IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 647

3055173

BETWEEN	SMITHS CITY (SOUTHERN) LIMITED Applicant
A N D	JEREMY CLAXTON First Respondent
AND	CANDO CREATIVE FLOORING LIMITED Second Respondent
AND	CANDO CREATIVE INSTALLS LIMITED Third Respondent
AND	MELANIE DOUGLAS Fourth Respondent

3055344

BETWEEN	SMITHS CITY (SOUTHERN) LIMITED Applicant
AND	NICHOLAS MILNE First Respondent
AND	CANDO CREATIVE INSTALLS LIMITED Second Respondent
AND	JEREMY CLAXTON Third Respondent

Member of Authority:	Peter van Keulen
Representatives:	Jeff Goldstein, counsel for the Applicant Kathryn Dalziel, counsel for the Respondents
Investigation Meeting:	4 November 2019
Submissions Received:	10 October 2019 and 4 November 2019 from the Applicant 30 September 2019 and 4 November 2019 from the Respondent
Date of Determination:	11 November 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondents have applied to remove both of these matters to the Employment Court.

[2] These two claims are complex multi-party matters with various employment relationship problems including allegations of breaches of the duty of fidelity, breaches of s 9 of the Fair Trading Act 1986, breaches of employment agreements, aiding and abetting breaches of employment agreements and breaches of the duty of good faith. The remedies sought exceed $1,000,000.00.

[3] The claims are set down for a ten-day investigation meeting and the parties have completed various procedural steps in progressing towards that investigation, including reasonably extensive disclosure.

[4] However, matters have now got to a point where Ms Dalziel, on behalf of the respondents, says I should remove these two claims pursuant to s 178 of the Employment Relations Act 2000 (the Act) as:

(a) Important questions of law are likely to arise in these matters other than incidentally; and

(b) In all the circumstances, the Employment Court should determine these matters.

[5] The applicant for both claims opposes the removal. Mr Goldstein on behalf of the applicant says neither of these grounds are made out and the Authority should determine these matters.

Removal to the Court

[6] The power to remove a matter to the Court, as set out in s 178 of the Act, is:

> (2) The Authority may order the removal of the matter, or any part of it, to the court if -
> (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.

[7] As outlined above this application has been advanced on the basis of ss 178(2) (a) and (d). I will consider each ground in turn.

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

[8] In the often quoted decision of *Hanlon v International Education Foundation (NZ) Inc*[1], Chief Judge Goddard considered when a question of law is important and stated:

> … 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 172]. On the other hand a question 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. Most questions of law that could be described as important will be far less momentous. … 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 would be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about the decision of it or a material part of it.

[9] It is clear from this quote that a question of law is important if its resolution may have a wide impact, perhaps impacting a number of employers and/or employees or the question may be significant to employment law. However, it is also clear that a question of law does not have to have an impact beyond the parties involved. The importance can be derived from the significance of the question of law to resolving the case. But, as Chief Judge Inglis stated in *Grant Johnston v The Fletcher Construction Company*[2] this point cannot be taken too literally. The Chief Judge referred to the legal question of whether a dismissal is justified under s 103A of the Act as probably not meeting the threshold of an important question of law. I take from this that the Chief Judge is saying, as was Chief Judge Goddard in *Hanlon*, that some questions of law may be significant to the resolution of a case but the principles engaged in answering the question are sufficiently established such that the question is not one that assumes importance for the purposes of removal to the Court.

---

[1] *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 at p 7.
[2] *Grant Johnston v The Fletcher Construction Company* [2017] NZEmpC 157 at [22].

[10] So, it appears that in applying the removal condition set out in s 178(2)(a) of the Act I need to be satisfied that there is a question of law that has significance and one that the answer is not so well established by the Court. This does not mean the question needs to be novel, complex or tricky – a point that Chief Judge Inglis made clear in *Johnston* – but it could be. This aspect is difficult to describe, but I believe it applies so that I am looking for a question of law where the answer is not clear because it has not been addressed at all or fully by the Employment Court, or because it is complex.

[11] These cases are removed because the answer to the question of law has significance and the Employment Court, for various reasons, is better placed to consider the question and answer it, not because the Authority cannot be trusted to get right.

[12] The reason why I have explained my thoughts on the test for an important question of law is because I am satisfied that this is exactly what this case presents. On the face of it there is no immediately obvious question of law but, as Ms Dalziel has pointed out, there are three areas of analysis in these cases that will engage questions of law, which are important on the basis that they are decisive of this case and the answers may impact more widely than on just the parties to these claims. And they are areas of law which have not been considered by the Employment Court (or higher courts) completely such that there is a significance to the answer – it is not simply that the areas are complex or tricky but rather that the basis for the answers has not been fully established by the Court.

[13] I will discuss these areas of law below.

[14] *Claims under s 9 of the Fair Trading Act 1986.* This is not a question about whether the Authority has jurisdiction as I had anticipated. Ms Dalziel accepts as a starting point that the Authority has jurisdiction to deal with claims under the Fair Trading Act, which is specifically conferred on it under the Act. The issue is whether conduct by an employee, during his employment, as an employee and running a third party business, means the employee and/or the third party business are in trade for s 9 of the Fair Trading Act. Whilst

the question of what is "in trade" has been traversed by the Employment Court and other courts it has not been addressed in the context that it arises in these cases.[3]

[15] *Aiding and abetting breaches of an employment agreement.* Again this is not a contentious area insofar as the Authority has jurisdiction and claims of the type have been considered by the Employment Court. Rather Ms Dalziel says these two cases engage questions of law relating to the high standard of proof (specifically what standard of proof is required) and possible implications of double jeopardy (in this case where an employee owns and operates a separate company and that company is alleged to have aided and abetted a breach, the employee also being liable for the consequences of the breach of the employment agreement). And these questions have not been fully traversed by the Employment Court.[4]

[16] *Damages for breach of duty of fidelity.* Ms Dalziel noted that this area of law has been subject to analysis by the Employment Court, particularly in detail in *Rooney Earthmoving Limited v McTague*[5]. However Ms Dalziel says the assessment of damages is complicated and involves an assessment of law and fact and this supports removal under s 178(2)(a) of the Act. Ms Dalziel was also very careful to note that this was not a suggestion that complicated matters should be removed per se, which infers the Authority might not have the ability to deal with such issues. Rather it is not simply the complicated analysis but it is this coupled with the limited assessment by the Court of the legal principles applying to the assessment of damages where there has been a breach of the duty of fidelity[6]. I agree with this submission and the assessment of damages for breach of the duty of fidelity, should that arise in these cases.

[17] Overall, I am satisfied that there are important questions of law in these cases, which warrant removal to the Employment Court.

---

[3] Ms Dalziel referred to a relevant Australian authority, *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (HCA), and said there is no relevant decisions of the Employment Court on this issue.
[4] See *Strachan v Moodie* [2012] NZEmpC 95; and *Su v iGolf Limited* [2015] NZEmpC 63.
[5] *Rooney Earthmoving Limited v McTague* [2012] NZEmpC 63.
[6] Noting of course that the respondents' primary position is to deny liability and Ms Dalziel's argument only applies if the issue of damages arises.

In all the circumstances, the Court should determine these matters

[18] In *Johnston,* Chief Judge Inglis considered the power to remove a matter to the Employment Court under s 178 of the Act and stated[7]:

> [39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a)-(c), which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose. The overarching point will be whether a particular case is best suited for resolution by the Authority's investigative processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[19] Ms Dalziel says there are two aspects of these cases that are relevant to this ground, disclosure and a likely challenge.

[20] Ms Dalziel accepts the parties have already undertaken some disclosure under the directions I have made in this case to date but she says this remains a problematic issue as the respondents have not yet made requests for disclosure and some of the directions I have made for disclosure from the various respondents have not been complied with. The short point is there is much to be considered and worked through in terms of disclosure and should that process become contentious or adversarial then the powers I have to direct disclosure may be wanting, whereas the formal and strict disclosure regime of the Employment Court would leave little room for any dispute.

[21] Then, Ms Dalziel says whatever the outcome of my determination this matter will most likely be challenged to the Employment Court. This is particularly so given the quantum claimed.

---

[7] *Grant Johnston v The Fletcher Construction Company Limited*, above n 2.

[22] Mr Goldstein, in response, says disclosure of documents has not been problematic to date, although it has required my intervention. He says the powers I have to order disclosure are more than adequate and the parties will likely comply with directions.

[23] In terms of any possible challenge, whilst Mr Goldstein does not deny that a challenge from any party is likely, he says that is a party's right and removal now will erode that right, which is not something that should be done readily.

[24] Reflecting on the disclosure that has been undertaken in my investigation of these matters to date, I accept Ms Dalziel's argument. Whilst there has been disclosure made by the respondents that has not all been done readily or easily – this has required intervention by me and my last directions have not yet been fully complied with. I believe the remaining issues of disclosure could be contentious and problematic. I believe the formal regime of the Court will be better suited to avoiding areas of dispute (as the obligations under the Court's disclosure regime are clearer) and resolving disputes if they do arise.

[25] On the question of the loss of rights to challenge, Chief Judge Inglis said, in *Johnston*:

> [33] I prefer to approach the residual discretion issue [s 178(2)(d)] on the following basis. Parliament has made it clear that many cases are best dealt with by way of the Authority's unique investigative processes (and under which determinations are made "according to the substantial merits of the case, without regard to technicalities"); some cases are best dealt with by the Court. Parliament has specified three particular grounds warranting removal by way of grant of special leave. The Court retains a discretion to decline leave notwithstanding that one or other of the grounds in s 178(2) has been made out. However, to adopt a starting point that leave ought rarely to be granted (for example because it would mean that a right of 'appeal' would be denied), runs the risk of undermining the objective of the provision and of reading in qualifying criteria which are not there. I respectfully agree with Judge Couch's observations in *Transpacific Industries Group (NZ) Ltd v Harris* that:
>
> > [The loss of a right of appeal] occurs whenever a matter is removed under s 178 and the legislature must have regarded it as an acceptable consequence.
>
> [Footnotes omitted.]

[26] On this basis, the loss of challenge rights is not a matter that should be given weight, but rather I should consider the potential cost implications of a long Authority investigation being wasted if a challenge is likely[8].

[27] Analysing these arguments and applying *Johnston*, I conclude that removing this matter to the Employment Court is appropriate:

(a) The parties are likely to be better served by the structured process of the Employment Court, particularly for the disclosure of documents.

(b) Costs expended in the Authority will be wasted if this matter is to be challenged in any event (which I believe is likely given the quantum of the remedies sought).

[28] There is also some force in the suggestion, which was not canvassed in this matter, that given the complex nature of the allegations, and given that counsel are likely to have a better understanding of these matters than the Authority, this case is probably better suited to the adversarial process of the Employment Court.

[29] In conclusion, in the words of Chief Judge Inglis, these two cases will consume at least two weeks of hearing time in the Authority, they require a more formal, procedure-laden approach, and the unsuccessful party is likely to pursue their statutory right of de novo challenge. For these reasons, these cases are better suited for hearing in the Court.

Conclusion

[30] I remove both of these matters to the Employment Court pursuant to ss 178(2)(a) and (d) of the Act.

---

[8] *Grant Johnston v The Fletcher Construction Company Limited*, above n 2 at [35] and [36]; and *Transpacific Industries Group (NZ) Ltd v Harris* [2012] NZEmpC 17 at [23].

Costs

[31] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[32] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority