* [2016] NZERA Auckland 275.

[3] The sole ground raised is that important questions of law are likely to arise in the matter, other than incidentally.[2]

Factual position

[4] The parties have agreed that the Court may consider this matter on the papers. They filed an agreed statement of facts as follows:

> 1. The Respondent is a duly incorporated company operating meat processing plants throughout the North Island, including at Rangiuru, outside Te Puke.
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> 2. The Applicant is employed by the Respondent at its Rangiuru plant.
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> 3. The Applicant was dismissed from her employment on 23 December 2015.
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> 4. The Applicant was reinstated to her position by way of an Oral Consent Determination of the Employment Relations Authority at an Investigation Meeting on 23 May 2016, confirming in writing on 24 May 2015 (attachment 1).
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> 5. By letter dated 29 June 2016, the Applicant was requested by the Respondent to attend a disciplinary meeting to take place on Tuesday 5 July 2016 at 11am (attachment 2). The purpose of the meeting was to discuss allegations of serious misconduct.
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> 6. The allegations of serious misconduct are set out in the letter of 29 June 2016, being allegations that the Applicant had made incorrect or misleading public statements about the Respondent and its shareholders or directors;
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> 7. The allegations follow incidents that took place on 7 March 2016, 8 March 2016, and 10 May 2016.
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> 8. The incidents had all occurred prior to the Applicant being reinstated to her position.
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> 9. The Applicant raised a personal grievance and filed an application in the Employment Relations Authority by way of a Statement of Problem on 4 July 2016 (attached).
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> 10. The Respondent filed a Statement in Reply (attached).
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> 11. During the course of the settlement of the allegation of unjustified dismissal, the Respondent had forwarded a settlement letter to the Applicant dated 20 May 2016 on a *without prejudice* basis. The applicant sought to produce the letter in the Authority.

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

[5] The attachments referred to in the agreed statement of facts are lengthy and have not been set out in this judgment.

[6] Prior to the commencement of the investigation meeting, the dispute as to the production of part of the without prejudice correspondence arose from submissions which were filed in the Authority by counsel for the parties. Mr Mitchell, counsel for Ms Ratu, sought to disclose parts of the correspondence which had been exchanged on a without prejudice basis. Mr Williams, counsel for the respondent, objected to the disclosure. The Authority Member then directed that Mr Mitchell remove the disclosures he had made about the content of the without prejudice correspondence. This was on the basis that they were not going to be part of the evidence considered by the Authority when investigating and determining Ms Ratu's claims.

[7] Following this direction of the Authority, Ms Ratu made the unsuccessful application for removal of her personal grievance claim to the Court on the basis that there were three important issues of law arising other than incidentally. Rather than filing a challenge to the determination declining removal, Ms Ratu has made the application seeking special leave of the Court for an order that the matter be removed. The application simply states that the grounds are that an important question of law is likely to arise in the matter other than incidentally. While the determination of the Authority declining removal was attached to the application, I requested that Mr Mitchell file a memorandum setting out the questions of law so that both the respondent and the Court were fully advised as to what was being argued.

[8] Mr Mitchell's memorandum of 7 November 2016 sets out the alleged important issues of law involved:

> (a) Whether the Employment Relations Authority has jurisdiction for reasons of public policy to prevent a party from admitting otherwise admissible evidence;
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> (b) Whether a settlement proposal made on a "*without prejudice*" basis in one proceeding between parties, is admissible in another proceeding;
>
> (c) Whether a fair and reasonable employer can raise as disciplinary matters, the conduct of an employee it was aware of at the time it consents to

> an order of reinstatement of the employee, or a reinstatement such as an order is made.

[9] The notice of opposition to the application for special leave is based on the grounds that the determination by the Authority declining to remove the matter is correct and that none of the three questions posed are important questions of law arising other than incidentally.

[10] As the matter is to be dealt with on the papers, counsel have filed submissions in support of their respective positions on the matter.

Legal principles-discussion

[11] The principles which apply in an application such as this have been discussed in previous authority of this Court. In *McAlister v Air New Zealand Ltd* Judge Shaw, relying upon *Hanlon v International Education Foundation (NZ) Inc* stated as follows:[3]

> [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 s178 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 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

3 *McAlister v Air New Zealand Ltd* AC 22/05, 11 May 2015 (EmpC), relying on *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC).

> 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.
>
> (Footnotes omitted)

[12] The decisions in *McAlister* and *Hanlon* have been subsequently applied in *Lloydd v Diagnostic Medlab Services Ltd*[4] and *New Zealand King Salmon Co Ltd v Cerny*.[5] In *Lloydd* Judge Travis allowed the application because the point of law raised passed the test under s 178(2)(a) of the Act 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, in that case, he considered that the factual situation was relatively complex and more eminently suited to an investigation by the Authority.

[13] In deciding this matter and in particular the first two issues raised, the Court in considering an application for special leave under s 178(3) of the Act, must have regard to s 178(6) which reads as follows:

> (6) This section does not apply—
>
> (a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and
>
> (b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

Conclusion and disposition

[14] The first two questions raised by the applicant deal with a matter that arises incidentally in the course of the proceedings. A decision to exclude the without prejudice correspondence is within the Authority's jurisdiction, as it is about its procedure in ensuring a fair hearing by way of the investigation meeting. There is ample legislative recognition of the Authority's entitlement to determine matters of

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4 *Lloydd v Diagnostic Medlab Services Ltd* [2009] ERNZ 42 (EmpC) at [17], [20].

5 *New Zealand King Salmon Co Ltd v Cerny* [2012] NZEmpC 195 at [5].

admissibility without intervention from the Court. Such intervention would be in breach of the scheme of the Act and the institutions established by it. The purpose of the legislation is to deliver insofar as the Authority is concerned a speedy, effective and non-legalistic problem resolution service by restricting the ability of the Employment Court to intervene during Authority investigations. Such issues were discussed in *Morgan v Whanganui College Board of Trustees*[6]. In the present case the applicant is attempting to dress up procedural matters merely involving admissibility of evidence as important issues of law when clearly they are not. These are matters covered by s 178(6) of the Act and accordingly the Court is not entitled to intervene.

[15] Insofar as the third issue raised is concerned, again this is an attempt to dress up into an issue of law a matter which is really the factual issue in this case that goes to the heart of the Authority's investigation pursuant to s 103A of the Act. In fact a key to reaching a decision in respect of this issue is contained in the statement of the issue itself. In Mr Mitchell's memorandum of 7 November 2016 he uses the words "Whether a fair and reasonable employer can raise as disciplinary matters…". That is the very inquiry which the Authority will be making in this matter. The Authority is being asked to consider whether the employer's actions withstand the requirements of s 103A of the Act when it entered into an agreement to reinstate Ms Ratu knowing that it intended to raise with her as disciplinary matters following such reinstatement, alleged behaviour which had occurred during her earlier period of employment. If any legal issue arises in the course of investigating that matter, it is certainly only incidental to the inquiry itself and would not reach the threshold required by s 178(2)(a) of the Act.

[16] Applying the principles established in *Hanlon,*[7] the issues raised by Mr Mitchell are at best mixed issues of fact and law and certainly do not reach the threshold required to justify an order for removal. This case can be more appropriately and speedily dealt with by the Authority thereby preserving the parties' further rights of appeal.[8]

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6 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, (2013) 10 NZELR 727.
7 At n 3.
8 *Hall v Westpac New Zealand Ltd* [2013] NZEmpC 66.

[17] For these reasons the application seeking special leave of the Court removing the matter is dismissed.

[18] As the proceedings now need to return to the Authority to enable it to complete its investigation meeting, it is appropriate that there be an order for costs in any event against the applicant. Such costs are to be calculated in accordance with Category 2B of the Court's Guideline Scale of Costs.

M E Perkins
Judge

Judgment signed at 10 am on 17 March 2017