

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 172/10
5307515

BETWEEN THE NEW ZEALAND
TRAMWAYS AND PUBLIC
PASSENGER TRANSPORT
EMPLOYEES UNION INC
AND CHRISTOPHER
RUPAPERA AND FAAIUASO
PAKAU
Applicants

AND WELLINGTON CITY
TRANSPORT LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Paul McBride for Applicant
Andrew Caisley for Respondent

Investigation Meeting: On the papers

Submissions received: By 5 October 2010

Determination: 28 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants have applied for the matter to be removed to the Employment Court under s 178 of the Employment Relations Act 2000 on the grounds:

- a. That there is an important question of law likely to arise other than incidentally.
- b. The case is of such a nature and of such urgency that it is in the public interest that it be moved immediately to the Court.

c. That in all the circumstances the matter should be removed.

[2] The respondent has opposed the application for removal because there is no important question of law, there is no urgency and no public interest shown, there are no related or similar proceedings before the Court and that there are no other grounds justifying removal.

Issues

[3] Have the applicants established their grounds to remove the matter to the Employment Court?

The facts

[4] The respondent and the union are parties to a collective agreement in force from 2008 to 2010 (the CEA). The CEA provides the terms of employment for the second and third applicants. Under clause 79 of the CEA there is provision for a discretionary retirement gratuity. The clause reads:

“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...”

[5] Clause 80 of the CEA provides for a separate discretionary resignation gratuity that reads as follows:

“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...”

[6] The second applicant was employed by the respondent as a bus driver for 20 years from 7 May 1990 to 8 May 2010, when he retired by resigning. He was a member of the union and covered by the CEA. He has requested payment of a

retirement gratuity and would have been entitled to 19 weeks under clauses 79 and 80 of the CEA. He was only paid a gratuity payment of 3 weeks wages. It is claimed there is a shortfall of 16 weeks pay.

[7] The third applicant was also a bus driver employed by the respondent. He had been employed by the respondent for 20 years and 7 months from 18 September 1998 to 8 May 2010, when he retired by resigning. He was paid a retiring gratuity of 3 weeks wages instead of his claim that he should have received 13 weeks pay under clause 79 and 6 weeks pay under clause 80. It is claimed that he too is owed a shortfall of 16 weeks pay.

[8] The respondent says the discretionary payments made to the second and third applicants were additional discretionary payments beyond anything required by the CEA because clauses 79 and 80 did not apply where no retirement gratuities were payable to both applicants.

[9] The union and the respondent are in dispute about the interpretation of both clauses and the applicability of the clauses to the second and third applicants.

Determination

[10] The first ground for removal relied upon is that important questions of law are likely to arise in this matter other than incidentally. Mr McBride relies upon a question whether the terms “retirement” and “retiring” can properly be limited to employees ceasing employment for age related reasons in circumstances where the term is not defined in the CEA. He says that the relevance of age when interpreting the term “retirement” has the potential to affect a large number of employees. On the latter point, with respect, that is speculative, when this matter relates to the facts of two employees. On the former matter, the issue of interpreting clauses 79 and 80 in regard to the circumstances of the second and third applicants is the usual type of matter that comes before the Authority. I can not see that an important issue of law is likely to arise in regard to the rules of interpretation, application and operation of an employment agreement as to a ruling on their entitlements. I agree with Mr Caisley that there is an emphasis on a high degree of importance required of a question of law before a proceeding will be removed, and that where the approach to the rules of

interpretation in regard to the two clauses may or may not be difficult, they do not constitute an important question of law. Also, I have had regard to many cases cited by Mr Caisley that suggest the issues around retirement and resigning gratuities have been well settled by the Court and nothing has emerged to suggest that an important question of law on the facts of this matter are likely to arise other than incidentally, I hold.

[11] I also agree with Mr Caisley that cases used to support the removal cited by Mr McBride are distinguishable on their own facts. There are no complex factors. Any issues likely to arise on age and discrimination are matters that no doubt submissions can be made from existing cases. I have not had the benefit of any in depth analysis of what is likely to arise to discern that existing case law will not be applicable on the issues. Finally there has been an underlying issue raised about the respondent's conduct in not applying clauses 79 and 80, but any allegations that the respondent has engaged in any harsh or oppressive behaviour is not the matter of the claim for any entitlement. The applicants may hold that view, but whether or not it has any relevance in resolving the employment relationship problem may well be another matter. There has been nothing submitted to show that any difference in approach distinguishing this matter from the cases Mr McBride has cited that will likely give rise to an important question of law other than incidentally, I hold.

[12] Next I turn to the public interest and urgency. This case relates to the two employees named and their circumstances. There may well be wider implications in terms of numbers covered by the CEA and the amount of money involved. In the absence of any details of any impact of a determination on other employees, I agree with Mr Caisley that this as a factor has no immediate relevance. I therefore agree that it should not be given any weight because each case will be determined on its own merits. Also that is no different to any matter arising on the interpretation, application and operation of a CEA often involved in the Authority. Since there is no monetary scale and cap on any proceedings it is difficult to discern any public interest. Also, there have been no discussions yet with the Authority on how the matter would be investigated including any options on minimising the costs and how an investigation meeting will be conducted and the timeframe. The matter if it is genuinely urgent can be dealt with accordingly in the Authority, but other than the second and third applicants being unemployed there are no other details to support the

ground for urgency surrounding their circumstances. I agree with Mr Caisley that the matter is essentially between two individuals and a single employer. The proceedings only concern the parties and there is no identifiable public interest and urgency.

[13] Turning to the claim under s 178 (2) (d) I find experienced Counsel are involved. Although Mr McBride submits that there is a likelihood of a challenge, that can not be a foregone conclusion when the respondent has opposed the removal and has not commented at all on the possibility of a challenge. If the applicants are wanting to save costs then it is for them to decide on how best to use any limited resources, which is not a factor requiring a huge amount of weight for a removal in this case I hold.

Orders of the Authority

[14] The application for removal under s 178 (2) (a) and or s 178 (2) (b) and or s 178 (2) (d) of the Act has not been made out. I decline to order the removal to the Court.

[15] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority