

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 18/09
5152716

BETWEEN WILLIAM ALEXANDER
 PORTEOUS
 Applicant

AND THE CHIEF EXECUTIVE OF
 THE DEPARTMENT OF
 BUILDING AND HOUSING
 Respondent

Member of Authority: G J Wood

Representatives: Michael Quigg for the Applicant
 Megan Richards for the Respondent

Investigation Meeting: By way of submissions

Submissions Received: By 25 February 2009

Determination: 26 February 2009

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Porteous, claims that he was offered redundancy and agreed to it, following a restructuring of the Department of Building and Housing (Building and Housing), but after it became aware of the size of his redundancy entitlements it created a new role for the purpose of avoiding the sum said to be owing to him. Mr Porteus seeks to have the employment relationship problem between himself and the respondent, the Chief Executive of the Department, removed to the Employment Court under s.178(2)(a) and (b).

[2] Under s.178(2)(a) one question of law is said to involve an assessment of whether an employee has any entitlement to redundancy compensation when that employee has been offered reassignment but declines it when the contract does not clearly provide for the situation. A second question of law is said to be how long an

employer in the state sector is entitled to keep an employee in employment, doing different duties, where their position has been disestablished and reassignment is being considered.

[3] Mr Porteous also argues that matters should be removed under s.178(2)(b) because he is presently in limbo over whether he can leave his employment and obtain redundancy compensation, or if he will not be entitled to redundancy compensation because he has failed to take up a new position offered to him. It is submitted that the nature of this claim, given the issues of state sector expenditure, the degree to which employers and employees need to be flexible to avoid redundancies in the current economic climate and the good faith duties of state sector employees, is such that the matter is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court.

[4] On behalf of Building and Housing Ms Richards consented to the application being removed to the Court.

[5] The parties have agreed to mediation next week and I have granted Building and Housing the right to defer making a statement in reply until after this determination, in case it is not needed.

[6] *Hanlon v. International Education Foundation (NZ) Ltd Inc* [1995] 1 ERNZ 1 states that a question of law will obviously be important if its resolution can affect a large number of employers and employees, or if the consequences of the answer to the question are of major significance to employment law generally.

[7] I accept that the issue of how long an employer can keep an employee in employment in other duties where their position has been disestablished, while reassignment is considered meets the above test, particularly in the state sector and in today's troubled economic times. The resolution of this issue, which may well however depend on the terms of employment agreements and other case specific factors, may still affect a large number of public sector employers and employees, as the disestablishment of positions is often not followed by immediate notice of termination for redundancy.

[8] For the reasons given below, and because of the urgency of the matter, I need not address the issue of whether other important questions of law arise, or whether it is in the public interest to remove the matter.

[9] The Authority has a residual discretion over whether or not to remove an employment relationship problem to the Court even where statutory grounds are made up. Clearly s.178 provides an exception to the general process, whereby the Authority is to deal with employment relationship problems in first instance.

[10] It may be more costly for the parties to attend the Employment Court at first instance, and they will be denied any benefits from the Authority's investigation process and its considered determination. However, given the important question of law to be addressed, and as the facts situation is fairly much agreed and not particularly complex, any such benefits may be outweighed by the benefits to the parties and other state sector employers and employees that may be provided by a judgment from the Court at first instance. In any event the Authority should not be astute in finding reasons to reject an application where removal has been agreed by experienced counsel (*Cocks v. Foote Cone & Belding Ltd* [1994] 1 ERNZ 180).

[11] I therefore order, pursuant to s.178(2) of the Act, the removal (in its entirety) of the employment relationship problem between William Alexander Porteous and The Chief Executive of the Department of Building and Housing (5152716) to the Employment Court for it to hear and determine without the Authority investigating the matter.

G J Wood
Member of the Employment Relations Authority