

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 158
5602137, 5602141, 5620916 &
5633878

BETWEEN RUDI HARTONO, WAHYONO,
AKMADI, ABDULADIS,
ROPI'I, SANTOSO,
UNWANULLOH
Applicants

AND SAJO OYANG CORPORATION
Respondent

Member of Authority: Christine Hickey

Representatives: Karen Harding, Counsel for the Applicants
Karyn van Wijngaarden, Counsel for the Respondent

Submissions: On the papers, with the last written submissions received
on 30 August 2016.

Determination: 19 September 2016

**PRELIMINARY DETERMINATION OF THE AUTHORITY ON THE ISSUE
OF TRANSFER OF APPLICATIONS TO THE AUCKLAND OFFICE OF THE
AUTHORITY**

- A. The application to transfer the proceedings to the Auckland office of the Employment Relations Authority is declined.**

- B. Costs are reserved until the substantive proceedings are determined or the proceedings are otherwise concluded.**

Employment relationship problem

[1] On 11 December 2015, Rudi Hartono's application for short-paid wages, holiday pay and pay for working on statutory holidays amounting to \$268,091.41 was lodged with the Employment Relations Authority at the Auckland office. An Auckland Authority Officer forwarded the application to the Christchurch office for lodgement. The application was lodged in the Christchurch office on 24 December 2015. The additional applications were lodged in the Christchurch office on 26 January, 18 May and 26 July 2016.

[2] All the applications have the same types of claims and the same preliminary issues to be resolved.

[3] All applicants have claims for wage arrears for hours worked, including "sleepover" claims. The claims are based on the Minimum Wage Act 1983 and the Wages Protection Act 1983. The respondent says that there are clear limitation issues with the majority of the wage claims being barred as having accrued more than six years before the proceedings were commenced. Ms Harding seeks extension of time for the earlier wage claims.

[4] Ms Harding argues that the applicants are also owed final holiday pay. Ms van Wijngaarden submits holiday pay is not within the Authority's jurisdiction, given s 103 of the Fisheries Act 1996.

[5] Ms Harding seeks an extension of time to lodge personal grievance claims related to how the applicants were treated while working on board the vessels. The respondent submits that the Authority does not have jurisdiction to hear personal grievance claims because of the limitations in s 103 of the Fisheries Act 1996, and would oppose any extension of time.

[6] Counsel have agreed that for the purposes of these preliminary matters the claims can be amalgamated and considered together.

[7] Ms Harding has indicated that there are several more claims that may be lodged by other former Indonesian employees against the same respondent.

[8] Ms Harding has indicated that she may seek removal of the proceedings to the Employment Court. However, no such application has been made. At this stage I am

not considering removal of the proceedings to the Employment Court of my own motion.

[9] Both parties agreed that the single issue of whether the proceedings should be transferred from the Christchurch office of the Authority to the Auckland office should be determined on the papers. I have received written submissions and copies of case authorities from both parties, which I have read and considered.

Relevant facts

[10] The claims for all seven applicants relate to work undertaken on foreign owned fishing vessels over a period of years. The applicants are all Indonesian nationals and resident in Indonesia.

[11] It appears the applicants flew into Christchurch at the beginning of their employment and flew out of Christchurch when their employment ceased.

[12] Each applicant embarked and disembarked the vessels at the Port of Lyttleton. The nearest Authority office to Lyttleton is the Christchurch office.

[13] The vessels fished in New Zealand's exclusive economic zone and were subject to New Zealand fisheries legislation. The vessel/s docked at the Port of Lyttleton every 30-40 days to offload the catch. Therefore, some work was done while in Port. The work undertaken by the applicants was on board the vessels and not on land.

[14] The respondent company is a South Korean company with no office, officers or employees in New Zealand. At the time of employment the respondent had a New Zealand charter partner, Southern Storm Fishing (2007) Limited, with an office in Christchurch. As of 15 June 2015, that company was removed from the Companies Register. Any relevant documents for the respondent that may exist in New Zealand, along with un-named witnesses for the respondent are likely to be in Christchurch. There may be other relevant documents and witnesses in South Korea.

Relevant law

[15] The relevant statutory provision is clause 13 of the Employment Relations Authority Regulations 2000:

- (1) Every application or other originating document lodged with an officer of the Authority must be lodged in such office of the Authority (being an office in Auckland, Wellington, or Christchurch)-
 - (a) as the person lodging the application or other originating document considers to be nearest by the most convenient route to the place at which the events that gave rise to the problem occurred; or
 - (b) as is agreed on by the parties and noted on the application or other originating document.
- (2) An officer of the Authority or member of the Authority may, of his or her own motion, or upon application, direct the transfer of any proceedings from any office of the Authority to any other office of the Authority.

[16] There are two parts to regulation 13 that I need to consider. The first is which office of the Authority is the “the nearest by the most convenient route to the place at which the events that gave rise to the problem occurred”.

[17] The parties do not agree on which office of the Authority is “the nearest by the most convenient route to the place at which the events that gave rise to the problem occurred”.

[18] The respondent submits that the appropriate office is Christchurch, given that is where the applicants embarked and disembarked the vessel/s.

[19] Ms Harding does not seek to argue that the events that gave rise to the problem occurred nearer to Auckland than to Christchurch. Instead, she concentrates her submissions on regulation 13(2); the discretionary power.

[20] That is the second aspect of Regulation 13 I need to consider. Should I transfer the proceedings to the Auckland office?

Where did the events that gave rise to the problem occur?

[21] The claims that have been lodged so far are all to do with payment for work done. That work was on board fishing vessels and was done, in the main, at sea and not necessarily closer to either the Auckland or the Christchurch office of the

Authority. However, some work was undertaken at the Port of Lyttleton, which is closest to the Christchurch office.

[22] If there are any wage and holiday pay arrears these arose both during employment and at the termination of the employment, which occurred in Christchurch when the crew members were signed off the boats and flew out of New Zealand.

[23] Ms Harding lodged the proceedings in Auckland because she considered that was most convenient for her and for the applicants, once they are in New Zealand. There is no evidence that she believed that the Auckland office was the nearest by the most convenient route to where the events that gave rise to the problem occurred.

[24] I consider the events that gave rise to the problem occurred nearest, by the most convenient route, to the Christchurch office of the Authority.

Should I exercise the discretion to transfer the proceedings to the Auckland office of the Authority?

[25] Regulation 13(2) gives me discretion to direct the transfer of the proceedings to another office. I need to exercise that discretion in accordance with principle. However, the regulation does not specify what criteria or factors I must take into account when exercising the discretion.

[26] In *Eardley v Conqueror International Limited*¹ Member Tetitaha decided that in exercising her discretion under Reg 13(2) she must have regard to the matters set out in Reg 13(1). She determined that the inherent purpose of Reg 13(1)(a) was to ensure that the matter was dealt with nearest to the location of the majority of witnesses and evidence. However, she also held that the office nearest to where the events giving rise to the problem occurred was determinative.

¹ [2014] NZERA Auckland 416

[27] Regulation 13(2) allows me to deal with the matter on its particular merits. I can take into account factors such as convenience and cost, and must assess the overall justice of the matter.²

[28] Ms Harding submits that I must also consider s 3 of the Employment Relations Act 2000 (the Act), which sets out the object of the Act, and includes a requirement to acknowledge and address “the inherent inequality of power in employment relationships”. She submits that the respondent is in an inherently more powerful position than the applicants are.

[29] Ms Harding also says that the Act requires the Authority to act according to equity and good conscience.³ She submits that the applicants’ circumstances present exceptionally high challenges for them to be able to participate in proceedings in Christchurch.

[30] The practical reasons Ms Harding gives for the transfer of the proceedings to Auckland are:

- The applicants’ residence in Indonesia and their impecuniosity and well as their inability to speak English make it difficult for them to access justice in New Zealand.
- The applicants require accommodation and interpretation services in New Zealand at all times, not only during the proceedings.⁴ The applicants have access through their counsel in Auckland to Indonesian legal assistants and affordable interpreters and translators for services outside the Authority investigation meeting. This is necessary for communication between the applicants and counsel and for communication with their accommodation provider.
- Indonesian legal assistants in Auckland will assist the applicants with transport and appropriate meals and transport to the mosque to pray.
- Accommodation costs for the applicants will be cheaper in Auckland.
- There will be no costs of internal travel within New Zealand for the applicants or their counsel if the proceedings are transferred to Auckland.

[31] Ms van Wijngaarden submits that such of the respondent’s documents as may exist in New Zealand are in Christchurch, although the premises in which they were housed were substantially damaged in the Christchurch earthquakes. The documents have not been identified and therefore the volume of such documents is unknown.

² This is the same approach taken by Member Robinson in *Department of Labour (Immigration Service) v Kamo* [2004] NZERA AA 74/04.

³ That is correct but Ms Harding relied on s 189, which relates solely to the Employment Court. Section 157(3) sets out the requirement that the Authority act in accordance with equity and good conscience.

⁴ When interpreters would be provide by the Authority.

She also submits that there will be three or four witnesses for the respondent, all of whom reside in Christchurch. She submits it is likely the respondent would engage an expert witness, likely a forensic accountant.

[32] Ms van Wijngaarden submits that all costs to the applicants of conducting their cases in Christchurch could be met by any later order of costs against the respondent if the applicants' claims are successful.

[33] Whatever costs the parties face, if they are successful, they may recover a proportion of their costs from the losing party. Ms Harding submits that the applicants would have trouble recovering costs from a Korean based company.

[34] It is obvious that the respondent would also have trouble recovering costs from the applicants, given their levels of financial hardship and lack of assets.

[35] In the *Kamo* case, on which Ms Harding relies heavily, Member Robinson was being asked to overturn the presumption inherent in Reg 13, that the correct place for proceedings was the office nearest to the place where events that gave rise to the problem occurred. He took into account factors that would have disadvantaged Mr Kamo if the proceedings were transferred to Wellington. The employer sought to overturn the presumption for its own convenience.

[36] Member Robinson upheld the presumption in that case. The discretionary factors and the presumption favoured Mr Kamo.

[37] In this case, particularly at this preliminary stage in proceedings, I consider the presumption that the proceedings should take place in Christchurch, which is the office of the Authority nearest to where the relevant events occurred, remains and is not displaced by the hardship grounds Ms Harding has advanced. If the substantive proceedings occur on the scale Ms Harding anticipates I will be open to arrangements to ensure that hardship does not prevent the full participation of the applicants, such as utilising technology to hear evidence at a distance, and/or convening at least part of the investigation meeting in Auckland.

[38] The further preliminary considerations now need to be investigated and determined and I will convene a case management conference as soon as possible to arrange the next steps. I invite Ms Harding to consider whether she will make an

application to remove the proceedings to the Employment Court as she has suggested may be the case.

[39] In addition, I will be asking both Counsel to consider whether there are questions of law which could be put to the Employment Court related to whether personal grievance proceedings and claims for holiday pay may be brought by persons engaged to do work on foreign owned fishing vessels. I am not aware that this question has ever been considered previously. A question of law may be worded something like this:

Does the Employment Relations Authority have the jurisdiction to determine claims for personal grievances under the Employment Relations Act 2000 and/or claims for holiday pay under Holidays Act 2003 when persons are deemed to be employees for the purpose of the Minimum Wage Act 1983 and the Wages Protection Act 1983 under s 103(5)(a) of the Fisheries Act?

Christine Hickey
Member of the Employment Relations Authority