IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 67
CRC 44/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KAREN PATRICIA PIVOTT First Plaintiff
AND	PATRICK MAURICE O'SULLIVAN Second Plaintiff
AND	SOUTHERN ADULT LITERACY INC (FORMERLY SOUTHLAND ADULT LEARNING PROGRAMME INC) First Defendant
AND	LITERACY AOTEAROA INC Second Defendant

Hearing: By affidavit and written submissions filed on 25 March, 15, 18 and 19 April and 20, 23, 27, 30 and 31 May 2011

Appearances: Patrick O'Sullivan in person and agent for first plaintiff
Mary-Jane Thomas, counsel for first defendant
Prudence Kapua, counsel for second defendant

Judgment: 22 June 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] I will try to keep this judgment short and simple because that is really the nature of the two issues despite the burgeoning volume of pleadings, submissions, and other written materials already generated and filed. I do so bearing in mind, also, that this is a challenge from a preliminary determination of the Employment Relations Authority which has delayed the Authority's investigation of the merits of the proceedings.

[2] For the first time in final written submissions filed with the Court on 5 May 2011, the plaintiffs purported to add to their two heads of challenge, a new application under s 178(3) of the Employment Relations Act 2000 (the Act) for special leave to remove the proceeding to the Court. Despite the understandable objections of the defendants to this very belated and informal application, I consider it does not add materially to the nature or scope of the argument on the challenge to the Authority's refusal to remove. Indeed, the grounds available to an applicant for special leave under s 178(3) are narrower than those available to the Authority and, therefore, to the Court on a challenge to the Authority's refusal to remove. I propose, in these circumstances, to deal with the belated application for special leave as part of the broader challenge to the Authority's refusal to remove the proceeding under s 178.

[3] In its "Further Interim Determination" issued on 24 September 2010[1] the Employment Relations Authority made two decisions with which the plaintiffs take issue. The first dealt with the procedure the Authority proposed to adopt to investigate and determine the plaintiffs' two separately filed employment relationship problems it had before it. It declined the plaintiffs' request for "joinder" of these proceedings and set out a bespoke process for their sequential investigation. The Authority's second decision, contained in the same written determination, was to decline to remove the matters before it to this Court under s 178(2)(a) of the Act.

[4] Although the Authority's determination is entituled "Further Interim Determination of the Authority", I assume that, rather than being "Interim" in the sense that it is to apply for a limited period, it is more correctly a determination of a preliminary issue or issues.

[5] The parties have agreed to deal with this challenge on the papers and there has been an exchange of submissions, affidavit evidence, and other relevant written material.

[6] Despite not having apparently occurred to the defendants, the answer to the first issue on the challenge is simple and dictated by the legislation. The Court must

[1] CA109A/10.

apply the statute irrespective of whether the point has been taken by a party. The Authority declined to investigate together the two separately filed but related employment relationship problems. It decided to undertake a preliminary investigation of the applicants' case for penalties against Literacy Aotearoa Inc without hearing from that defendant. It said that if the plaintiffs established a case to answer against the second defendant, Literacy Aotearoa Inc would then be involved appropriately in its investigation of those claims. It should be noted that there was no employment relationship between the plaintiffs and Literacy Aotearoa Inc.

[7] Section 179(5) of the Act precludes the Court from considering a challenge "to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow … and … about whether the Authority may follow or adopt a particular procedure." This part of the plaintiffs' challenge falls squarely within that prohibition and so can go no further. This is precisely the sort of challenge that Parliament has said should not be brought to this Court. The plaintiffs will, of course, retain rights of challenge from the Authority's substantive determination(s) when that/those is/are issued including, if they wish, by electing a hearing de novo. That first element of the challenge is therefore dismissed.

[8] The Authority then concluded that the plaintiffs had failed to establish the existence of any of the several grounds under s 178(2)(a) of the Act for removal of the proceedings to the Court. It found that the plaintiffs faced "fundamental difficulties" including that they had not identified, at least sufficiently, an important question of law which would arise other than incidentally. The Authority rejected the plaintiffs' submission that its application for joinder, which had been dismissed by an earlier determination of 5 May 2010,[2] was such an important question of law. As the Authority pointed out, that earlier determination could have been challenged but was not. It said at [21]:

> … Joinder is not especially novel and in each case, the Authority has simply considered the arguments and made a decision which is available to challenge. It is suggested that the real basis for the application to remove was the erroneous belief the Authority had already made a capricious decision and that claim is displaced by the present determination.

[2] CA109/10.

[9] The plaintiffs' grounds for removal (both on the challenge and now on the application for special leave to remove) under s 178 are as follows. First, Mr O'Sullivan submits that if the plaintiffs are successful in their challenge to the Authority's refusal to join the proceedings in the Authority, "any issue of removal is obviated by the seizure of the entire Employment Relationship Matter that was before the Authority. Given that, the question of removal ought not arise." In light of my decision earlier in this judgment that the Authority's preliminary determination on the question of joinder of causes of action is unchallengeable, I will assume that the plaintiffs will now consider it necessary for the Court to determine their removal application.

[10] Section 178 provided at the material time and, for the purpose of determining this challenge, continues to provide, as follows:

> **178 Removal to Court**
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> (1) Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.
>
> (2) The Authority may order the removal of the matter, or any part of it, to the Court if—
>
> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> (b) 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; or
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> (c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
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> (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.
>
> (3) Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).
>
> (4) An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.
>
> (5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.
>
> (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.

[11] The amendments to s 178 by the Employment Relations Amendment Act (No 2) 2010 which came into force on 1 April 2011, do not have retrospective effect, even in respect of this challenge which is determined after those amendments came into effect.

[12] The next ground for removal is that the Authority has made and/or will make such errors of law in relation to its determination not to join the proceedings that they ought to be removed. Errors of law or erroneous decisions do not constitute grounds under s 178 for removal. Such are remediable by challenge but after the Authority has concluded its investigation and determination on the issues before it.

[13] Nor do I accept Mr O'Sullivan's submission that "although [errors of law were] made in respect of a preliminary issue, [they] are so dispositive of the material and decisive issues going to the substantive case, that it would not be possible for the Authority to judicially determine that substantive case and it could proceed to that only under the shadow of an inevitable challenge." Even if I were to accept Mr O'Sullivan's submission that a challenge is inevitable, that is not one of the statutory grounds under s 178 for removal of a proceeding.

[14] Even if it might be argued that s 178(2)(d) (that "the Authority is of the opinion that in all the circumstances the Court should determine the matter.") is applicable to a challenge-inevitable proceeding, there is insufficient material before the Court to persuade me that a challenge is inevitable. Despite Mr O'Sullivan's submission to the contrary, this case is essentially one of personal grievances, albeit hotly contested, which is only at a very preliminary stage of investigation by the Employment Relations Authority. I do not think that the outcome can be predicted with sufficient accuracy that either party can be said inevitably to be set to challenge that outcome.

[15] The plaintiffs rely, with one exception noted already, on the grounds for removal under s 178(2)(a) of the Act, namely, that "an important question of law is likely to arise in the matter other than incidentally …". The following discussion of the submissions focuses on that subsection.

[16] As well as I have been able to interpret the plaintiffs' discursive and prolix submissions, Mr O'Sullivan identifies the following as the important issues of law that he says will arise in the case other than incidentally. First is said to be the role of the second defendant in decision making by the first defendant that affected the first plaintiff. However, despite a plethora of quotations from documents in the proceedings, Mr O'Sullivan has not identified a question of law arising out of that other than incidentally, let alone an important one.

[17] Mr O'Sullivan says that the seriousness of breaches of their employment agreement by the first defendant leading to the plaintiffs' resignations and matters of foreseeablity of that consequence, will be important issues arising out of that other than incidentally. Again, however, Mr O'Sullivan has failed to identify the important question or questions of law about constructive dismissal.

[18] Next, Mr O'Sullivan submits that whether there was a breach of contract by the defendants will be an overlapping issue to be determined by the common law of employment. In particular, this breach is the removal of professional development and employee access to it and, if so, whether its breach by the employer amounted to a repudiation of the contracts by it. Mr O'Sullivan submits that this will be a question of law that will be decisive of the alternative (common law) cause of action and is, therefore, a ground for removal.

[19] Accepting this as an issue on the pleadings, I do not agree, however, that any such question of law meets the test under s 178(2)(a) of being an important issue of law that will arise other than incidentally. The law of constructive dismissal is well established and is considered and applied by the Employment Relations Authority in numerous cases without uncertainty as to its nature, meaning or scope.

[20] Next, Mr O'Sullivan identifies "good faith" issues said to taint fatally the employer's dealings with the employees. They are also said to be features of the plaintiffs' claims against the second defendant which was not the plaintiffs' employer. Examples of alleged bad faith behaviour include, according to Mr O'Sullivan, one of mediation confidentiality affecting his position. Further, Mr O'Sullivan claims that counsel for either or both of the defendants have breached good faith ("wittingly or otherwise negligently") in relation to mediation. I do not agree that these issues meet the s 178 tests for removal.

[21] Next, counsel contends that issues of health and safety were levelled at him "in secret" and that the process initiated to address that was concealed from him. Not dissimilarly, Mr O'Sullivan submits that Ms Pivott will argue that her impending redundancy was concealed from her and that both defendants acted complicitly to prevent her from knowing of that in a way that amounted to deceitful and misleading conduct. Those allegations likewise do not meet the s 178 tests.

[22] Next, Mr O'Sullivan submits that Ms Pivott will argue that the first defendant or the defendants prevented her from knowing, until the last minute, of a contract that was so varied that it destroyed her job. This is said to have been a deliberate act of "oppression", the only foreseeable consequence of which was "either abject capitulation or forced resignation". Mr O'Sullivan says that both plaintiffs will argue that managerial representatives of Southern Adult Learning Programme Inc (now the first defendant) misrepresented deliberately relevant issues as part of a plan to "dislodge or neutralise" the plaintiffs. He submits that this was one part of a wider and sustained pattern of repetitive conduct having that objective, so that a subsequent "investigation", which never happened, was a breach of good faith. Mr O'Sullivan submits that all of these issues were placed before the Authority but it chose to ignore them and thereby decided wrongly not to remove the case for hearing in this Court. He argued that such issues cannot be effectively presented to the Authority in the absence of the second defendant, either in that capacity or by a witness or witnesses.

[23] Whatever their merits, none of these further matters meets the s 178(2)(a) test.

[24] Next, Mr O'Sullivan submits that it will be an important question of law arising out of and other than incidentally in the proceedings whether the plaintiffs can have recognised their claims to "vindication" as part of their personal grievances. This is said to be a very important issue for the first plaintiff who claims to have been unable to secure another job at the same level of management as she previously held with the first defendant. In these and associated circumstances, Mr O'Sullivan submits that public vindication of her position will be paramount.

[25] I do not understand, however, how this may amount to an important issue of law that will arise other than incidentally. It has always been an element of curial determination of personal grievances that a successful grievant may thereby be vindicated publicly and I do not understand there to be any difference of opinion on that broad question by the defendants.

[26] Next, Mr O'Sullivan submits that there will arise questions of law about the implied and statutory duties of an employer not to act to the detriment of its employees' reputations. Ms Pivott's case will be that she was denigrated as part of a campaign by her employer to oust her and that the consequences of this persist even now, long after the end of her employment.

[27] Again, I am unpersuaded that this raises an important question of law other than incidentally in the proceeding. Long and well established implied and now statutory obligations of confidence, trust and fair dealing between employers and employees (both ways) include such obligations. I do not understand the defendants to argue otherwise in principle. Rather, the dispute between the parties is whether those obligations have been met or breached in the particular circumstances of the case.

[28] Mr O'Sullivan submits that a further question of law will arise in relation to "damages" in either the personal grievance or common law settings for breach of the first defendant's contract, to compensate for loss of reputation including opportunity for advancement or indeed other employment within the plaintiffs' chosen fields. These might be what are known as stigma damages but again these are now well established at common law and are amply covered by the broad compensation

provisions of s 123 of the Act. In this respect, also, no important issue of law is identified by the plaintiffs. Rather, they have identified what may be important remedial issues but about which their existence or scope is uncontroversial.

[29] Next, Mr O'Sullivan has submitted that what he describes as "a discovery wrangle" in the Authority, affecting an audio tape recording of a committee meeting, amounts to an important question of law in the proceeding that will arise other than incidentally. According to Mr O'Sullivan, the defendants say that the written minutes of the meeting are all that should be disclosed by them, whereas the plaintiffs say that the audio recording of the meeting is both relevant and important to the Authority's investigation of their personal grievances.

[30] I do not agree that this constitutes an important question of law in the proceeding that will arise other than incidentally. What documents (including audio recordings) the Authority considers relevant to its investigation will be for it to determine. If Mr O'Sullivan can persuade the Authority that it is appropriate for it to consider the audio tape recording, then it will call for this. Document disclosure or discovery is not an inter partes interlocutory exercise as it is in the Employment Court.

[31] As to mediation privilege (already referred to), Mr O'Sullivan submits that: "There is a question of law dominantly at large about the complicity of [the second defendant] in that as well as to how this influenced his decision to resign – the seriousness and foreseeablity of that on his perception of the employment relationship – his perception of good faith and trust." Again, questions of confidentiality and privilege are now well established in case law and I am not satisfied by the submissions of the plaintiffs that this constitutes a ground under s 178 of the Act.

[32] Next Mr O'Sullivan submits that there are "public interest" questions affecting the roles of the defendants and, thereby, their obligations to the plaintiffs. His argument is as follows:

> This argument will not only go to issues of causation but creates a separate issue of public interest in why an organisation so extravagantly funded by public money should indulge in such egregious breaches of employment law in the pursuit of its purported good works. There is an irreconcilability of philosophy, ethics, probity and principle here which needs to be resolved in the public interest.

[33] Mr O'Sullivan submits that these and associated issues need to be addressed urgently. It is also said to raise questions of law about the competency of governing boards in not-for-profit organisations which Mr O'Sullivan submits are:

> … relevant and urgent to this proceeding for the immediate and meretricious impost on employment relationships. This is not an isolated case so there is a pervasive public interest and welfare at issue.

[34] These submissions do not, however, persuade me that the case warrants removal to the Court under s 178. Whatever the merits of the issues Mr O'Sullivan has raised, they are not grounds for removal of the proceeding.

[35] Next, Mr O'Sullivan submits that the "Conduct of the Authority" warrants removal because of "breaches of natural justice by the Authority". Mr O'Sullivan submits that it ignored issues placed before it in determining not to remove the proceeding and in refusing joinder of the separate proceedings before it. In reality, however, this is simply criticism of the Authority's determination which is the subject of a challenge but which I have determined is not able to be brought before the Court. As I have already noted, if the plaintiffs (or indeed the defendants) are dissatisfied with the determination of the Authority of the plaintiffs' claims on their merits (or as to the way in which those were dealt with by the Authority), they are entitled to challenge by hearing de novo the Authority's determination and, if valid, these complaints can be rectified.

[36] Despite extensive efforts, the plaintiffs have not improved their position at all on this challenge. The voluminous affidavit and other material filed by the plaintiffs focuses largely on the factual merits of their claims before the Authority, but no grounds under s 178 have been made out for removal of the proceeding, or any part of it, to the Court for hearing at first instance. I am not satisfied that the Authority wrongly determined the absence of an important question of law in the proceedings

before it and I am not persuaded even now that the plaintiffs have identified such, including in their belated application for special leave. Their challenges are dismissed. The plaintiffs' cases are now free to be investigated on their merits by the Authority.

[37] The defendants are entitled to costs on the challenge which, if they cannot be agreed with the plaintiffs, may be the subject of memoranda by the defendants to be filed and served within one month of the date of this judgment and to which the plaintiffs will then have the further period of one month to respond by memoranda.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Wednesday 22 June 2011