IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 111
5605646

BETWEEN	KAREN BELOW First Applicant
A N D	DAVID BELOW Second Applicant
AND	THE SALVATION ARMY NEW ZEALAND TRUST Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Paul McBride, Counsel for Applicants Andrew Scott-Howman, Counsel for Respondent
Investigation Meeting:	On the papers
Memoranda and Submissions Received:	20 June 2016, from Applicant 15 June 2016 from Respondent
Determination:	5 September 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms and Mr Below claim to have been employees of the Salvation Army New Zealand Trust until their dismissal on 25 August 2015. They have brought a number of claims to the Authority including unjustified dismissal, unjustified disadvantage, discrimination and breaches of good faith. They seek reimbursement of lost wages and benefits together with compensation and costs.

[2] The Salvation Army is an international religious and charitable organisation. The New Zealand Salvation Army Trust (the Army) says the Salvation Army is organised throughout the world on the basis of a Corps of Officers, each of whom is

required to make a spiritual commitment to it. This includes an express acknowledgement the Officer is not a party to any contractual arrangement with the Army. The Army says, accordingly, officership does not give rise to an employment relationship but is recognised as giving rise to the equivalent of ordained Ministry.

[3] The Army denies Ms and Mr Below were ever its employees. It says they were training to be Officers of the Army. This entailed a process of education and development during which their suitability for officership was assessed. Training was carried out through the Booth College of Mission, a facility operated by the Army and accredited under Education legislation.

[4] The Army has raised a preliminary issue of jurisdiction which it has applied to have removed to the Employment Court for consideration and determination. That issue is whether Ms and Mr Below were in an employment relationship with it.

[5] Ms and Mr Below have consented to the removal to the Employment Court. In doing so, they note the issue of their contractual status has been raised by the Army as an important question, and something of a test case. While the matter is of individual importance to Ms and Mr Below, they acknowledge it may have implications beyond their own facts. For that reason, they see it as appropriate for the matter to be addressed on a definitive basis by the Court, given the likelihood it would be addressed before the Court in due course in any event.

Issue

[6] The sole issue is whether Ms and Mr Below's claim to have been in an employment relationship with the Salvation Army New Zealand Trust should be removed to the Employment Court for determination.

Relevant law

[7] Section 178(2) of the Employment Relations Act 2000 (the Act), gives the Authority the discretion to remove a matter, or any part of a matter to the Employment Court provided at least one of the following criteria is satisfied:

> *(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 of the circumstances the Court should determine the matter.*

[8] In *Hanlon v International Educational Foundation (NZ) Inc*[1] former Chief Judge Goddard considered whether questions of law likely to arise in a matter were important questions of law He observed:

> 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 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.[2]

[9] He said that was not enough by itself, however, to render the question of law an important one:

> 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.

Grounds for removal

[10] The Army asserts an important question of law is raised by this issue. It formulates that question as being whether persons enrolled at a training facility which is accredited under Education legislation, are employees of the operators of that training facility. It says the issue is capable of affecting a large number of organisations. These include universities, private training establishments, institutes of technology and wananga.

[11] The Army submits the issue has implications for religious institutions in the nature of their relationship with ordained religious officers, and/or those aspiring to be ordained. It says this issue is not incidental to the Belows' claim but is a fundamental issue capable of determining their claim entirely. It asserts this issue has not been previously considered, or determined, by the Authority or the Court.

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1 [1995] 1 ERNZ 1 at 7

2 Section 94 of the Employment Contracts Act 1991 was the equivalent provision to s 178 of the Employment Relations Act

[12] The Army says the issue is severable from the other issues raised by Ms and Mr Below and that, if it is resolved in their favour, a separate hearing, involving different matters, will be required before the Authority. Alternatively, if it is resolved in favour of the Salvation Army, that will represent a complete end to the proceeding. It is, therefore, capable of discrete removal as a preliminary issue to the balance of the proceeding.

Should the preliminary issue be removed to the Employment Court?

[13] The employment status of religious workers has previously been considered in cases such as *Mabon v Conference of the Methodist Church in New Zealand*[3] and *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee*[4]. The approach has been to consider each case on its particular facts.

[14] In *Mabon* the Employment Court[5] held that neither party conveyed a clear intention to enter into an employment relationship. It found Mr Mabon's belief that he was called by God to be a minister to be inconsistent with an intention to be in a legally binding relationship as a result of his ordination or stationing in a shared ministry in Woodville. The Court of Appeal dismissed Mr Mabon's appeal, making a number of observations and holding that ultimately it came down to the parties' intentions.

[15] In *Gray* the Employment Court found Mr Gray was not an employee in relation to his ministry but was an employee in his role as a hospital chaplain. Both *Mabon* and *Gray* involved ministers who had been ordained and were undertaking ministries in the Methodist Church.

[16] The current application differs from these cases in that the Belows claim an employment relationship with the Army during their training or cadetship. I am unaware of any other case where the status of religious trainees has been considered. I consider the application of Ms and Mr Below raises an important question of law other than incidentally.

[17] I agree with counsel for the respondent that the question is fundamental and the answer will determine whether or not the Belows' claims can be heard.

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3 [1998] 2 ERNZ 440 (CA)
4 [1995] 1 ERNZ 672 (EmpC)
5 [1997] ERNZ 690 (EmpC)

[18] I consider there is no good and sufficient reason not to remove the matter, or part of it, to the Court.[6]

Determination

[19] I am satisfied it is appropriate to remove to the Employment Court the preliminary issue of whether Ms and Mr Below were in an employment relationship with the Salvation Army New Zealand Trust while they were undertaking training with the aspiration of becoming Officers of the Army.

Costs

[20] I reserve the issue of costs but note that, as both parties have consented to the respondent's application for removal to the Employment Court, it may be appropriate for each party to bear its own costs.

Trish MacKinnon
Member of the Employment Relations Authority

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6 *Auckland DHB v X (No 2)* [2005] ERNZ 551 at [30]