IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 5

BETWEEN	RUDI HARTONO First Applicant ERA file 5602137
	WAHYONO Second Applicant ERA file 5602141
	AKMADI Third Applicant ERA file 5620916
	ABDULADIS, ROPI'I, SANTOSO, UNWANULLOH Fourth Applicants ERA file 5633878
AND	SAJO OYANG CORPORATION Respondent

Member of Authority:	Christine Hickey
Representatives:	Karen Harding, Counsel for the Applicants Karyn van Wijngaarden, Mike Sullivan and Kim Proctor-Western, Counsel for the Respondent
Submissions:	On the papers, with submissions received on 23 and 24 November 2016.
Determination:	9 January 2017

DETERMINATION OF THE AUTHORITY

A. **Under s 178 of the Employment Relations Act 2000 these applications are removed to the Employment Court to hear and determine without prior investigation by the Authority.**

Employment relationship problem

[1] On 11 December 2015, Ms Harding lodged Rudi Hartono's application with the Employment Relations Authority at the Auckland office. The application has been dealt with in the Christchurch office. Ms Harding lodged the three further applications on 26 January, 18 May and 26 July 2016.

[2] All seven applicants claim wages arrears for hours worked, including "sleepover" claims. Their claims are based on the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[3] The respondent says that there are clear limitation issues with the majority of the wages claims being barred as having accrued more than six years before the proceedings were commenced. Ms Harding seeks extensions of time for the wages claims.

[4] Ms Harding argues that the applicants are also owed holiday pay and pay for working on statutory holidays. Ms van Wijngaarden submits holiday pay is not within the Authority's jurisdiction under of s 103[1] 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.

[6] Also, personal grievance claims were not raised within the s 114 of the Employment Relations Act 2000 (the Act) 90-day time limit. The respondent does not consent to the grievances being raised out of time and opposes any extension of time.

[7] Counsel have agreed that the claims should be amalgamated and considered together because a number of the legal issues are common to each claim.

[8] Ms Harding says there are several more claims that may be lodged by former crew members against the same respondent, making a possible 28 claimants.

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[1] This was the applicable section of the Fisheries Act at the relevant time. On 1 May 2016, the Fisheries Act was amended. Section 103A of the Fisheries Act now contains the relevant references to the Minimum Wage Act and the Wages Protection Act and to the Authority's and the Court's jurisdiction.

Relevant facts

[9] The claims for all seven applicants relate to work undertaken on fishing vessels fishing in New Zealand fisheries waters. The applicants are all Indonesian nationals and resident in Indonesia. The officers that were in charge of the vessels are South Korean and resident in South Korea.

[10] 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.

[11] The applicants flew into Christchurch at the beginning of their employment and flew out of Christchurch when their employment ceased. Each applicant embarked and disembarked the vessels at the Port of Lyttelton.

[12] 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 Lyttelton every 30-40 days to offload the catch.

The Authority's investigation

[13] Ms Harding applied for a transfer of the proceedings to the Auckland office of the Authority. I determined that application on 19 September 2016, declining to transfer the proceedings. I indicated in that determination that counsel should consider whether there were questions of law arising in these proceedings or any other issues that meant the proceedings would be more appropriately heard in the Employment Court.

[14] On 7 November 2016, I held a case management teleconference. I have since received written submissions from both parties seeking removal to the Court of all the proceedings, which the parties agree contain a mix of legal and factual questions.

[15] There has not yet been any mediation because there have been preliminary jurisdictional questions to consider. Counsel for the respondent has indicated that once legal and jurisdictional questions have been decided it is highly likely that any

issues of quantum of unpaid wages and/or holiday pay could be settled by agreement between the parties. In my opinion, mediation would be of most use at that stage.

Removal to the Employment Court under s 178 of the Act

[16] At the relevant times, the jurisdiction of the Authority and the Court to determine issues of pay for fishers on fishing vessels owned and operated by overseas persons while vessels are in New Zealand fisheries waters arose from s 103(5) of the Fisheries Act 1996:

> (a) for the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of any other enactments as are necessary to give full effect to those Acts, a person engaged or employed to do work on the vessel who holds a temporary entry class visa with conditions that allow the person to work under the Immigration Act 2009 shall be deemed to be an employee;
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> (b) for the purposes of the Minimum Wage Act 1983, the Wages Protection Act 1983, and such provisions of any other enactments as are necessary to give full effect to those Acts, the employer of a person referred to in paragraph (a) shall be deemed to be,—
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> (i) if the operator of the vessel is the employer or contractor of those persons, the operator:
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> (ii) in any other case, the person from whom the operator has, by virtue of a lease, a sublease, a charter, a subcharter, or otherwise, for the time being obtained possession and control of the vessel:
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> …
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> (g) the Employment Relations Authority and the Employment Court may exercise jurisdiction in respect of any employment relationship that arises by virtue of paragraph (a) or paragraph (b) as if it were a lawful employment relationship subject to New Zealand law.

[17] Grounds under which the Authority may order the removal to the Court of a matter or matters, or any part of them, include "where an important question of law is likely to arise in the matter other than incidentally", and "the Authority is of the opinion that in all the circumstances the Court should determine the matter".[2]

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[2] Section 178(2)(a) and (d) of the Employment Relations Act 2000.

[18] Counsel for the respondent submits that all legal issues requiring determination should be referred to the Court prior to any factual considerations being investigated in the Authority.

[19] Counsel for the applicants agree that it is appropriate for the "matters of law to be referred to the Employment Court".

Are there questions of law that arise other than incidentally?

[20] In *Hanlon v. International Educational Foundation (NZ) Inc*[3] it was held:

> 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.
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> …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. 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.[4]

[21] There are two issues that appear not to have been judicially considered previously. The first is:

- Whether and, if so, how the principles set out in the "sleepover" cases of *Idea Services v Dickson*[5] and *Law* v *The Trustees of Woodford House*[6] apply to the Minimum Wage Act 1983 for fishers on board vessels at sea for extended periods.[7]

[22] I consider that it is fundamental to the case, although I acknowledge it will be a mixed question of fact and law, whether or not provisions of the Minimum Wage Act apply to the relevant workers when they were not working actively on board. While the issues have been dealt with in depth in the *Idea Services* case and the *Woodford House* case, the Courts' findings have not been extended to the fishing industry.

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3 [1995] 1 ERNZ 1.
4 Ibid at p 7.
5 [2011] NZCA 14.
6 [2014] ERNZ 576.
7 In the Woodford House case, the Court made reference to the unique payment regime in the fishing industry in reference to *Sealord Group Limited v New Zealand Fishing Industry Guild Inc.* [2005] ERNZ 535.

[23] I also consider that the determination of this matter could potentially affect a number of other employers in the fishing industry. Therefore, the proceedings involve more than one important question of law.

[24] Secondly, the question of whether the Authority and the Court have jurisdiction over claims for personal grievances under the Employment Relations Act 2000 and/or claims for holiday pay under Holidays Act 2003 when the workers were deemed to be employees for the purpose of the Minimum Wage Act 1983 and the Wages Protection Act 1983 under the then s 103(5)(a) of the Fisheries Act 1996[8] is also a fundamental one.

[25] It may be that the questions of law need further development or refinement by the parties in discussion with the Court.

[26] I therefore conclude that one or more questions of law will arise in the determination of these cases and certainly not in an incidental way. The grounds for removal under s 178(2)(a) have therefore been made out.

Should the Court in all the circumstances determine the matter?

[27] There are additional factors I have considered under s 178(2)(d) which mean I am of the opinion that in all the circumstances the proceedings in their entirety should be determined by the Court.

[28] There would be significant cost for both parties, given the fact that the applicants and the respondent's witnesses live outside of New Zealand, in having to undergo more than one set of proceedings if matters proceeded first in the Authority, and were challenged to the Court.

[29] I am satisfied that the proceedings are so important to the parties that the party that was unsuccessful in the Authority is highly likely to challenge to the Court. Ms Harding submits that the applicants' resources are very scant and their foreign domicile means that the expenses of more than one set of proceedings in New Zealand might be beyond their means. I accept that there is significant vulnerability for the applicants.

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8 Now s 103A(7)(g).

[30] If the proceedings remained with the Authority, it would need to offer dual interpretation facilities throughout the proceedings. The lack of a record of the proceedings in such a complex multi-issue, multi-lingual case would complicate matters for the Authority.

[31] The respondent's office was damaged in the 2010-2011 Canterbury earthquakes and it is not clear how that damage has affected the availability of the respondent's documents. There is likely to be a large volume of documentation. The passage of time and complications, such as some of the respondent's witnesses and documents being in Korea and the possibility that some New Zealand documents may be difficult to access, mean that the Court's discovery regime may be more effective.

[32] Ms Harding also submits that there is significant public interest in the issues that are central to these cases. That is likely to be the case because of the significant media coverage and public interest there has been about the payment and treatment of foreign crews on foreign vessels fishing in New Zealand's territorial waters.

[33] The matters are important to a number of employees, up to 28, and potentially involve a significant sum of money. [9]

Determination

[34] For the reasons set out above the Authority's files number 5602137, 5602141, 5620916 and 5633878 should be removed to the Employment Court on the basis that an important question of law is likely to arise other than incidentally and that, in all the circumstances, I am of the opinion that the Court should determine the matters.

Christine Hickey
Member of the Employment Relations Authority

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[9] Mr Hartono seeks wage arrears and holiday pay for the period 16 December 2007 to 11 December 2009 being a total of $268,091.41. Mr Wahyono seeks wage arrears and holiday pay for the period 13 December 2007 to 15 December 2009 being a total of $270,266.72. Mr Akmadi seeks wage arrears and holiday pay for the period 4 May 2008 to 15 April 2010 being a total of $267,934.02. Mr Abuladis seeks wage arrears and holiday pay for the period 19 January 2009 to 3 July 2010. Mr Ropi'i seeks wage arrears and holiday pay for the period 20 January 2009 to 3 July 2010. Mr Santoso seeks wage arrears and holiday pay for the period 22 January 2009 to 6 December 2010. Mr Unwanulloh seeks wage arrears and holiday pay for the period 6 March 2010 to 10 December 2010. The total sought by Messers Abduladis, Ropi'I, Santoso and Unwanulloh is $777,210.59. Meaning that for these seven applicants alone a total of $1,583,501 is claimed.