IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 27
ARC 66/12

IN THE MATTER OF	special leave to remove Employment Relations Authority proceedings
BETWEEN	PETER DAVID HALL Applicant
AND	DIONEX PTY LTD Respondent

Hearing:	7 February 2013 (Heard at Auckland)
Counsel:	Tony Drake, counsel for plaintiff Daniel Erickson, counsel for defendant
Judgment:	7 March 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The applicant has applied, pursuant to s 178(3) of the Employment Relations Act 2000 (the Act), for special leave to have an employment relationship problem removed from the Employment Relations Authority (the Authority) to the Employment Court.

[2] The Authority, in its determination dated 31 August 2012,[1] had declined the applicant's earlier application for removal. Section 178(3) provides that in determining an application for special leave the Court must apply the criteria set out

[1] [2012] NZERA Auckland 299.

in s 178(2)(a)-(c) of the Act. Only one is relevant in the context of the current application, namely whether an important question of law is likely to arise other than incidentally.[2]

[3] The questions of law that the applicant contends will arise, and which justify removal to this Court, are:

> 1. Did the contract of employment contain a term, implied by law, that the employer would itself conduct any disciplinary procedure, strictly in accordance with its contractual and statutory obligations?
>
> 2. Was it justifiable for the respondent to assign or transfer to a person who was not a director, officer or employee of the respondent the rights and obligations which the respondent had and owed to the applicant when conducting a disciplinary process involving the applicant, the outcome of which could be dismissal from his employment, without first –
>
> (a) obtaining the applicant's agreement to such an assignment or transfer; or
>
> (b) giving the applicant reasonable notice of such an intended assignment or transfer; or
>
> (c) consulting with the applicant?
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> 3. If it was not justifiable for the respondent to have transferred or assigned any rights and obligations (as referred to in question 2 above), did this vitiate the decisions and actions taken on behalf of the respondent during the disciplinary process?
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> 4. Did the action which the respondent took (as referred to in question 2 above) lawfully authorise the person referred to in question 2 to dismiss the applicant from the respondents' employment?
>
> 5. Did the respondent's obligations to act in good faith require it to provide to the applicant the information regarding the assignment or transfer of rights and obligations to the person referred to in question 2 above when the applicant requested to be provided with that written information prior to dismissal?

[4] The respondent opposes the application for special leave, essentially on the basis that the claim does not give rise to any important question of law. Rather, the respondent says that the claim will fall to be determined on the facts, and that even if this is not so, the Court ought to exercise its residual discretion against the grant of leave. The latter submission gave rise to a further area of dispute between the

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

parties. The applicant submits that once one or more of the qualifying criteria are met the Court is required to grant leave: no residual discretion exists. I do not accept that submission, for reasons set out below.

The facts

[5] The facts, as far as they can be discerned at this early stage, can be drawn from the affidavits filed in support of, and in opposition to, the application for leave. They can be summarised as follows.

[6] The applicant commenced employment with Dionex Pty Limited (the respondent) on 24 May 2004, initially in the position of Technical Representative New Zealand and later as Sales and Service Manager for New Zealand. He reported directly to the respondent's Country Manager. The Country Manager was also the respondent's director.

[7] The respondent was part of Dionex Corporation worldwide, which was acquired by Thermo Fisher Scientific Inc in May 2011. From May 2011 the respondent became a subsidiary of the Thermo Fisher Group of companies. Following its acquisition, the Country Manager reported to the Category Manager – Analytical Instrumentation for Thermo Fisher Scientific Australia Ltd, who in turn reported to the Director of Scientific Australia, with a dotted line of responsibility to the Director, Scientific New Zealand for New Zealand business. At the relevant time, Ms Amanda Cameron held this last position.[3] It is common ground that she was not an employee of the respondent company.

[8] In early July 2011, Thermo Fisher Scientific New Zealand Ltd (Thermo Fisher NZ) undertook a process of integrating Dionex employees into its structure. The respondent contends that the integration process had been completed by the time the applicant was dismissed, and that the respondent was Thermo Fisher in all but its strict legal status. Ms Cameron deposes that the applicant was never an employee of Thermo Fisher NZ.

[3] She was also referred to, interchangeably, as General Manager, Scientific New Zealand.

[9] Mr Hall's dismissal arose in the context of a broader disciplinary enquiry, involving a large number of Dionex managers, including Mr Hall's manager (the Country Manager). His manager reported to Ms Cameron. Mr Hall's manager was dismissed on 12 December 2011, although he remained as a director until 12 January 2012.

[10] The Country Manager was one of three directors of Dionex. Neither of the other two directors was based in New Zealand. One was based in South Australia, the other in Massachusetts. It was the Massachusetts director who purported to delegate authority to Ms Cameron to undertake the disciplinary investigation and impose any disciplinary sanction in respect of the applicant's alleged wrongdoings.

[11] Mr Hall was dismissed on 23 December 2011. He had earlier been suspended following a meeting on 12 December 2011 with Ms Cameron. Ms Cameron made the decision to both suspend, and then dismiss, Mr Hall.

[12] It is Ms Cameron's role in the disciplinary process that is at the heart of the substantive claim, and the application for special leave. In particular, it is contended that the respondent could not justifiably have transferred to Ms Cameron the statutory, contractual, and common law obligations it says were owed to the applicant. A plethora of other alleged deficiencies in the process leading up to the applicant's dismissal, and the decision to dismiss, are advanced on his behalf in the statement of problem.

Analysis

On an application for special leave the onus is on the applicant to establish that an important question of law is likely to arise in the matter other than incidentally. It is not necessary that the question of law is difficult or novel. As the Court observed in *McAlister v Air New Zealand Ltd*:[4]

> 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

[4] AC22/05, 11 May 2005 at [9]. See too *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

> 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.

[13] The applicant contends that his employment agreement contained an implied term that Dionex would undertake any disciplinary enquiry and/or impose any disciplinary sanction and that it was not permissible for Dionex to delegate that task to a non-employee, Ms Cameron. This, it is alleged, renders the applicant's dismissal procedurally unjustified. Dionex say that Ms Cameron was given the authority to act by a director of Dionex and was accordingly entitled to carry out the disciplinary process.

[14] Mr Drake, for the applicant, submits that the relationship between employer and employee is a personal one, as reflected in various provisions of the Act.[5] He also points out that s 4 does not appear, on its face, to contemplate the assignment or transfer of an employer's (or an employee's) good faith obligations, which an employer is required to comply with when making decisions affecting the continuation of an employee's employment. Mr Drake submitted that if the applicant's contract of employment is found to have contained an implied term of the sort alleged then, on that ground alone, the dismissal will have been both procedurally and substantively unjustified.

[15] Mr Erickson, for the respondent, submitted that the question of whether Ms Cameron ought to have been involved is unlikely to be determinative of the final result. That is because the justification or otherwise for a decision to dismiss, and any disadvantageous action suffered, must be considered having regard to the overall circumstances. That means that even if the applicant's process is found to be procedurally flawed, it does not follow that his grievance will succeed**.** It was also submitted that the applicant's claim of breach of contract relating to his dismissal is misconceived as the Act provides that the only way to challenge a dismissal is by way of personal grievance: s 113. While there is apparent strength in the proposition advanced on behalf of the respondent, and some academic commentary to support it, the issue is not free from doubt and has not been the subject of direct judicial

[5] See, for example, ss 103(2), 104, 108-110, 114, 117-119.

consideration. Ironically, Mr Erickson's objections in relation to the jurisdictional foundation of part of the applicant's claim highlight a question of law that will arise other than incidentally and which will bear some importance in determining this case.

[16] Under s 103A, the Authority/Court is obliged to consider whether the dismissal was justified in all of the circumstances. While procedural errors may undermine the justification for a dismissal that will not always be the case. Mr Erickson submitted that the ultimate issue will fall to be determined having regard to all of the circumstances, including the reasons why Ms Cameron took on the role of decision-maker and whether any issues were raised by the applicant in respect of the process that was undertaken. However, that presupposes that the respondent's case has not fallen at an earlier hurdle. I accept Mr Drake's submission that issues will arise as to the legal effect of any finding that the respondent could not justifiably transfer, assign or delegate the obligations it owed to the applicant. This will include arguments relating to invalidity that are not straightforward. And even if the case will ultimately fall to be decided on the facts, rather than the law, that is not the test that applies under s 178(3).[6]

[17] I accept that a question of law arises as to the extent to which someone who is not an employee, director or officer of the employer can undertake a disciplinary process and impose a disciplinary outcome. While the Court has previously considered issues relating to the engagement of external advisers to assist in undertaking the disciplinary investigation,[7] neither counsel has been able to identify any cases where the investigation, decision-making process and the decision has been outsourced. Counsel were at odds as to what might underlie the paucity of case law on this point. However, I accept that resolution of this issue will assume some importance in the case (and more generally) and will raise a number of legal considerations, including the effect of outsourcing on the personal nature of the relationship between employer and employee, and whether it is permissible. And

[6] In *Lloydd v Diagnostic Medlab Services Ltd* [2009] ERNZ 42 at [20], Judge Travis found that while the facts would ultimately determine the case, the important questions of law arising justified the grant of special leave.
[7] See *Association of Staff in Tertiary Education v Northland Polytechnic Council* [1992] 2 ERNZ 943 at 958. See also *Affco New Zealand Ltd v Nepia* WC25/07, 28 September 2007 at [57].

while some assistance, by way of analogy, may be able to be drawn from the approach adopted by Judge Colgan in *NZ Seamen's IUOW v Gearbulk Shipping (NZ) Ltd*[8] the judgment is not on all fours with the circumstances that arise in the present case.

[18] The applicant further submits that, even if Ms Cameron was entitled to undertake the disciplinary process, additional legal issues will arise at hearing as to whether the Massachusetts director's email correspondence constituted a valid delegation. The applicant submits that those issues will need to be determined having regard to relevant principles of company law. While that may be so, I do not accept that a determination of the validity or otherwise of the alleged delegation raises issues that the Authority would not be well placed to resolve, following consideration of the facts.

[19] It is submitted that a question of law arises in relation to whether the respondent was obliged to provide information to the applicant, in particular about the delegation issue. Guidance as to the extent of an employer's obligations of good faith can be found in the full Court's judgment in *Vice-Chancellor of Massey University v Wrigley*,[9] including as to the information that must be provided to an employee when an employer is proposing to make a decision affecting their employment. The Authority is well placed to deal with these issues, applying its factual findings to previously articulated legal principle.

[20] It is evident that while issues arise as to Ms Cameron's status in the decision-making process and the extent to which this was appropriate, many other issues of an intensely factual nature will require determination. These issues include the process that was followed in relation to Mr Hall's suspension and subsequent dismissal and the facts underpinning it on which the respondent relied. Such matters would not otherwise justify leave.

[21] Mr Drake submitted that the case was "bristling with legal issues". I agree that numerous legal issues will arise in the context of these proceedings. When

[8] [1990] 1 NZILR 688.
[9] [2011] NZEmpC 37, [2011] ERNZ 138.

viewed on a continuum, many fall short of the descriptor "important question of law". However, I am satisfied that issues relating to the lawfulness of Ms Cameron's appointment to conduct the disciplinary process, and the impact of this, fall squarely into this category. Her appointment arose in the context of a particular factual matrix, including an integration process, and for arguably good reason (given the position relating to the applicant's immediate supervisor and Ms Cameron's position in the corporate structure). These are factual matters which will be relevant but will not answer the core legal question, namely whether her involvement in the process was lawful and (if not) what the ramifications of that are in terms of the justification or otherwise for the decisions she made.

[22] I am satisfied that the requirements of s 178(2)(a) are met and, in particular, questions 2 and 3 are important questions.

Residual discretion?

[23] Section 178(2) provides that:

> 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
>
> …

[24] Section 178(3) provides that:

> Where the Authority declines to remove any matter on application under subsection (1), 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).

[25] The applicant submits that where one or more of the statutory criteria in s 178(2)(a)-(c) has been made out, the Court must grant an application for special leave. Mr Drake submitted that support for this submission could be found in *Auckland District Health Board v X (No 2)*.[10]

[10] [2005] ERNZ 551.

[26] I accept that there is some strength in Mr Drake's argument, based on a literal reading of s 178(3). However, I do not accept that such an interpretation is correct when the provision is read in context. It ignores the introductory wording of s 178(2) which provides that a matter *may* be removed which must, in my view, be read with subparagraphs (a) to (c) preserving the Court's discretion. On Mr Drake's analysis, the Authority would have broader powers (a residual discretion) to determine an application for leave than the Court on a subsequent application for special leave. It would also mean that (assuming special leave determinations can be challenged under s 179) different tests would apply in the Court, depending on whether an applicant applied for special leave or a party challenged[11] the Authority's leave determination. The Authority could decline an application in the exercise of its residual discretion despite finding that one or more of the criteria in s 178 was made out. The Court could not. Rather, it would have to grant an application if satisfied that, for example, an important question of law arose other than incidentally. That would mean that an applicant, dissatisfied with the Authority's determination not to grant leave in its discretion, could apply for special leave which the Court would then be obliged to grant, on narrower grounds. A respondent, dissatisfied with the Authority's determination, would have a right to challenge the Authority's determination and such a challenge would (on usual principles) be determined applying the Authority's "broader" powers. Such consequences could not have been intended.

[27] Mr Drake's reliance on *X* is misplaced. In the paragraph relied on by the applicant, the Court made the point that Parliament had narrowed the grounds for granting special leave in the Court compared to the Authority by excluding the catchall of s 178(2)(d) (that the matter may be removed if the Authority considers the Court should determine the matter in all the circumstances).[12] The Court did not conclude that it had no residual discretion to refuse leave even if one of the factors in s 178(2)(a)-(c) had been made out. This is apparent from the Court's careful discussion of the factors that would influence the exercise of that discretion.[13] Indeed, *X* is a case in which the Court found that despite there being an important

[11] See *Pivott v Southern Adult Literacy Inc (formerly Southland Adult Learning Programme Inc)* [2011] NZEmpC 67 at [2].
[12] *X* at [3].
[13] At [47]-[63].

question of law,[14] the Court should decline to remove the case.[15] I note also that the many cases subsequent to *X* in this Court have accepted that a residual discretion exists for the purposes of determining an application for special leave.[16] I consider that the Court retains a residual discretion to decline special leave where one or more of the applicable criteria in s 178(2) is made out.

[28] The respondent submitted that even if an important question of law arose other than incidentally, the Court should nevertheless decline the application. Essentially three points were advanced in support of this submission, namely that the respondent would effectively be denied its right of challenge, that an investigation by the Authority would be more expeditious than a hearing in this Court, and the weight of factual matters that will arise for determination in the context of the applicant's claim. These factors weighed in favour of the Court's decision to decline special leave in *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*.[17]

[29] In *Carter Holt Harvey*[18] the Court had regard to a range of factors that apply generally, including the parliamentary intent that the Authority is well placed to deal with factual disputes, and that the grant of leave would effectively rob one party of its statutory rights of challenge. I consider that such factors may be considered in assessing whether, in the Court's residual discretion, leave ought to be granted. However, I am not persuaded to exercise my discretion against the grant of leave in the circumstances and having particular regard to the nature of the issues that will arise for determination between the parties.

[30] Special leave is accordingly granted, removing the matter from the Authority to the Court.

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[14] At [28].
[15] At [62].
[16] Refer, for example, to *Transpacific Industries Group (NZ) Limited v Harris* [2012] NZEmpC 17 at [28]; *NZ Tramways and Public Passenger Transport Employees Union v Wellington City Transport Ltd* [2011] NZEmpC 78 at [28].
[17] [2002] 1 ERNZ 74.
[18] At [38].

[31] Costs are reserved, at the request of both parties.

Christina Inglis
Judge

Judgment signed at 12.30pm on 7 March 2013