

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 63
3029714

BETWEEN BEN TIMMINS
 Applicant

AND ALLIED WORKFORCE LIMITED
 First Respondent

AND CPB CONTRACTORS PTY
 LIMITED

Member of Authority: Michele Ryan

Representatives: The Applicant acting on his own behalf
 Gillian Service, Counsel for the First Respondent
 Michael O'Brien, Counsel for the second Respondent

Investigation Meeting: On the papers

Submissions Received: 14 May 2018 from the Applicant
 28 May 2018 from the First Respondent
 29 May 2018 from the Second Respondent

Determination: 23 July 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns an application by Mr Ben Timmins to have his claims, currently before the Authority, removed to the Employment Court for determination without the Authority investigating the matters.

[2] The first respondent, labour hire company Allied Workforce Limited (AWL), opposes Mr Timmins application. It says there are no grounds to remove this matter.

[3] The second respondent, CPB Contractors Pty Limited (CPB), neither consents nor opposes the matter.

Background to Mr Timmins' claims

[4] Mr Timmins signed an employment agreement with AWF on 31 March 2016. In mid-April 2018 he was assigned to work for CPB, a company engaged in the Transmission Gully motorway project (the project). Mr Timmins says after commencing work representatives of CPB promised him full time employment on completion of a 3-month trial period.

[5] In August 2016 Mr Timmins was unable to work following a workplace injury in June. He received ACC cover until late October 2016 when he was given medical clearance to return to work. AWF advised that his position at CPB had not been held for him and there was no available work with CPB at that time. Mr Timmins informed AWF that he would be raising a personal grievance. He resigned in mid-December 2016. Mr Timmins' says he was constructively dismissed by AWF and/or CPB.

[6] AWF says at all material times it was Mr Timmins' employer but denies it dismissed him. CPB says Mr Timmins was never employed by it.

Procedural background

[7] Mr Timmins filed a statement of problem on 29 January 2017. Following mediation on 12 May 2017. He advised the Authority he was "*about to make an application to have this matter brought before the Employment Court...*". The basis for the removal was said to be due to his concerns that the respondents would alter documents and interfere with witnesses. No application was received.

[8] In readiness for an investigation meeting scheduled for 24 and 25 July 2018 to examine (as a preliminary matter) the nature of the relationship between Mr Timmins and CPB, a timetable for the exchange of information was agreed. Mr Timmins was to confirm his witnesses or apply for any required summonses on or by 11 May 2018. The first and second respondents were to provide written statements by 8 and 22 June 2018 respectively and Mr Timmins was scheduled to provide a written response by 6 July 2018.

[9] On 1 May 2018 Mr Timmins sent an email stating, amongst other things, that he intended to make an application for removal of his matter to the Court. His application was received on 15 May 2018. The respondents have each had an

opportunity to respond to the application. The dates for the Authority's investigation meeting, and for the exchange of information, have been vacated and postponed respectively to enable the Authority to determine this application.

The law

[10] The Authority's discretionary power to remove a matter to the Court is governed by s 178 of the Employment Relations Act (the Act). Subsection 178(2) sets out are four separate grounds on which removal to the Court may be granted, 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
- (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[11] Section 178(6) of the Act prohibits the removal of a matter to the court on grounds concerning the Authority's procedure – the manner in which the Authority conducts its investigation. A similar prohibition is repeated at s 179 where a party is prevented from challenging a determination of the Authority about the Authority's procedure.

Discussion

Evidence

[12] At the crux of Mr Timmins' application are his apparent concerns regarding the provision of evidence. He is steadfast in his view that one or both of the respondents have interfered with witnesses. That apprehension appears to have prompted Mr Timmins' unwillingness to alert the respondents (and therefore the Authority) of the identity of witnesses he wishes to have attend the investigation meeting, or the nature of the testimony his witnesses will furnish. The letter sent to the Authority foreshadowing this application referred to an unnamed District Court Judge and a right to "*keep my powder dry until the day*". Mr Timmins is further dissatisfied that the Authority has not made orders requiring the respondents to

provide information about the number of people who were supplied by AWF to work for CPB in or around the time he was medically cleared to return to work. The inference drawn from Mr Timmins' application is that he considers the Court's procedures will deal better with these matters than the Authority.

[13] Each of Mr Timmins' concerns relate either directly or indirectly to the procedure the Authority has followed, is following, or is intending to follow, to investigate his claims. As already noted, s 178(6) expressly excludes the Authority's procedures as providing grounds by which a matter may be removed to the court.

[14] Setting aside the statutory prohibition, I am not persuaded that a removal of the matter to the Court would, in any event, substantially alter the way Mr Timmins' concerns would be addressed where:

- (a) The requirement for parties to provide early advice as to the identity of witnesses and the nature of their testimony is standard practice both at the Authority and at the Court.
- (b) Mr Timmins has not identified what evidence has been interfered with or who he says has been improperly approached by the respondents. As has been conveyed to the parties, the Authority routinely questions and requires answers from witnesses on matters (including the lines of inquiry Mr Timmins' concerns have raised) relevant to the claims. The Authority is then able to assess and make findings as to the credibility of any evidence or person.
- (c) In respect of the disclosure of documents the Authority investigation is still in the preparatory stage. Once the evidence from each of the respondents is filed the Authority will be in a position to assess whether additional information is required, and if so, will call upon any party to so provide.¹
- (d) Information regarding what work AWF (and/or CPB, if it is determined that the relationship between Mr Timmins and CPB was one of employment) had available in late October 2016, is likely to be requested by the Authority in the lead up to the investigation about the alleged unjustified dismissal.

¹ Section 160(1)(a) of the Act

[15] Mr Timmins' issues regarding the Authority's procedure is not a basis on which his claims can be removed to the Court.

Is there an important question of law that is likely to arise other than incidentally?

[16] Mr Timmins is self-represented. He did not identify a specific important question of law as the basis for removal to the Court. Rather he says "multiple questions of law are likely to arise in this matter hence the necessity to remove to the court".

[17] In *Hanlon v. International Foundation (New Zealand) Inc*² the Court defined an important question of law (for the purposes of removal to the Court) in the following way:

*... The importance of the 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.*³

[18] In *Centre for Advanced Medicine v Sprott*⁴ the Court referred to *Hanlon* and noted "There must be some good reason for removing the proceeding to the Court from the Authority which is designed to determine cases at the first instance".

[19] It is clear from the material provided by Mr Timmins that the question as to whether CPB became his employer is important to him.

[20] An inquiry as to whether a person is employed by a particular entity involves a factual examination as to how the parties intended to engage with each other alongside how the relationship operated in practice and any other relevant factors. The existence of various legal principles that must be applied following an assessment of the factors (above) does not mean there is an important question of law for the purposes of s 178. The Authority is frequently required to determine whether the nature of a relationship between parties is one of employment or not. I am not persuaded there is an important question of law that meets the test on which this matter should be removed to the Court.

² [1995] 1 ERNZ 1

³ Ibid at p 7

⁴ Unreported, Employment Court, Shaw J, AC 20/05, 10 May 2005, at [6]

Is the case of such a nature and of such urgency it is in the public interest to remove to the court?

[21] Mr Timmins says “a large number of potential claimants are and could be affected” and therefore it is in the public interest to remove to the Court.

[22] Section 178(2)(b) requires *both* the nature *and* the urgency of the case to be such that it is “in the public interest” to order removal to the Court.

[23] No information or explanation was given as to why urgency to this matter is now being sought. As noted by counsel for AWF Mr Timmins has taken a significant amount of time to progress his claim since early 2017 when it was lodged. Not all the delays in scheduling this matter can be apportioned to Mr Timmins, but I note the preliminary matter was tentatively set down for investigation on 28 and 29 November 2017. Unfortunately Mr Timmins was unable to attend at that time due to work commitments abroad.

[24] There is no reason for urgency at this juncture. The elements required to justify a removal pursuant to s 178(2)(b) have not been met.

Conclusion

[25] I accept it is Mr Timmins’ preference to have his claims removed to the Court but I have not been provided with a good reason to do so. It follows that his application is declined.

[26] The Authority will convene an urgent case management conference call to discuss the progression of Mr Timmins’ claims.

[27] Alternatively, if Mr Timmins wishes to seek the special leave of the Court to have his case removed, the Authority asks to be notified of that matter as soon as is reasonably possible.

Costs

[28] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority