IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2012] NZERA Christchurch 191
5387248

	BETWEEN	FRANCIS ANTONIO MORETTI, MARTIN CERNY Applicants
	AND	THE NEW ZEALAND KING SALMON CO LIMITD Respondent

Member of Authority:	David Appleton
Representatives:	Graeme Malone, Counsel for Applicants Karen Radich, Counsel for Respondent
Investigation Meeting:	Determined on the papers by consent of the parties
Submissions received:	7 August 2012 from the Respondent 8 August 2012 from the Applicants
Determination:	Friday 31 August 2012

DETERMINATION OF THE AUTHORITY

A. The respondent's application for removal to the Employment Court is declined.

B. Costs are reserved.

Employment relationship problem

[1] The respondent has applied to the Authority pursuant to s.178 of the Employment Relations Act 2000 (the Act) for the removal to the Employment Court at Christchurch of the matter set out in the applicants' statement of problem for hearing and determination. The applicants oppose that application.

[2] Messrs Cerny and Moretti have worked since 2003 and 2000 respectively as hatchery operators at the Takaka Salmon Hatchery in Marlborough. They claim an unjustified disadvantage in relation to their pay, although their claim may more

accurately be characterised as a claim for arrears of pay under s.11 of the Minimum Wage Act 1983 or s.131 of the Employment Relations Act 2000 (the Act). Their claim is based upon the principle confirmed by the Court of Appeal in *Idea Services Limited v. Dickson* [2011] NZCA 14; namely, they claim that they are employed to work *on call* from 4:30pm to 8:00am, during which period they do not receive the minimum hourly rate as required by the Minimum Wage Act.

[3] The respondent company denies that the applicants are entitled to be remunerated at the minimum wage rate for the periods that they are on call at the salmon hatchery as they say that the applicants are not *working* during those periods.

[4] This determination addresses the application for removal only.

The applicable law

[5] Section 178(2) sets out the grounds upon which the Authority may order the removal of a matter, or any part of it, to the Employment Court. These grounds are as follows:

(a) An important question of law is likely to arise in the matter other than incidentally; or

(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

(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

(d) The Authority is of the opinion that in all the circumstances the court should determine the matter.

[6] The respondent argues that the matter should be removed to the Employment Court on the grounds that an important question of law is likely to arise from the applicants claims, other than incidentally, and that, in all the circumstances, the Court should determine the matter.

The respondent's submissions

[7] Ms Radich refers me to the case of *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 in relation to the meaning of the phrase *an important question of law.* The Employment Court held that the principles to be applied included the following:

> *…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.*

[8] The respondent argues that the important question of law that arises in this present matter is whether employees in the fishing/farming industry who are required to stay overnight in accommodation provided by the employer and assist with livestock issues that might arise during the night are entitled to be paid the minimum wage for those overnight periods. Ms Radich points out that there has been no case law on this question. She submits that the question of law is important and its determination will have significant precedent value, potentially affecting a large number of employers and employees, including around another 35 employees of the respondent.

[9] Ms Radich goes on to submit that the present case could impact on the rate of pay due to employees whose workplaces are situated in remote locations such that they are required to stay overnight and inevitably have an ongoing caretaking role due to their presence on site.

[10] Ms Radich submits that the law is not *well settled*, either generally or in relation to the applicants' situation. Ms Radich argues that it will need to be determined as a question of law, whether the applicants are working whilst they are sleeping on site, but required to respond to alarms which might sound during the night at the salmon hatchery.

[11] Ms Radich identifies the key issue in dispute between the parties as the question of whether the applicants' duties cause them to be *on call* (the respondent view) or *working* (the applicants' view) during the night time periods. Ms Radich argues that this is a question of law which will need to be determined by applying facts which do not appear to be fundamentally in dispute.

[12] Ms Radich submits that, in the alternative, in all the circumstances the Employment Court should hear this matter, primarily because it is a test case which is properly determined at that level. In addition, Ms Radich argues that the claims are significant in terms of the financial levels of the claims and also because the outcome of the case would impact on other employees of the respondent in the same situation at other work sites. Ms Radich submits that this factor ought to be considered when reviewing *all the circumstances* in terms of s.178(2)(d) of the Act.

[13] Ms Radich also states that it is likely that a challenge may result from any Authority determination. Ms Radich points out that the Employment Court recognises this is a valid factor to consider in terms of a s.178 application in the case of *McAlister v. Air New Zealand Limited* unreported, AC22/05, para [10]:

> *Even if an important question of law is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been…..whether this will be a case which will inevitably come to the Court by way of a challenge in any event.*

The applicants' submissions

[14] Mr Malone for the applicants submits that the case before the Authority does not involve an important question of law or one of wider impact than that involving the two applicants and refers to the Employment Court in *Dickson* adopting the decision of the Court of Appeal in *NZ Fire Service Commission v. NZ Professional Firefighters Union* [2006] ERNZ 1109 that the determination was an intensely practical one involving a factual enquiry as to what is required by an employer of an employee and whether that constitutes *work*.

[15] Mr Malone also argues that the function required of the Authority in the present case is no more than the usual function it has in applying established law to the factual evidence to be given and that the current case therefore falls well within the jurisdiction and capability of the Authority. Mr Malone referred me to the case of *Ozieranska v. Cintra Quad Group Limited* [2011] NZERA Auckland 442 in which the principles of *Dickson* were applied in the case of an applicant who worked as a franchise manager (otherwise described as a general manager) whose duties were to manage an apartment block operated by a serviced apartment business. Mr Malone

points out that, unlike Mr Dickson but like the applicants, Ms Ozieranska did not work in the area of disability care.

[16] Mr Malone disagrees that a determination in the present case could or would have any real precedent effect given the virtually infinite variety of working conditions and circumstances that exist in today's employment environment. He also argues that it is almost impossible to see how this case (involving the day to day requirements of two people on a specific property in Golden Bay) could have any wider relevance to the farming industry or the fishing industry. He also submits that there is no evidence that the case could even have any precedent impact in respect of the respondent's other employees because of the different working conditions of the applicants. I, however, have no evidence about that before me.

[17] Mr Malone argues that Parliament had intended that disputes of fact (which he argues characterise the current case) should be dealt with at first instance by the Authority as it is designed to allow the parties an opportunity to resolve their dispute at a low level and low cost forum. He submits that such evidence being given in the Employment Court at first instance would take longer and involve more resources for both parties and the Crown than if heard in the Authority and that, even if the Authority's determination were to be challenged, the hearing at first instance in the Authority could reasonably be expected to narrow the issues and evidence required before the Employment Court.

[18] Mr Malone also points out that there is a statutory right to challenge the Authority's determination *de novo* and that the Act anticipates that such a right should be afforded. He contrasts this with the position in the Employment Court from which there is no appeal on fact that can be taken. Mr Malone also questions whether it is inevitable that there would be a challenge by any party to the Authority's determination.

The Authority's determination

[19] In its judgment in *Idea Services Limited v. Dickson* [2009] NZELR 116 the Employment Court held that, in determining whether sleepovers constitute work for the purposes of s.6 of the Minimum Wage Act 1983, it was helpful to consider three factors:

> *a. the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;*
> *b. the nature and extent of responsibilities placed on the employee; and*
> *c. the benefit to the employer of having the employee perform the role.*

[20] The Court held that the greater the degree or extent to which each factor applied (ie, the greater the constraints, the greater the responsibilities and the greater the benefit to the employer) the more likely it was that the activity in question ought to be regarded as *work*. The Employment Court said that the question has to be approached in an *intensely practical* way. The Employment Court did not attempt to be more prescriptive than Parliament had chosen to be and the Court of Appeal thought that that was appropriate. The Employment Court noted that legislation applies to circumstances as they arise and, to cite the Court of Appeal:

> *It would be a brave Court that attempted to divine or craft an exhaustive definition of what "work" meant in 1983, or in 1945 (the date of the Act the current legislation is modelled on), or, for that matter, what it means in 2010.*

[21] Of the Employment Court's guidance as to what factors would ordinarily be relevant in deciding whether a person is working, the Court of Appeal said that it:

> *Appropriately reflects, we think, the wide variety of work that can be undertaken and the circumstances in which it may take place.*

[22] In my view, contrary to the respondent's view, the present case does not raise a question of law of whether *employees in the fishing/farming industry who are required to stay overnight in accommodation provided by the employer and assist with livestock issues that might arise during the night, are entitled to be paid the minimum wage for those overnight periods.* The matter to be determined is whether the applicants are engaged in *work*, as referred to in s.6 of the Minimum Wage Act, while they are on call. The extrapolation of the consequences of that exercise to the entire fishing/farming industry that the respondent asks me to make is simply not tenable in my view.

[23] In order to determine the matter before the Authority, it will be necessary to apply the particular facts to the law as clarified in *Dickson*, and in that sense a question of law is clearly engaged. However, that exercise will not require the

Authority to interpret the law beyond the boundaries already set by *Dickson*. Although the facts considered in the *Dickson* case involved an employee who worked in the disability care sector, the principles described by the Employment Court clearly relate to all types of work; not just work in the disability sector. The principles, which were very clearly stated, can be applied to individuals engaged in every activity comprising employment and the methodology of doing so will require a factual enquiry, which the Authority is very well able to carry out.

[24] The fact that this matter does not involve a worker in the disability care sector does not, alone, justify removing the case to the Employment Court. Given the publicity that the *Dickson* case has received, it would not be surprising if employees in many other areas of employment were to see parallels between Mr Dickson's situation and their own in terms of working on call. They are likely to include workers employed in any 24 hour operation and staff working in a wide variety of emergency roles. It cannot be the case that s.178 requires the Authority to remove the matter to the Employment Court each time a minimum wages claim comes in from someone whose particular work type has not yet been explored in such a context.

[25] Furthermore, I also do not agree that the resolution of this matter *can affect large numbers of employers or employees or both, or* [that] *the consequences of the answer to the question are of major significance to employment law generally*. I agree with Mr Malone that the case will not inevitably set a precedent, either for other employees employed by the respondent company or the fishing/ farming industries in general.

[26] The applicants state in their Statement of Problem that they work in an isolated area, which becomes completely cut off from time to time by flooding. The applicants are alone when they are on call (the nearest other staff living several kilometres away) and oversee the hatchery which is a multi million dollar enterprise. They say they are employed to work *on call* from 4.30pm to 8am, being solely responsible for covering site checks and responding to all necessary site emergencies. Even if many other workers work in broadly similar circumstances, it is likely that there will be factors which are unique to the applicants' employment which could make a difference as to whether the *Dickson* principles are satisfied. That they may be satisfied in this case does not mean that they will be in other fishing/farming cases.

[27] Stepping back, and reviewing *all the circumstances*, I am not persuaded that they are of sufficient weight to merit removal. The respondent argues that the claims are significant in terms of their financial levels and also because the outcome will impact on other employees in the same situation at other worksites. The respondent recognises that the financial quantum of a claim alone cannot comprise a ground for removal, and there is no evidence before the Authority of the extent of the impact on other worksites. It is not explained how many other worksites there are and how many other staff are in the same position as the applicants, for example.

[28] Furthermore, whilst I accept that there is a possibility that the matter may be challenged and end up before the Employment Court in any event, and that this is a factor to take into account in accordance with the Employment Court's judgement in *Transpacific Industries Group (NZ) Ltd v Harris and Ors* [2012] NZ EmpC 17, it is not a determinative factor on its own. In addition, as a countervailing argument, is the fact that the Employment Court hearing the matter at first instance deprives the parties from challenging the judgement *de novo*.

[29] Overall, I am not persuaded that, in all the circumstances, this matter should be removed to the Employment Court. Accordingly, I decline to remove the claims of the two applicants to the Employment Court.

Costs

[30] Costs shall be reserved until the conclusion of the substantive investigation.

David Appleton
Member of the Employment Relations Authority