

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 481  
5350889  
& 5361204**

BETWEEN RICHARD LAWRENCE  
First Applicant  
NICHOLAS FRANKISH  
Second Applicant

AND IAN LOCK & JOHN SHEATON  
AS LIQUIDATORS OF EX CED  
FOODS  
Respondents

Member of Authority: Eleanor Robinson

Representatives: Phillipa Muir, Counsel for First Applicant  
Don Mackinnon, Counsel for Second Applicant  
Philip Skelton, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 7 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The issue that the Applicants, Mr Richard Lawrence and Mr Nicholas Frankish, wish to resolve is a claim for recovery of monies, being payment of wages or other monies due to them pursuant to their employment agreements, being salary in lieu of notice and redundancy compensation.

**Issues**

[2] The Respondent seeks an order for removal to the Employment Court pursuant to s 178(2) of the Employment Relations Act 2000 ("the Act"), on the grounds that:

- a. an important question of law is likely to arise in the matter other than incidentally;*
- d. ....in all the circumstances the court should determine the matter.*

[3] The important questions of law Mr Skelton for the Respondent has identified are:

- (a) Whether an employee, who has a contractual entitlement to receive a specified period of notice of termination of employment, or payment in lieu of such notice, has a duty to mitigate loss if he is not given the notice specified in his contract.
- (b) Whether the earnings received by the employee during the notice period must be deducted in assessing the employee's loss.
- (c) Whether, in circumstances where the employment of an employee is terminated by Receivers pursuant to section 32(1)(b) of the Receiverships Act 1993 to prevent the Receivers from incurring personal liability for ongoing employment cost, and the employee is then offered re-employment forthwith by the same legal entity:
  - (i) A redundancy situation arises;
  - (ii) The employee is entitled to redundancy compensation;
  - (iii) a duty to mitigate loss arises;
  - (iv) The employee is entitled to payment in lieu of notice

[4] Ms Muir and Mr Mackinnon for the Applicants do not oppose the application by the Respondent for removal.

### **Background Facts**

[5] Mr Lawrence and Mr Frankish were respectively Managing Director and Finance Director of Cedenco Foods (Ex Ced Foods)("the Company").

[6] On 9 November 2009 the Company went into receivership. On 23 November 2009 the Joint Receivers gave Mr Lawrence and Mr Frankish notice of termination, and notice that claims for outstanding wages, redundancy compensation and holiday pay must be brought against the Company.

[7] Mr Lawrence and Mr Frankish were also offered new employment by the Joint Receivers on similar, but less favourable, terms and conditions of employment.

[8] On 27 November 2009 Mr Lawrence and Mr Frankish both signed and returned to the Joint Receivers a Confirmation of Preferential Claim Form.

[9] The consideration for Mr Lawrence and Mr Frankish accepting the new offers of employment was the written acknowledgement from the Joint Receivers of their secured and unsecured claims to contractual and statutory entitlements.

[10] Subsequently Mr Lawrence and Mr Frankish received payments in respect of their preferential claims.

[11] On 6 May 2010 the Company was placed into voluntary liquidation and Joint Liquidators were appointed.

[12] On 1 June 2010 Mr Frankish submitted an Unsecured Creditor's Claim form to the Joint Liquidators for the balance of his Total Employee Claim.

[13] On 10 June 2010 Mr Lawrence submitted an Unsecured Creditor's Claim form for the balance of his Total Employee Claim.

[14] On or around 25 May 2011 the Joint Liquidators paid out at 100 cents in the dollar on all unsecured claims lodged by the Company employees, excluding the claims lodged by Mr Lawrence and Mr Frankish.

## **Determination**

[15] Mr Skelton in his application has made reference to the leading case on what constitutes an important question of law, *Hanlon v International Educational Foundation (NZ) Inc*<sup>1</sup>. At page 8 the then Chief Judge Goddard stated:

*First it is necessary to identify a question of law arising in the case other than incidentally; and secondly to measure the importance of that question ....*

*It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that*

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<sup>1</sup> [1995] 1 ERNZ 1

*the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s. 94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. ...*

*It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter 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 it or a material part of it.*

[16] I consider that there are important questions of law arising in this case pertaining to the duties, responsibilities and rights of employees and Receivers where there is both a termination pursuant to s 32(1)(b) of the Receiverships Act 1993, and a subsequent ongoing employment relationship in the Company in receivership.

[17] I am satisfied that the questions will be decisive of the case or some important aspect of it, and that the test in s 178(2) (c) has been made out.

[18] This has been a protracted matter for the parties, involving a High Court judgment on jurisdiction and significant delays in excess of two years. In these circumstances I further consider that removing the proceedings before the Authority to the Court will result in a more efficient allocation of judicial resources.

[19] I am satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2)(d) of the Act. In all the circumstances the Employment Court should determine these matters.

[20] **I order that the whole employment relationship problems between the Applicants and the Respondents be removed to the Employment Court.**

#### **Costs**

[21] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

