

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

**[2021] NZERA 571
3146304**

BETWEEN TPT FORESTS LIMITED
First Applicant

AND TPT GROUP LIMITED
Second Applicant

AND CRAIG PENFOLD
First Respondent

AND SIMON STRONGE
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Richard Upton, counsel for the First and Second Applicants
Stephen Langton, counsel for the Second Respondent

Submissions: 27 July and 3 December 2021 from the Applicants
7 July 2021 from Second Respondent

Investigation Meeting: On the papers

Determination: 20 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority received an application from the First Applicant, TPT Forests Limited, on 16 November 2020 (file no: 3125317). In that application the First Applicant was seeking a compliance order in respect of a breach of their employment obligations by the First and Second Respondents, Craig Penfold and Simon Stronge.

[2] The basis of that claim was specifically that Mr Penfold and Mr Stronge had breached their employment agreements by unlawfully removing and disclosing the First and Second Applicants' confidential information to third parties, including to customers of the First and Second Applicants.

[3] The First and Second Respondents filed Amended Statements in Reply in which they set out their defences to the claims by the Applicants including that, if they accessed and/or disclosed confidential information to third parties that was on the basis that:

... The recipient of the information had an interest in receiving it and/or

...there was a public interest in [the confidential information] being accessed and disclosed ...

[4] Matters in the Authority proceeding became the subject of Search Order proceedings in the Employment Court in which the Second Respondent, supported by the First Respondent, filed an application to enforce the First Applicant's undertakings as to damages.

[5] A ground upon which the application relied was that when the First Applicant applied for the Search Orders, it failed to disclose to the Court material and relevant information.

Submissions by the Respondents in favour of removal

[6] The Second Respondent submits that this information included the extent to which the First and Second Applicants were involved in relevant and fraudulent, corrupt or improper practices, and that a claim had been made against them by a third party in relation to one of those practices.

[7] On 5 November 2020 the Employment Court issued a judgment, granting the application by the First and Second Applicants for Search Orders.

[8] Since the Search Orders were executed, the parties have been in discussions regarding the issue of access on the 'yield' on the computer devices. That issue is currently before the Employment Court, a hearing was set down on 11 August 2021, but was adjourned and a new date is yet to be scheduled.

[9] It is submitted by counsel for the Second Respondent that the same, or similar or related issues as arise in the Authority proceedings, arise in the Search Order proceedings which are before the Employment Court. These being the question of the same fraudulent, corrupt or improper practices which arise for consideration, investigation and determination.

[10] On that basis the First and Second Respondents submit that the matter should be removed to the Court pursuant to s 178 (c) of the Employment Relations Act 2000 (the Act) which states as one of the grounds for the Authority ordering removal: "the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues".

[11] This application is supported by counsel for the First Respondent, and by counsel for the First and Second Applicants.

[12] Counsel for the First and Second Applicants also submits that there is a further ground justifying removal, namely that, pursuant to s178 (a): “an important question of law is likely to arise in the matter other than incidentally”. The important questions of law are stated to be:

Is there a public interest defence available to employees who access, remove and disclose to third parties their employer’s confidential information without the employer’s knowledge or consent?

To what extent has the Protected Disclosures Act 2000 replaced and/or modified any public interest defence that may have been available to the employees prior to the passing of that Act?

[13] It is submitted by counsel for the First and Second Applicants that these are important questions of law that can be described as being ‘central’ to the entire proceedings.

[14] An argument is also submitted in favour of the removal application as supported by counsel for the First Respondent, namely the likelihood of challenge to the Court should the Authority retain and hear the matter. Further that the Court’s adversarial process is better suited to the process than that of the Authority’s investigative role.

Submissions by the Applicants in favour of removal

[15] The First and Second Applicants support the application for removal made by the Respondents and submit that only one of the statutory tests set out in s 178 (2) of the Act in favour of removal needs to be met, and the first of the grounds identified by the Second Respondent, that of the same or similar proceedings being before the Court, does meet that test.

[16] However counsel for the First and Second Applicants further submits that in determining whether a question of law is important regard must be had to its nature and its consequences.

[17] It is submitted on behalf of the Applicants that the questions of law as posited will arise ‘other than incidentally’. The Applicants also submit that they are central to the Respondents defence and will be largely decisive of the case.

[18] It is submitted that the questions of law cannot be simply removed for determination before the substantive hearing is dealt with in Authority, as that would result in duplication and be impractical.

[19] It is submitted that the questions of law are also of general importance because they extend beyond the parties to this litigation and principally involve interpretation of statutory provisions. The interpretation of those provisions will have broader relevance than just the facts of this case.

[20] Counsel for the Applicants submit that from their research none of the questions of law have been previously considered by the Authority, the Employment Court, or the Court of Appeal.

[21] It is also submitted by the Applicants in support of the submission by the Respondents that the proceedings would benefit from the more formal adversarial approach of the Employment Court in that there have already been significant arguments before the Court about the disclosure process and how that will occur, especially against the background of the Court having granted the Search Order. These arguments currently encompass issues such as the scope of the disclosure, who will oversee it, and who will be the independent computer expert involved in those searches.

[22] It is submitted that there is a very high likelihood that any substantive Authority determination will be challenged in the Court as supported by the conduct of the proceedings to date in which senior representatives have been instructed by the parties.

Should removal be granted?

General Principles of Removal

[23] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[24] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In doing so the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court¹.

[25] The Authority approaches applications for removal cautiously, especially in circumstances such as the present case in which the Authority has not fully investigated the matters before it for determination.

¹ *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]

[26] As observed by the Court of Appeal:

... removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.²

[27] In regard to the submission that a challenge is inevitable should the Authority decline to remove the matter and proceeds to a determination in due course, I am not persuaded by the argument that the possibility, or indeed the stated ‘inevitability’, of a challenge supports the ground for removal.

[28] I observe that it is not unusual for a party, dissatisfied with the finding in a determination of the Authority, to exercise its right to appeal that determination. That right includes the right to appeal on a *de novo* basis which traverses both appeals based on the facts and the law. Removing the matter prior to the Authority determining it renders nugatory that right to challenge.

[29] Again, the fact that parties may wish to engage senior counsel is a matter of choice for them, but I am not persuaded that it has any ascendancy over that of the grounds for removal as set out in s 178 of the Act.

[30] Similarly, the agreement by the representatives for the parties that the matter should be removed does not override the statutory basis for the jurisdiction of the Authority to investigate the matters filed before it.

The Court already has proceedings before it: s 178 ((2)(c):

[31] Turning to the grounds argued as a basis for removal, and having considered the submissions and the history of the proceedings to date, I accept that there are the same or similar related issues arising before the Authority and the Court, specifically the question of the alleged fraudulent, corrupt or improper practices by the Applicants raised in defence by the Respondents in the Search Order proceedings.

[32] I find that this would satisfy the grounds for removal pursuant to s 178(2)(c) of the Act.

[33] It is only necessary that I find one ground to support removal pursuant to s 178(2) of the Act, however the parties have submitted that there is a further ground providing a basis for removal under s 178(2)(a) of the Act, namely that there are important questions of law which need resolving by the Employment Court.

² *Labour Inspector by Gill Pizza Limited* [2021] NZCA 192 at [48]

Important Question of law: s 178(2)(a)

[34] In *Hanlon v International Educational Foundation (NZ) Inc* Chief Judge Goddard stated in relation to the basis for questions of law qualifying for removal from the Authority to the Employment Court:

It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. 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 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

[35] It can be deduced from this observation that questions of law do not need to be unduly complex, or indeed unique to qualify, however they must be intrinsic to the issue. In this case the parties submit that the questions are central to the issues, and that they are of general importance having an application beyond the parties to this litigation, and constitute interpretations of statutory provisions which have not been the subject of any judicial review to date.

[36] I am satisfied that important questions of law are likely to arise other than incidentally in this matter, which will be decisive of important aspects of the case.

Residual discretion to remove

[37] Having arrived at that point I must consider my residual discretion to decline to remove a matter as indicated by the word ‘may’ in 178(2) of the Act. In exercising that discretion I must consider whether or not there are any factors which present: “ ... a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests”.⁴

[38] Having considered the exercise of my discretion in the circumstances of this particular case I do not find any factors which make it undesirable to remove this case to the Employment Court.

[39] Accordingly, having found that the application for removal meets grounds set out for removal in s 178(a) and (c) of the Act, I am of the opinion that the Court should determine the matter.

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

⁴ *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 562

Costs

[40] There is no order as to costs.

Eleanor Robinson
Member of the Employment Relations Authority