

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC78
WRC 35/10**

IN THE MATTER OF an application for special leave to remove
Authority proceedings

BETWEEN NZ TRAMWAYS AND PUBLIC
PASSENGER TRANSPORT
EMPLOYEES UNION
First Applicant

AND CHRISTOPHER RUPAPERA
Second Applicant

AND FAAIUASO PAKAU
Third Applicant

AND WELLINGTON CITY TRANSPORT
LIMITED
Respondent

Hearing: 5 May 2011
(Heard at Wellington)

Appearances: Ms Tanya Kennedy, counsel for the applicants
Mr Bernard Banks, counsel for the respondent

Judgment: 6 July 2011

JUDGMENT OF JUDGE A D FORD

The application

[1] The applicants have made application, pursuant to s 178(3) of the Employment Relations Act 2000 (the Act), for special leave to remove an employment relationship problem from the Employment Relations Authority (the Authority) to this Court. The first applicant is the New Zealand Tramways and Public Passenger Transport Employees Union (the union) and the second and third

applicants are two affected members of the union. The stated grounds for the application are that important questions of law (s 178(2)(a) of the Act) are likely to arise in the matter other than incidentally and that the case is of such a nature and of such urgency (s 178(2)(b)) that it is in the public interest that it be removed immediately to the Court. The respondent, Wellington City Transport Limited, previously traded as “Stagecoach Wellington” and presently trades as “Go Wellington”. It opposes the removal.

[2] Application for the matter to be removed to the Court was initially made to the Authority but, in a determination¹ dated 28 October 2010, the Authority declined the application for removal concluding on the facts that nothing had emerged from its investigation to suggest that an important question of law was likely to arise other than incidentally and that it had not been shown there was any identifiable public interest and urgency.

[3] When the Authority declines to remove any matter to the Court, the party applying for removal may, pursuant to s 178(3), seek special leave of the Court for removal and in that event the Court must apply the same criteria as that which applied to the Authority apart from that criterion contained in s 178(2)(d).

The background facts

[4] Prior to 1 July 1991, bus drivers in Wellington were employed directly by Wellington City Council under terms and conditions of employment agreed between the council and the union. Their employment was also covered by the Wellington City Council Employee Regulations which prescribed certain resignation and retirement gratuities. In 1991 local authorities ceased to have the power to conduct passenger transport services but they were able to continue to be involved in the industry through a local authority trading enterprise.

[5] In July 1991, Wellington City Council established the respondent company, Wellington City Transport Limited, as a local authority trading enterprise. All resignation and retirement gratuities contained in the earlier regulations were

¹ WA 172/10.

retained. The statement of problem filed on behalf of the applicants records subsequent developments:

All subsequent agreements with Wellington City Transport Limited (both under Wellington City Council and private ownership as Stagecoach & Infratil) through to the current agreement, contained the same wording as the current clauses 79 and 80. These clauses reflect the entitlements that existed as at 30 June 1991 under the WCC Employee Regulations and were frozen at that point.

[6] The relevant “current agreement” referred to in [5] is the Go Wellington Collective Employment Agreement 2008 – 2010 (the CEA). Under cl 79 of the CEA there is provision for a discretionary retirement gratuity. The clause reads:

79 Retiring Gratuities for Employees Employed Prior to 1 July 1991

On retirement of any employee who had continuous service with Wellington City Council up to 30 June 1991, the Company may pay to that employee by way of a gratuity, an amount calculated in accordance with the following scale:

Three weeks’ pay increasing by one week for each additional year’s service after 10 years until a maximum of twenty six weeks’ pay is reached after thirty three years’ service.

[7] Clause 80 provides for a discretionary resigning gratuity:

80 Employees Employed Prior to 1 July 1991 Resigning for Private Reasons

Employees employed by the Company as at 1 July 1991, who resign for private reasons may, at the discretion of the Company, be granted resigning leave on full pay as follows:

After ten years’ continuous service	-	3 weeks
After fourteen years’ continuous service	-	4 weeks
After seventeen years’ continuous service	-	5 weeks
After twenty years’ continuous service	-	6 weeks

[8] Up until their retirement in 2010, the second and third applicants were bus drivers employed by the respondent and its predecessor. During their employment they were both members of the union employed under the relevant agreement or CEA. The second applicant, Mr Rupapera, was employed as a bus driver for 20 years from 7 May 1990 until 8 May 2010 when he retired. The third applicant, Mr Pakau, was employed as a bus driver for 20 years and seven months between 18 September 1989 and 8 May 2010 when he retired. Mr Rupapera and Mr Pakau

contend that they should have been paid 19 weeks' pay and 20 weeks' pay respectively under cls 79 and 80 of the CEA. Instead, each received a payment described by the respondent as a "gratuity payment" of three weeks' pay.

[9] The respondent's position, as set out in its statement in reply, is that upon the resignation of the second and third applicants, it considered whether to pay a gratuity pursuant to cl 79 of the CEA or resigning leave pursuant to cl 80 of the CEA but in each case it decided not to make any such payment. Instead it made what it referred to as "an additional 'gratuity payment' of \$3,715.20" to each applicant being equal to three weeks' pay. The respondent stated that the payment "was a purely discretionary payment beyond anything required by the Collective Agreement."

The legal principles

[10] The legal principles relevant to applications for special leave to remove are well established. They were summarised by this Court in *McAlister v Air New Zealand Ltd*:²

1. An applicant for special leave under s 178 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 an 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.

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

² AC 22/05, 11 May 2005 at [9] – [10].

the 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.

[11] In *Virtual Warehouse Ltd v Hormann*,³ Judge Couch noted, in relation to whether an important question of law is likely to arise, that the Court must be able to “properly conclude” that such an important issue will in fact likely arise in the proceeding.

Important question of law

[12] Section 178(2)(a) of the Act provides that a matter may be removed to the Court, if “an important question of law is likely to arise in the matter other than incidentally”. In relation to this ground for removal, the Authority Member determined that the issue of interpreting cls 79 and 80 of the CEA involved the usual type of matter that comes before the Authority and he could not see that any important issue of law was likely to arise in relation to his ruling.⁴

[13] In this Court, Ms Kennedy, for the applicants, set out six questions of law which she submitted were important and likely to arise other than incidentally:

- (i) What is the legal meaning of “retirement” and “resigning” when no definitions have been contractually agreed by the employer and the employees?
- (ii) What legal limits are there on an employer’s discretion to pay retirement gratuities and/or resigning leave?
- (iii) Is there any legal impediment to an employee claiming both resigning leave and a retirement gratuity upon retirement?
- (iv) Can an employer lawfully restrict the payment of a retirement gratuity to the attainment of a certain age in circumstances where the contract does not specify any age-related entitlement criteria?
- (v) In the absence of any contractual age-related entitlement criteria, is a policy of only paying retirement gratuities to employees who have attained the age of 65 a breach of the Human Rights Act 1993 and section 104 of the Employment Relations Act 2000?

³ AC 3A/06, 10 February 2006 at [21].

⁴ At [10].

- (vi) What effect does section 238 of the Employment Relations Act 2000 (No contracting out of the ER Act) have on an employer adopting a policy of only paying a retirement gratuity to employees who have attained a certain age?

[14] Ms Kennedy submitted that these questions were important because they would be decisive or strongly influential in bringing about a resolution of the dispute between the parties and were of significance to at least 49 other employees in similar positions. Ms Kennedy focused, in particular, on the relevance of age in relation to the interpretation of the word “retirement”. She referred to several recent cases which had considered issues about discrimination against employees on the basis of age generally.

[15] In response, Mr Banks submitted on behalf of the respondent that no important question of law arises in the proceeding but what the case involves is a “routine matter of contractual interpretation” of particular clauses in the CEA. As counsel expressed it:

The application of the principles of contractual interpretation to the particular clauses of this particular CEA, is unlikely to be difficult and in any event it does not constitute an important question of law, since how this particular CEA is to be interpreted does not affect employers or employees generally, and is of no consequence for employment law generally.

[16] Mr Banks submitted that the law on contractual interpretation of CEA’s is now “a well settled area of law”. He referred to several cases that had come before the Authority, this Court and the High Court involving the interpretation of retirement gratuity provisions in CEA’s. In relation to the specific questions of law framed by Ms Kennedy, Mr Banks contended that the first three questions were not questions which would arise in this case in the form presented. Rather, as counsel submitted, the retirement and resignation gratuity clause would have to be interpreted in the context of the particular collective agreement and the task of the Authority or the Court will be “to determine what the two particular provisions of this particular collective agreement allowed for, and whether these two individual employees, in their own particular personal circumstances, qualified for either or both of the payments concerned.”

[17] Mr Banks submitted the final three questions presented would not arise because the respondent did not have a policy which restricted “the payment of a

retirement gratuity to the attainment of a certain age (and in particular to reaching the age of 65)". In summary, Mr Banks submitted that the principles to be applied in the interpretation of a CEA are well established and do not involve any important question of law.

Nature, urgency and public interest

[18] The second limb of s 178(2) relied upon by the applicants is para (b) which provides that a matter may be removed to the Court if, "the case is of such a nature and of such an urgency that it is in the public interest that it be removed immediately to the court". Under this head, the Authority Member determined that the case relates to only the two named employees and their circumstances. He accepted that there may be wider implications in terms of numbers covered by the CEA and the amount of money involved but, in the absence of any details of the impact his determination would have on other employees, he considered that the proceedings concerned only the stated parties and there was no identifiable public interest and urgency.⁵

[19] In this Court, Ms Kennedy submitted that potentially over 45 other employees covered by the CEA may bring similar claims against the respondent and that the respondent's liability to those employees may be substantial. Counsel submitted that given its potential liability, the respondent was likely to challenge any adverse determination by the Authority. Ms Kennedy also submitted that the public interest would benefit from a decision about the appropriate interpretation of the words "retirement" and "retiring" given apparent "varying approaches" that have been taken by members of the Authority.

[20] Mr Banks submitted that there was no urgency in this case. The employees had resigned over one year ago and were not seeking reinstatement. He submitted that whether in the future some of the respondent's other employees may or may not be affected by the decision is not a relevant consideration to these proceedings and should not, therefore, carry any weight. In counsel's words: "The fact dependent nature of these proceedings will naturally limit the application of this proceeding to other cases and limit any public interest."

⁵ At [12].

Discussion

[21] Turning first to the alleged questions of law, I have some difficulty in accepting that the first three questions will arise in the manner presented or will have the importance contended for by the applicants. The first question of law asserted by the applicants is, “what is the legal meaning of ‘retirement’ and ‘resigning’ when no definitions have been contractually agreed to by the employer and employees?” While the interpretation and legal meaning attached to the words “retirement” and “resigning” is clearly a question of law, I agree with Mr Banks that the question posed is not a question of law which will arise in this case. The issue that will arise will be the meaning to be given to those particular words as used by these particular parties, in the context of this particular collective agreement. The interpretation exercise will, therefore, involve a consideration of the collective as a whole, an evaluation of the intention of the parties in the context of their employment relationship and evidence in relation to past practices under the provisions in question which are long-standing, having been carried over through successive collectives. As the Court of Appeal recently noted, historical considerations such as the way in which the parties have approached particular provisions in past CEAs can be used to assist in their construction.⁶

[22] The second question of law posed by the applicants is, “what legal limits are there on an employer’s discretion to pay retirement gratuities and/or resigning leave”. Again it is unlikely that the question will arise in the way formulated. The question that will arise is whether the respondent, in making the particular decisions it did in respect of the two applicants, complied in all respects with its obligations under the CEA. The limits on the respondent’s discretion, in other words, will primarily be a matter of interpretation of this particular CEA and that, in turn, will involve a consideration of evidence as to past practices under the relevant long-standing retirement and resignation provisions.

[23] The third question of law as formulated by the applicants is, “is there any legal impediment to an employee claiming both resigning leave and a retirement gratuity upon retirement?” In relation to this question, Mr Banks submitted:

⁶ *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317 at [43]-[44].

The applicants have worded the question as a general and abstract question in the apparent hope of creating the impression that there is some general question of importance to employment law generally. In fact the task for the Authority or the Court in this case will be to determine what the two particular provisions of this particular collective agreement allowed for, and whether these two individual employees, in their own particular personal circumstances, qualified for either or both of the payments concerned. It is not a question of general importance or a question that will affect a large number of employers of employees generally.

[24] I accept the thrust of Mr Banks' submission. The question that arises can only relate to the two particular employees in the present case and not to employees generally. Whether or not there are any legal impediments will again involve the interpretation exercise referred to above. Given the long-standing nature of both provisions, the interpretation of the CEA will involve a careful consideration of evidence as to their historical application. The heavily factual nature of that assessment weighs against the Court removing the case at this stage.

[25] The final three questions of law posed by the applicants can be dealt with more succinctly. Each question relates to an alleged policy by the respondent not to pay out a retirement gratuity to any employee who ceases employment prior to the attainment of a certain age and, in particular, the age of 65. Whether such a policy exists will be a matter of evidence. On the papers presently before the Court this is a matter of dispute. The Wellington branch secretary of the union has alleged in an affidavit that he was informed by the then general manager of the respondent that the company had such a policy, but in an affidavit filed in response, the respondent's human resources manager denies that proposition. He deposes that the respondent has no such policy and claims that each case is considered on its merits. This dispute of fact can only be resolved by a full hearing. If the respondent does not in fact have a policy requiring employees to reach a certain age before becoming entitled to a retirement gratuity then the proposed questions of law will not arise. Given this factual dispute, I cannot properly conclude, as I am required to do before removal, that the last three proposed questions of law are "likely to arise".

[26] Turning to the issue of urgency and public interest under s 178(2)(b), the Act requires an applicant relying upon this ground for removal to show both that the case is of such a nature and of such urgency that it is in the public interest for it to be

removed immediately to the Court. I have set out the contentions of each counsel.⁷ I accept Mr Banks' submission that urgency has not been made out by the applicants. It is now over one year since the two employees retired and while it is understandable that they would like the issue settled promptly, I do not consider that their case requires the urgent consideration of this Court. The reality is that if the case really did merit urgency then steps would have been taken to have it heard promptly after the employees retired. Had the matter proceeded before the Authority, it is likely that a determination would have been made before the end of 2010 and that determination may well have been satisfactory to both parties.

[27] Mr Banks submitted that there is no public interest in these proceedings because they "are a private concern to the particular parties". He further submitted that the possibility that the outcome might affect some of the respondent's other employees sometime in the future should not carry any weight. I agree with that submission. Whether or not the outcome may affect some of the respondent's other employees in the future is speculative. A finding in relation to one or other of the elements making up a ground for removal to the Court under s 178(2) should be based on credible evidence rather than speculation.

Conclusions

[28] Given my conclusions that I am not satisfied that the six proposed important questions of law are likely to arise and the matter is not of such a nature and urgency that it should be removed, I am not required to consider the residual discretion of the Court not to remove even if one of the categories in s 178(2) is made out. The proceeding essentially involves the interpretation of a collective agreement and a consideration and assessment of the conduct of an employer. I consider those matters to be well within the competence of the Authority and a hearing before the Authority may well refine the issues further.

[29] The application for special leave has failed to meet the statutory criteria and is, accordingly, dismissed. At this stage I prefer to reserve the question of costs.

⁷ At [19] and [20].

A D Ford

Judge

Judgment signed at 4.00 pm on 6 July 2011