IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 3
EMPC 334/2017

IN THE MATTER OF	an application for special leave to remove matter to Employment Court
BETWEEN	ELENA KAZEMI Applicant
AND	RIGHTWAY LIMITED First Respondent
AND	EDWIN FREDERICK SHAND READ Second Respondent
AND	GREGORY MICHAEL SHEEHAN Third Respondent
AND	DARRYL DEVENDRA JHINKU Fourth Respondent

Hearing:	On papers filed on 21, 28 November and 5, 11, 12, 14 and 21 December 2017
Appearances:	T Drake, counsel for applicant G Service, counsel for first, second and third respondents D Jhinku, counsel for fourth respondent
Judgment:	13 February 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] On 3 October 2017 the applicant (Ms Kazemi) filed a challenge to a determination of the Employment Relations Authority declining to remove a matter to the Court.[1] An application for special leave was subsequently filed, after issues relating to the Court's ability to deal with the challenge were raised.

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1 *Kazemi v Rightway Ltd* [2017] NZERA Auckland 300.

[2] The parties agreed that the application could be dealt with on the papers, following the exchange of written submissions.

Appropriate procedural route - challenge or special leave?

[3] After the parties had filed written submissions in accordance with the Court's timetabling orders, a judgment was delivered in *Johnston v The Fletcher Construction Company Ltd*.[2] Similar procedural issues arose in that case. The parties were invited to file further submissions and did so. The first, second and third respondents essentially supported the approach adopted in *Johnston*; counsel for the applicant advised that it was not now considered necessary for the Court to determine the applicant's challenge. Rather Mr Drake invited the Court to determine the applicant's application for removal on the sole basis of the application for special leave.

[4] While I understand the applicant to be effectively abandoning the challenge, it is convenient to set out the approach adopted in *Johnston*. That is because I would have applied the same approach in the present case and dismissed it on that basis.

[5] In *Johnston* I concluded that the correct approach is to pursue an application for special leave to remove a matter to the Court under s 178 of the Employment Relations Act 2000, rather than to pursue a challenge, observing that:

> [48] The issue appears to me to boil down to a narrow question of statutory construction. Parliament has provided a general right of challenge to litigants dissatisfied with determinations of the Authority. Parliament has provided a specific vehicle for seeking to revisit a decision to decline leave to remove a matter to the Court, namely by way of an application for special leave. The specific overrides the general. In making specific provision for an application for special leave in a particular class of case (decisions of the Authority declining leave) Parliament has clearly indicated that that is the process which must be followed.
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> [49] It could be argued that the words "the party applying for the removal may seek the special leave of the court" suggest that it is not obligatory to take this route. Similar permissive wording is, however, found in s 179. It is tolerably clear that the word "may" in these provisions is not directed at conferring on a dissatisfied litigant a choice between one route or another. Rather it is a choice between seeking special leave, or not; and pursuing a challenge, or not. The different purpose of each provision reinforces the

[2] *Johnston v The Fletcher Construction Ltd* [2017] NZEmpC 157.

> point – s 179 facilitates a party's entitlement to have its case heard afresh (de novo) or on a limited (non-de novo) basis. Section 178(3) is directed at ensuring that a matter is dealt with by the appropriate institution. In this regard it allows a party to seek special leave, the grant of which enables them to bypass the usual process in resolving a grievance, bunny-hopping to the Court for hearing at first instance.

[6] If that analysis is correct it follows that the appropriate course is for the applicant to apply for special leave to remove the matter to the Court, which is what the applicant has done. I turn to consider this application next.

Special leave

[7] The application is advanced on three principle grounds. In summary, it is said that an important question of law is likely to arise other than incidentally (s 178(2)(a)); that the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court (s 178(2)(b)); and that it is the sort of case which ought to be removed to the Court under s 178(2)(d). The respondents argue that neither of the first two grounds are made out in the particular circumstances and say that s 178(2)(d) has no application when the Court is considering an application for special leave. That is because s 178(2)(d) is limited to conferring a discretionary power on the Authority to remove a matter to the Court, not on the Court to remove a matter to itself.

[8] Removal may occur via one of two routes – first, by exercise of the Authority's powers under s 178(1); second, by exercise of the Court's powers under s 178(3). There is no presumption in favour of or against removal. Section 178 simply reflects the point that some cases are better suited for disposition via the Authority's investigative processes; some are better suited to judicial determination by the Court's adversarial processes. Parliament has identified three particular factors which may make it appropriate for the Court to hear a case at first instance. The Authority may also remove a matter to the Court where it otherwise considers it appropriate to do so, under s 178(3)(d). The broader discretionary power contained in s 178(3)(d) is restricted to the Authority. I do not consider that it extends to the Court for the reasons set out in *Johnston*:[3]

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3 *Johnston*, above n 2.

> [50] It is not immediately apparent why Parliament did not broaden the wording of s 178(3) to confer on the Court (in considering an application for special leave) a comparable power to the one enjoyed by the Authority in s 178(2)(d) (in considering an application to remove a matter to the Court). Parliamentary material does not cast any light on the issue. However, the close juxtaposition (within the same section) of the Court's powers with the Authority's more expansive powers indicates that it was a deliberate omission. This may be seen as consistent with the statutory objective of having most matters disposed of at first instance by way of investigation in the Authority, rather than the Court.
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> [51] Parliament has made it clear (by referring back to the criteria in s 178(2)(a)-(c)) that the Court's involvement is limited in circumstances where a litigant is dissatisfied with a decision of the Authority declining leave to remove a matter to the Court. An interpretation allowing a litigant to deviate off down the challenge route where a "good reason" is said to exist seems to me to run the risk of reading in what Parliament has deliberately left out – namely the sort of mop-up provision contained within s 178(2)(d). And to interpret the legislation as allowing two alternative options, each of which results in a different approach and the application of a different test to determining the same issue, would (in my view) be illogical. (footnotes omitted)

[9] Essentially, reading s 178(3)(d) in the way contended for would require the express statutory reference to one employment institution (namely the Authority) to be supplemented by implied reference to an additional institution (the Court), despite the apparently deliberate omission by Parliament (for whatever reason) in the original drafting.

Important question of law? (s 178(2)(a))

[10] The applicant has identified what are characterised as four important questions of law which, it is said, will arise other than incidentally. The questions are:

(a) Was the amount of $125,000 that was paid to the first respondent on 30 October 2015 a premium in respect of the employment of the applicant in contravention of s 12A of the Wages Protection Act 1983?

(b) 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?

(c) 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 the Applicant 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 the respondents 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 the first respondent relevant to, or affect, the applicant's right to recover the amount of the $125,000 buy-in as a debt due?

(d) Was the incorporated term in the applicant's contract of employment, which required the first respondent to act in good faith, breached by the first respondent's actions, and if so, can general damages be awarded to the applicant for breach of that contractual term, and what is the correct level of such an award?

[11] As Parliament has made clear, it may be more appropriate for the Court to hear and determine a matter where an important question of law is likely to arise. That does not mean that the question needs to be complex, tricky or novel. It may be important because the outcome will be decisive of the case[4] or the answer to it is likely to have a broader effect, or assume significance in employment law generally. It need not be important beyond the particular parties.[5]

[12] I accept the respondents' submission that determination of each of the questions posed by the applicant will involve, to a greater or lesser degree, consideration of the relevant factual context. Plainly they do not comprise stand-alone questions of pure law. That is not, however, the yardstick under s 178(2)(a). And it is clear that in this case none of the questions will be answered by a simple

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4 *Johnston*, above n 2, at [22].

5 See, for example, the discussion in *Johnston* and the authorities cited therein at [21]-[28].

analysis of the facts. By way of example, question four relates to an alleged breach of good faith and, if established, whether general damages can be awarded and (if so) at what level. While the facts are likely to be determinative in establishing whether or not there has been a breach of good faith, the law will be determinative in deciding the jurisdictional issue of whether general damages *can* be awarded. A mixed question of law and fact will then arise as to the appropriate level of damages.

[13] While it is true that the Authority routinely deals with allegations of breach of good faith, it remains an open question (of law) as to whether general damages are available to address any such breach. The position was described in the following way by Chambers J in *New Zealand Tramways and Public Passenger Transport Union Inc v Mana Coach Services Ltd*:[6]

> [75] … [It] is by no means clear what remedies are available for a breach of the duty of good faith. Obviously penalties are available but only in limited circumstances: see s 4A. A breach might also lead to a compliance order under s 137. But can damages be claimed? The authorities are divided on this point. There is slight authority for the proposition damages might be claimable in *Baguley v Coutts Cars Ltd*[7] and *Masina v The Commissioner, Te Kura Kaupapa Maori O Piripono Te Kura Whakahou O Otara*[8]. I say "slight authority" because in neither case did the Employment Court actually decide damages were claimable; in each, the matter was disposed of on the basis that, even if damages can be recovered for a breach of s 4, such recovery was not appropriate on the facts of those cases. To the contrary is *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*, in which the Employment Court held damages were not available as a remedy.[9] …

[14] And while a subsequent judgment of the Employment Court (in *Hally Labels Ltd v Powell*)[10] has concluded that that a claim for damages may be untenable for a breach of good faith, this has been questioned by the authors of *Mazengarb's*

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6 *New Zealand Tramways and Public Transport Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2011 ERNZ 326, [2012] 1 NZLR 735. See too *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Employees Union Inc* [2015] NZEmpC 44, (2015) 12 NZELR 452 at [158].

7 *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [64]. Note that this was reversed in part by *Coutts Cars v Baguley* [2001] ERNZ 660, [2002] 2 NZLR 533 (CA), but the Court of Appeal (at [16]) heard no argument on this point.

8 *Masina v Commissioner, Te Kura Kaupapa Maori O Piripino Te Kura Whakahou O Otara* [2010] NZEmpC 141, [2010] ERNZ 413 at [36] and [66].

9 *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597 (EmpC) at [293].

10 *Hally Labels v Powell* [2015] NZEmpC 92 at [133].

Employment Law.[11] In a nutshell, the availability of damages for breach of good faith remains uncertain. The answer to the availability question is plainly one of general importance.

[15] For completeness, I note that the fact that a question of law will arise in relation to remedies does not mean that the question will arise incidentally and accordingly fall outside the scope of s 178(2)(a). As observed in *Johnston*:[12]

> I do not accept that the fact the questions relate to relief rather than liability take them outside the ambit of s 178(2)(a) or mean that they can properly be characterised as incidental. Section 178(2)(a) is couched in speculative, rather than definitive, terms. If the applicant fails to establish his claim, issues of relief will not arise. If he does succeed, including in part, they will. If issues of relief do arise, the questions (of relief) will be central to resolving his claim.

[16] One of the key components of the applicant's claim relates to an alleged breach of the Wages Protection Act 1983. She alleges that the respondents charged an unlawful premium under that Act. As a full Court has recently observed in *Labour Inspector v Tech 5 Recruitment*,[13] while the Wages Protection Act has been in place for some time there has been a paucity of case law in relation to what will, and will not, amount to an unlawful premium. That case related to the relatively narrow issue of trade-testing costs incurred by workers recruited from the Philippines. The Court noted:

> [54] Used in the context of s 12A we consider "premium" naturally captures paying to acquire a job (that is, consideration over and above the wage paid for the work performed in the wage/work bargain) as described in *Sears* and illustrated in *Tan*; specifically where a price is paid either by an employee, or potential employee, or is paid on that person's behalf to secure employment. However, we consider "premium" extends beyond those situations to apply to an employer recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. Given the ingenuity with which agreements can be drafted each case will be fact-specific. However, the feature that stands out in this case is the lack of any benefit to the employee in meeting the trade testing costs, other than getting the job. An inference arising strongly from cls 7 and 8 of the addendum is that obtaining the job was conditional on agreeing to pay these costs.

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11 *Mazengarb's Employment Law* (online ed) at ERA4.23.3.
12 *Johnston*, above n 2, at [24].
13 *Labour Inspector v Tech 5 Recruitment* [2016] NZEmpC 167, at [2].

[17] Issues relating to the reach of the definition of "premium" have yet to be fully explored and will likely be determinative in these proceedings. As Mr Drake points out, the parties' arrangements in the present case bear some unusual features in terms of the cases which have previously come before the employment institutions under the Wages Protection Act. Relatively sophisticated commercial documentation will need to be unpicked, and which will almost certainly spawn numerous legal issues and arguments in terms of the correct analysis to be applied. This dovetails into the applicant's point about the extent to which the employment institutions can, in the exercise of their exclusive jurisdiction, delve into the legality of some or all of the parties' arrangements. While it is not uncommon for blurred lines to exist between employment relationships and other relationships (including purely commercial relationships) the unpicking exercise is not always straightforward, as a range of judgments emerging from the Court of Appeal, High Court and this Court reflect.[14] The respondents say that issues relating to which side of the jurisdictional divide this case sits on will be decided by a straightforward application of settled law to the facts. I think this reflects an overly optimistic view of the likely complexity of these proceedings, including having regard to the way in which the documentation is drafted (as emerges from the affidavit evidence) and the pleadings (as they presently stand). This includes issues relating to this Court's jurisdiction to deal with what are said to be purely commercial agreements; the interrelationship between those agreements and the admitted employment agreement; and the nature and extent of any available remedies.

[18] I accept that the answers to the questions posed will be important not only to the individual litigants (as they will fundamentally impact on their respective liabilities and entitlements) but will also have a broader effect.

[19] None of this is to say that the legal issues associated with this case would pose insurmountable difficulties for the Authority. That is not the applicable test. But it is to say that this is a case where determination of the issues is likely to be

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[14] See, for example, *Ecostore Co Ltd v Worth* [2017] NZHC 1480, (2017) 15 NZELR 93; *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] ERNZ 37, [2015] 3 NZLR 618; *RPD Produce Holdings Ltd v Miller* [2013] NZHC 705, (2013) 10 NZELR 521; *Newick v Working In Ltd* [2012] NZEmpC 156, [2012] ERNZ 510.

better suited to the Court's processes, rather than the investigative processes of the Authority conferred by the Employment Relations Act.

Conclusion

[20] I am satisfied that important questions of law are likely to arise, other than incidentally, in these proceedings and that there are no factors which would warrant an exercise of the residual discretion against removal.[15] These conclusions are sufficient to decide the application, which is granted accordingly.

[21] A statement of claim must be filed and served within 10 working days of the date of this judgment, with the usual timeframe for the filing and service of statements of defence. A telephone directions conference should then be convened with a judge to make the necessary directions and orders.

[22] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2.30 pm on 13 February 2018

[15] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[30].