

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 106
3039835

BETWEEN CHIEF OF NEW ZEALAND
DEFENCE FORCE
Applicant
AND MISHELE RADFORD
Respondent

Member of Authority: Vicki Campbell
Representatives: Jenny Catran for Applicant
Greg Lloyd for Respondent
Investigation Meeting: On the papers
Submissions Received: 2 November 2018 from Applicant
15 November 2018 from Respondent
Determination: 27 November 2018

DETERMINATION OF THE AUTHORITY

- A. The question of whether the New Zealand employment institutions and the provisions of the Employment Relations Act 2000 apply to an employment agreement between the Chief of Defence Force and a person in Ms Radford's situation is removed to the Employment Court to be determined as a preliminary matter.**
- B. Costs are reserved.**

Employment relationship problem

[1] Ms Mishele Radford lodged an application with the Authority on 31 August 2018 claiming she was unjustifiably dismissed and that the Chief of the New Zealand

Defence Force (NZDF) breached its obligations of good faith, the employment agreement and the Defence Act 1990.¹

[2] NZDF applied for and was granted an extension of time to respond to Ms Radford's application. NZDF has lodged a formal protest to jurisdiction of the Authority to hear and determine Ms Radford's claims.

[3] This determination deals with an application made by NZDF on 21 September for a question of law to be removed to the Employment Court without the matter first being investigated by the Authority.

[4] During a case management call with the parties on 16 October I granted NZDF's application for the lodging of the statement in reply to Ms Radford's application to be adjourned until the removal application is determined.

[5] By consent the application for removal is being dealt with on the papers currently before the Authority. Section 178 of the Act allows the Authority to remove a matter or any part of it to the Court without investigating it if one of the following four grounds of removal are established:²

- 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] NZDF has made its application under s 178(2)(a) and (b) of the Act. That is that an important question of law is likely to arise in the matter other than incidentally

¹ Employment Relations Authority matter number 3037934.

² Employment Relations Act 2000 section 788(2).

and/or 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.

An important and decisive question of law is likely to arise in the matter other than incidentally

[7] An important question of law is one that will arise other than incidentally. Its importance has to be measured in relation to the case in which it arises and 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 The question of law need not be complex, tricky or novel to be important.⁴

[8] NZDF says the important question of law is whether the New Zealand employment institutions and the provisions of the Employment Relations Act 2000 apply to an employment agreement between the Chief of Defence Force and a person in Ms Radford's situation.

[9] Ms Radford's situation is that she was employed by NZDF as Business Support Officer Finance in the New Zealand Embassy in Washington DC. Ms Radford's employment agreement defined Ms Radford's employment as a locally engaged civilian (LEC) under s 90 of the Defence Act 1990. The employment agreement states that Ms Radford would be subject to the United States of America Labour Laws and NZ legislation did not apply to her.

[10] NZDF says the question is important because the answer will impact on many LECs employed by NZDF and may create a precedent for locally engaged staff employed by other agencies, such as the Ministry of Foreign Affairs and Trade (MFAT).

[11] Untested affidavit evidence was produced for the Authority's consideration. In his affidavit the Manager Defence Attaché Support Services for NZDF said NZDF has 99 locally employed LEC's in 14 different countries. The LEC's are a combination of NZ citizens and local citizens.

[12] I also received an affidavit from the Divisional Manager in HR for MFAT. MFAT also engages LECs although they are called "staff employed at Post". For ease

³ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1.

⁴ *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

of understanding I have referred to these employees as LECs. Of 850 staff employed by MFAT in overseas posts, 550 of these are LECs. The terms and conditions applying to the 550 employees are modelled on local employment laws and practices. A number of these employees are NZ citizens.

[13] Ms Radford agrees with NZDF that an important question of law is likely to arise in the matter other than incidentally.

The matter is of such a nature and urgency that it is in the public interest that it be removed immediately

[14] NZDF says the case has particular public interest because there are approximately 100 people employed by NZDF around the world that have analogous employment agreements to that of Ms Radford. In addition, there are approximately 550 people employed as LECs by MFAT on similar but not identical arrangements.

[15] Ms Radford disagrees with NZDF's submissions on this point. I agree with Ms Radford's submissions that to satisfy the statutory test both limbs must be established. That is the case must be of such a nature and of such urgency that it is in the public interest that it be removed immediately. Ms Radford agrees the case is of such a nature that it is in the public interest to remove the question to the Court but disagrees that the urgency criteria is made out.

Conclusion

[16] It is only necessary to establish one of the tests under s 178(2) of the Act in order for removal to be granted.⁵ I am satisfied NZDF has established an important question of law will arise other than incidentally.

[17] In determining whether I should exercise my discretion I have considered whether there are any factors against removal and am not satisfied there are. The question of law is fundamental to Ms Radford's case. If the answer to the question posed by NZDF confirms its position that the New Zealand employment institutions do not apply, Ms Radford would be required to pursue the matter in the United States.

⁵ *Auckland District Health Board v X (No 2)* [2005] 1 ERNZ 551.

[18] The question posed by NZDF has not yet been the subject of legal proceedings and there are other NZDF and MFAT employees in similar circumstances which means the decision of the Court may have wider implications and precedent value.

[19] The jurisdictional question is divisible from the substantive question of Ms Radford's personal grievance. This supports the removal of the question posed by NZDF. If NZDF's position is not confirmed and Ms Radford's employment is subject to New Zealand law her personal grievance can be investigated by the Authority in the usual way.

[20] Removal to the Employment Court of the preliminary question posed by NZDF is warranted. The question is whether the New Zealand employment institutions and the provisions of the Employment Relations Act 2000 apply to an employment agreement between the Chief of Defence Force and a person in Ms Radford's situation.

[21] The timeframe for NZDF to lodge its statement in reply to matter number 3037934 is extended until 14 days after the date of the Employment Court decision on the preliminary question.⁶

Costs

[22] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority

⁶ Employment Relations Authority Regulations 2000, Reg 8(4).