

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 125
EMPC 256/2018**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN RIGHTWAY LIMITED
 First Plaintiff

AND EDWIN FREDERICK SHAND READ
 Second Plaintiff

AND GREGORY MICHAEL SHEEHAN
 Third Plaintiff

AND GENDI BURWELL
 Defendant

Hearing: 2 October 2018
 (Heard at Auckland)

Appearances: M McGoldrick, counsel for plaintiff
 T Drake, counsel for defendant

Judgment: 26 October 2018

JUDGMENT OF JUDGE J C HOLDEN

[1] In its determination dated 31 July 2018, the Employment Relations Authority (the Authority) ordered that Ms Burwell’s matter brought against RightWay Limited and the other plaintiffs (together referred to as RightWay) be removed to the Employment Court (the Court) pursuant s 178(2)(a) of the Employment Relations Act 2000 (the Act).¹

[2] RightWay challenges this determination.

¹ *Burwell v Rightway Ltd* [2018] NZERA Auckland 240.

[3] The Authority found that the five identified questions of law in Ms Burwell's matter were important.² RightWay agrees that the first four of those questions are important questions of law. However, it argues that the Authority ought to have exercised its residual discretion and not removed the matter to the Court. It now seeks a judgment from the Court that the matter should not have been removed and that it is to be remitted back to the Authority.

[4] RightWay's position boils down to the submission that the Authority's decision to remove the matter to the Court lacks common sense in the circumstances.

[5] The reason for this is that the Court has another matter before it, also involving RightWay, (the Kazemi case³) that will address the first four questions of law. The Kazemi case is set down for hearing in the last week in November 2018.

[6] RightWay argues that once judgment in the Kazemi case is received, it is likely the similar aspects of Ms Burwell's case will be settled. This would leave just one matter to be resolved. As can be seen from question five in Appendix A, that matter includes a question as to whether the sale of shares by RightWay to Ms Burwell (or to her family trust) can be examined by the employment institutions, or whether it is a transaction that, while occurring in the context of an employment relationship, nevertheless is not a matter that arises from or is related to the employment relationship and so is outside their jurisdiction.

[7] RightWay argues that the issue of jurisdiction is straightforward, applying s 161 of the Act, and is not an important question of law. It says the Authority therefore is well equipped to address it.

[8] In addition to relying on s 178(2)(a), Ms Burwell relies on s 178(2)(d). She argues that the fifth question also is an important question of law. She says that if the matter was not to remain in the Court, it will likely lead to her being seriously prejudiced by having to incur double, perhaps more, of the expense of being able to

² See Appendix A of this judgment for the questions of law as provided to the Authority.

³ EMPC 45/2018 Kazemi v RightWay Ltd and ors.

have the proceedings authoritatively and finally determined. She says there is no basis on which the residual discretion against removal ought to be exercised.

[9] Essentially the competing arguments represent different views on the relative efficiencies of having the matter dealt with at first instance in the Authority, or of being removed to the Court.

The test in s178(2)(a) is met

[10] Section 178(2)(a) of the Act does not require an important question of law to be novel or difficult, only that it is likely to arise other than incidentally.⁴

[11] The fifth question involves the extent to which the employment institutions can consider share sales between an employer and employee. It may be that the question ultimately is not difficult, but that does not mean it is not important. Here Ms Burwell says the question is important to her as well as to other employees to whom RightWay has sold shares. Relevant to my consideration is that, if the Authority or Court finds it has no jurisdiction to consider the share sale issue, that would be decisive of this aspect of the case.⁵ The fifth question also may have wider importance for parties considering the jurisdictional boundaries of the employee institutions.

[12] I accept that the fifth question posed satisfies s 178(2)(a) of the Act. In any event, as acknowledged by RightWay, the test in s 178(2)(a) has been met as the other questions are important questions of law.

There are good reasons for the Court to determine the matter

[13] It is correct that the Authority was influenced in its determination by the prospect that Ms Burwell's case could be heard with the Kazemi case. Given the current timeframes involved in both cases, that is not feasible. Nevertheless, given both matters are being managed by the same judge, have substantially similar fact

⁴ *McAlister v Air New Zealand Ltd* EmpC Auckland, AC 22/05, 11 May 2005 at [9], cited with approval in *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [35]-[36]; *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1.

⁵ *Johnston v The Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

situations, and the same counsel, there would still be efficiencies with the Court dealing with both of them. I agree with the Authority that Ms Burwell would likely obtain a final conclusion to her claims earlier than if her matter returned to the Authority but was stayed pending the outcome of the Kazemi case. That certainly would be the case if her matter was investigated by the Authority and then there was a challenge.

[14] While RightWay says that judgment in the Kazemi case would likely lead to RightWay adopting a responsible approach in Ms Burwell's case, leading to settlement of the common aspects, of course neither party can guarantee that. If Ms Kazemi is unsuccessful, Ms Burwell will need to consider whether her case has material differences that justify her proceeding nonetheless. The same is true of RightWay; if it is unsuccessful in the Kazemi case, it will need to consider whether it continues to fully defend Ms Burwell's case. The judge who considered Ms Kazemi's case would be particularly well able to work through whether any differences in the two situations are material.

[15] In any event, the responsible approach can equally be adopted whether Ms Burwell's case is in the Court or before the Authority.

[16] In all the circumstances, I consider the Court should determine Ms Burwell's matter. While there remains a residual discretion not to remove the matter to the Court, there are no good or sufficient reasons for it to be exercised.⁶

The challenge therefore fails

[17] The challenge fails. The plaintiffs are now to file and serve their statement(s) of defence in Ms Burwell's matter (EMPC 222/2018), such statement(s) of defence, to be filed within 21 days of the date of this judgment.

[18] Ms Burwell is entitled to costs on this judgment to be calculated on a category 2B basis. Those costs ought to cover the filing of a statement of defence and the preparation of submissions. I am hopeful the parties will be able to agree on the

⁶ Employment Relations Act 2000, s 178(5).

calculation but if that does not prove possible, Ms Burwell may apply for costs by memorandum to be filed within 21 days of the date of this judgment. RightWay then has 14 days within which to respond.

J C Holden
Judge

Judgment signed at 11.45 am on 26 October 2018

APPENDIX A

1. Was the amount of \$125,000 that was paid to RightWay Ltd on 30 October 2015 a premium in respect of the employment of Ms Burwell in contravention of s 12A Wages Protection Act 1983?
2. Is the structure and arrangements contained in the Deed Poll and Deed of Adherence part of the contract of employment or is it a separate commercial structure and arrangement?
3. Are all the provisions of the Deed Poll together with the provisions of the Deed of Adherence an illegal contract, or otherwise void in relation to Ms Burwell and her contract of employment? If not all of the provisions are an illegal contract or otherwise void, then:
 - (a) if the provisions relating to the transfer and sale of the Client Register are not an illegal contract or void, what amount of restitution or compensation should be awarded in respect to the Client Register which RightWay value as being in excess of \$104,000?;
 - (b) if the provisions relating to the payment of commission to the RP Owner are not an illegal contract or void, are the total commission payments that have been paid by RightWay Ltd relevant to, or affect, Ms Burwell's right to recover the amount of the \$125,000 buy-in as a debt due?
4. Was the incorporated term in Ms Burwell's contract of employment, which required RightWay Ltd to act in good faith, breached by RightWay Ltd's actions; and if so, can general damages be awarded to Ms Burwell for breach of that contractual term, and what is the correct level for such award?
5. Does the Employment Court have jurisdiction to hear and determine Ms Burwell's claim relating to loss suffered from RightWay Ltd having sold its shares to her; and if so what is the appropriate level of damages to be awarded?