

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 241
3105232

BETWEEN CREST COMMERCIAL
CLEANING LIMITED
Applicant

AND TOTAL PROPERTY SERVICES
(CANTERBURY) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Charles McGuinness, counsel for the Applicant
Paul McBride and Saadi Radcliffe, counsel for the
Respondent

Investigation Meeting: On the papers

On the papers and by Application for removal of part of matter to Employment
teleconference: Court 18 May 2020
Memorandum of counsel for Respondent 26 May 2020
Telephone conference with Authority 5 June 2020

Date of Determination: 22 June 2020

DETERMINATION OF THE AUTHORITY

- A The application for removal to the Employment Court is declined.**
- B Costs on the application are reserved until after a substantive
determination.**
- C An Authority Officer will confirm with counsel whether the preliminary
issue about jurisdiction/standing is ready for determination.**

Employment Relationship Problem

[1] Crest Commercial Cleaning Limited (CrestClean) seeks removal of part of the matter lodged with the Employment Relations Authority under file number 3080774 to the Employment Court.

[2] Total Property Services (Canterbury) Limited (Total Property) say that the circumstances in which the substantial issue, and its context and surrounding facts, are intricately linked and if any matter is to be removed into the Court then the entire matter is properly removed. Total Property abides the Authority's decision as to removal.

[3] A telephone conference was held to hear any additional submissions on the removal application. By agreement the matter is dealt with on the basis of the papers lodged and those additional submissions.

The application before the Authority

[4] CrestClean successfully tendered for a cleaning contract at a Christchurch high school. Total Property had held the contract previously. Eleven of its employees opted to transfer to CrestClean with three subsequently opting out partway through the transfer.

[5] CrestClean says that its request for individualised employee information for the transferring staff under s 69OEA(2) of the Employment Relations Act 2000 ("the Act") was not complied with, that only partial information was provided and on a sporadic basis. CrestClean says this has created difficulties in ensuring transferred staff continue on existing terms, conditions and being able to calculate the correct transfer cost with Total Property.

[6] CrestClean seek a finding that Total Property is in breach of s 69OEA(2), s 69OEA(3)(a) and (b)(i), s 69OEA(5) and s 69LA(7)(a) of the Act. A penalty is sought for each breach under s 69OEA(6) together with an order for compliance.

[7] Total Property dispute matters about provision of information and what amounts to individualised employee information under s 69OB of the Act.

Jurisdictional/standing issues

[8] The Authority held a telephone conference on 9 March 2020 with then counsel for CrestClean, Ms Rachel Brazil and counsel for Total Property Mr Paul McBride and Mr Saadi Radcliffe.

[9] During the telephone conference Mr McBride identified a potential jurisdictional issue about the ability of CrestClean to bring a penalty claim against another employer under s 69OEA. There was a further issue identified as to whether there was a penalty available for a breach of s 69LA(7)(a).

[10] Mr McBride was given until 17 April 2020 to confirm whether the jurisdictional/standing issue would be pursued. The Authority was subsequently advised that it was to be pursued and submissions were lodged and served.

[11] Mr McGuinness was then instructed by CrestClean and lodged memorandum of counsel dated 7 May 2020. The memorandum confirmed the change in representation, that CrestClean was withdrawing the application for any penalty in respect of any breach of s 69LA(7)(a) of the Act and confirmed instructions to apply to remove the jurisdictional/standing matter about penalty to the Employment Court.

[12] Mr McGuinness subsequently lodged submissions with the Authority on jurisdictional/standing issues.

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

[13] The Authority may under s 178(1) of the Act either on its own motion or on the application of a party to a matter order the removal of the matter or any part of it to the Employment Court to hear and determine. It can do so on the grounds set out in s 178(2) of the Act.

[14] CrestClean relies on the first of the grounds in s 178(2) of the Act that an important question of law is likely to arise in this matter other than incidentally.

[15] Mr McGuinness submits that the broad application of s 69OEA of the Act and the necessity for certainty regarding the jurisdiction of the Authority and the standing of the

applicant raises an important question of law likely to arise in the matter other than incidentally.

[16] Mr McBride refers to broader interest in this matter from hospitality and cleaning industries.

[17] Section 690EA is in subpart 2 of Part 6A of the Act and was effective from 6 March 2015.¹ The subpart is directed to disclosure of information relating to transfer of employees. Section 690EA applies if an employee elects to transfer under s 69I of the Act to a new employer and requires the individualised employee information to be provided within certain timeframes.

[18] Section 690EA(6) provides that:

Every employer who fails to comply with subsections (2) to (5) is liable to a penalty imposed by the Authority.

[19] In *Johnston v The Fletcher Construction Company Limited* Chief Judge Inglis set out what may constitute an important question of law. It does not need not be complex or novel. It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. It is not however necessary for the resolution of the question to have an impact beyond the parties.²

[20] In *Hanlon v International Educational Foundation (NZ)* it was held that 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. It may be regarded as important if it is decisive of the case or some important aspects of it or strongly influential in bringing about a decision in the case or a material part of it.³

[21] The question of jurisdiction/standing of the Authority to hear a claim by CrestClean for a penalty if a breach or breaches are established is a question of law. Jurisdiction/standing questions by their nature are important. There does not appear to be previous cases about the jurisdiction/standing for penalties under s 690E of the Act.

¹ Inserted by Employment Relations Amendment Act 2014 No 61 s 47.

² *Johnston v The Fletcher Construction Company Limited* [2017] NZEmpC 157 at [22]

³ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1ERNZ 1 at p 7

[22] The answer to the question of jurisdiction and standing will involve amongst other considerations interpreting the text and purpose of s 69OE and the jurisdiction the Authority has in s 161 generally including actions for recovery of penalties. It will also involve consideration of s 133 about jurisdiction for penalties. The Authority is well placed to undertake statutory interpretation.⁴

[23] The jurisdiction and standing to bring a claim for a penalty under s 69OE is a legal issue but it will not on its own be decisive of or strongly influential in bringing about a decision of the case before the Authority. There will need to be investigation and findings as to whether Total Property has breached its obligations under s 69OEA. There is additionally a claim by CrestClean for an order for compliance if breaches are established about which there is no jurisdiction/standing challenge. CrestClean is content to leave those matters with the Authority.

[24] I acknowledge Mr McBride's submission that there is some interest in the jurisdictional/standing question from those in the cleaning and hospitality industries. I am not persuaded that the answer to the jurisdiction/standing question about penalty under s69OEA would have significantly broad effect in the employment area.

[25] I am not satisfied that the ground is s 178(1)(a) of the Act is made out about an important question of law about jurisdiction/standing arising other than incidentally in respect of a penalty in s 69OE(6) of the Act.

Should the Authority otherwise remove?

[26] I have not been satisfied that the ground relied on for removal has been made out.

[27] Removing part of the matter before the Authority about jurisdiction/standing deprives the parties of a level of challenge to that issue once determined.

[28] It is less satisfactory to remove part of the matter before the Authority and there is no suggestion that the other aspects of the employment relationship problem raise important questions of law.

[29] I am not otherwise minded to remove the matter to the Employment Court and the application is therefore declined.

⁴ Section 5 Interpretation Act 1999

Costs

[30] Costs are reserved until after the substantive determination.

Next Steps

[31] The Authority is in receipt of submissions from both parties about jurisdiction/standing with respect to a penalty under s 69OEA of the Act.

[32] The Authority Officer will engage with counsel to ascertain if the jurisdiction/standing matter is ready for determination or whether a further step is required.

Helen Doyle
Member of the Employment Relations Authority