IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 188
3183643

	BETWEEN	BRYCE WILSON Applicant
	AND	PRAGMA DESIGNER HOMES LIMITED First Respondent
	AND	SANJIL MISTRY Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Josh Nyika, counsel for the Applicant Erin Anderson, counsel for the Respondents
Investigation:	On the papers
Determination:	17 April 2023

DETERMINATION OF THE AUTHORITY

A. The application for removal of this matter to the Employment Court to hear and determine is declined.

B. Costs are reserved.

Employment relationship problem

[1] Bryce Wilson lodged an application in the Authority seeking findings that Pragma Designer Homes Limited (Pragma) had unjustifiably disadvantaged and unjustifiably dismissed him and should be ordered to pay him compensation, lost wages and a bonus entitlement of more than $1.7 million. He sought findings that Pragma had breached the terms of his employment agreement and that Pragma's managing director Sanjil Mistry should be ordered to pay a penalty for aiding and abetting those breaches.

[2] Mr Wilson had worked as Pragma's general manager from 2016. He was dismissed in 2022 following a restructuring process in which his role was disestablished and the duties of that role were transferred to Mr Mistry.

[3] Pragma and Mr Mistry denied treating Mr Wilson unfairly or breaching his terms of employment. Pragma said Mr Wilson was, in fact, paid 540,833 more than he was entitled to as bonuses and he had refused to return the overpaid amount. It is also said he had breached good faith duties by using its commercially sensitive information. Pragma lodged its own application to the Authority seeking orders requiring Mr Wilson to return the allegedly overpaid amount and to pay a penalty for breaches of fidelity and good faith.

The removal application

[4] Mr Wilson applied to the Authority to have his application removed to the Employment Court because he said there were "complex and unusual aspects to this litigation that are best heard in the Employment Court". Those complex aspects were said to be the argument around the "very substantial entitlement to bonuses", the inclusion of Pragma's director Mr Mistry in the proceedings and another dispute, outside of the employment jurisdiction, that was "intertwined with these proceedings".

[5] The reference to another dispute concerned building costs for a house built by Pragma for Mr Wilson's family trust.

[6] Pragma and Mr Mistry opposed removal of Mr Wilson's claim to the Employment Court.

[7] The substantive issue concerned the size Mr Wilson's bonus entitlement. On his calculations he was owed $1,793,694. On Pragma's calculation he had been overpaid $540,833 in bonuses already paid. It said the calculation was "relatively straightforward and certainly within the Authority's ability to determine". Pragma said there were no questions of law or public interest warranting removing the matter to the Court and the Authority could appoint an accountant to assist if the parties' calculations needed expert review.

[8] Pragma also said the claim against Mr Mistry was not grounds for removal because such a claim against a director of an employer company was "commonplace". It said the building dispute between Mr Wilson's family trust and Pragma, over payment

for works undertaken was distinct from the employment relationship and would still need to be dealt with by separate, parallel proceedings in the civil jurisdiction whether the employment issues were determined in the Authority or in the court.

[9] The parties agreed the removal application should be determined on the papers. and lodged written submissions. Those submissions have been considered along with the information outlined in the statements of problem and statements in reply lodged by each party for their respective claim and counterclaim. The removal application concerned only Mr Wilson's claim but the parties agreed that if his claim was to be removed to the court, Pragma's counterclaim would also need to be removed as it concerned the same parties and involved the same, similar or related issues.[1]

Legal framework

[10] The Employment Relations Act 2000 (the Act) sets four grounds on which the Authority may order removal of a matter to the court:

> 178 Removal to court
>
> (1) The Authority may, 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 court to hear and determine the matter without the Authority investigating it.
> (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.

[11] If a removal application satisfies one or more of those grounds, the Authority must then exercise its residual discretion by considering whether there may be a good and sufficient reason not to remove a particular matter in spite of the establishment of one or more of the grounds in s 178(2).[2]

[12] Relevant in this application are the two phases of the ground concerning important questions of law. Firstly, an important question of law must be likely to arise. Secondly that question must arise "other than incidentally", in the sense of being a

---

[1] Employment Relations Act 2000, s 178(2)(d).
[2] *Auckland District Health Board v X* (No 2) [2005] ERNZ 551 at [29]-[31].

minor or chance connection. The nature or character of such important questions has been summarised in this way:[3]

> A question of law need not be complex, tricky, or novel to warrant use of the descriptor "important". It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it. The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point.

Mr Wilson's arguments for removal

[13] Mr Wilson's removal application relied on two grounds for removal. Firstly, under s 178(2)(a), he submitted important questions of law were likely to arise other than incidentally. Secondly, under s 178(2)(d), he submitted the Authority could and should come to the opinion that the circumstances were such that the court should determine the matter.

Suggested important questions of law

[14] Mr Wilson submitted two questions of law arose which were sufficiently important to require removal.

[15] Firstly, he submitted the question of which agreement between Mr Wilson and Mr Pragma, relating to bonuses, was legally enforceable would involve arguments involving the principles of contract law. Mr Wilson said his employment agreement, and its bonus provisions, were varied when he relocated from Christchurch to Hamilton in 2019. Pragma argued the terms on bonuses remained those in the employment agreement they made in 2016. Mr Wilson said those arguments about applicable principles would be largely decisive or at least strongly influential in deciding his claim.

[16] Secondly, Mr Wilson said the ongoing building dispute between Pragma and his family trust were interconnected because Pragma's action against him as a trustee coincided with its actions in their employment relationship which gave rise to his employment claims. He submitted an important question of law was therefore likely to

---

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

arise over whether the building dispute between his family trust and Pragma was entirely separate from his bonus and grievance claims.

A public interest in claims about payment of bonuses

[17] Although Mr Wilson did not seek removal under the s 178(2)(b) category concerning some matters of public interest, he submitted there was "a degree of public interest in the enforceability of bonus arrangements, given their wide use by employers".

Appropriate in all the circumstances

[18] Mr Wilson submitted that "complex and unusual aspects to this litigation" were more appropriately resolved through the formal adversarial processes of the court rather than investigation by the Authority. He identified six factors supporting that proposition:

(i) The anticipated important questions of law;

(ii) The related building dispute;

(iii) The "inevitability of expert accounting evidence being required" and the dispute about whether the agreement was varied causing "real complexity in relation to a substantial entitlement";

(iv) The "vastly different positions" taken by the parties in Mr Wilson's claim and Pragma's counterclaim;

(v) The inclusion of Mr Mistry in the claim;

(vi) The "inevitability" of challenge by one or both parties due to the complexities and size of the claim so removal would spare the parties from incurring costs for likely lengthy proceedings in the Authority that they would have to replicate in *de novo* proceedings in the Court.

Evaluation

No sufficiently important questions of law

[19] As Pragma submitted, the claim and counterclaim involve some factual complexity and concerned a substantial amount of money, but the resolution of those factual issues was not likely to require the Authority to apply principles of contractual interpretation that would have far reaching consequences or were likely to affect anyone outside of the parties involved. The principles about contract formation, variation and interpretation which may be relevant to the employment relationship problem is this

case are settled. They are regularly applied by the Authority rather than being an area of the law where questions about the relevant principles are in dispute.

[20] The Authority is designed to take a fact-oriented, merits-based approach to resolving problems in employment relationships. Those problems are defined in s 161 of the Act as a comprehensive jurisdictional class without fine or technical distinctions at the boundaries and include disputes about what employment agreements mean:[4]

> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
> (a) disputes about the interpretation, application, or operation of an employment agreement:
> (b) matters related to a breach of an employment agreement:

[21] Section 162 of the Act also expressly empowers the Authority to "in any matter related to an employment agreement, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts".

[22] And Schedule 2 of Act confirms the expectation the Authority will routinely deal with such matters:

> **1 Construction of employment agreements and statutory provisions**
>
> (1) The Authority may, in performing its role, deal with any question related to the employment relationship, including—
> (a) any question connected with an employment agreement, being a question that arises in the course of any investigation by the Authority:
> (b) any question connected with the construction of this Act or of any other Act, being a question that arises in the course of any investigation by the Authority.

[23] What is absent from the Act's description of the Authority's jurisdiction is any reference to the size of the claim limiting that jurisdiction. The principles to be applied in this case concerning a bonus entitlement worth more than a million dollars are likely the same as those applicable if the amount in dispute was $10,000. Both scenarios could have a factual context of equal complexity. A difference of value does not, inherently, give rise to any difference or importance to the questions of law to be applied to those facts or the forum in which the claim and counterclaim are to be heard and determined.

---

[4] *FMV v TZB* [2021] NZSC 102 at [58] and [64] and Employment Relations Act 2000, s 161.

[24] Similarly, there may be some factual issues concerning the actions of Pragma in its building dispute with Mr Wilson's family trust that may be relevant to Mr Wilson's personal grievance claim. This concerns his allegation that a default notice and threat to suspend works on his family home were a form of retaliation for having raised a personal grievance about his bonus entitlement. However those are factual issues about what happened, where and why are well within the Authority's jurisdiction to investigate and determine. The Authority's ability to consider those aspects during its investigation does not give rise to an important question of law about the jurisdictional boundary with the forum that may deal with the building dispute between the trust and the company.

No wider public interest

[25] As Pragma submitted, the terms of employment providing bonuses for Mr Wilson, whichever party's version or interpretation was applied, were "bespoke" and did not apply to his colleagues. A determination about the particular arrangements that these parties had made was not likely to apply an interpretation or reach conclusions likely to have any wider impact. The case did not meet the standard for removal on the grounds of potential public interest.

Not appropriate for removal "in all the circumstances"

[26] Two of the factors that Mr Wilson submitted should lead the Authority to an opinion favouring removal have already been considered. Anticipated questions of law, to be applied to the facts, were not of sufficient importance to warrant removal. Whatever factual issues concerning how the building dispute had arisen could be considered by the Authority without encroaching on the civil jurisdiction's resolution of that dispute.

[27] For the following reasons none of the other four factors proposed as supporting removal were persuasive.

[28] Firstly, the Authority routinely deals with matters where there is factual complexity over whether a variation of the terms of employment was agreed and, where needed, hears evidence from experts. The calculation of the bonus entitlements and the question of why and how the basis of those calculations was changed or reassessed is expected to be a topic on which parties will put forward their own witnesses with

accounting expertise. The Authority can also appoint an expert of its own, if needed, to assist with the analysis of accounts and data in respect of the disputed differences that emerged over the use of projected and actual profits in calculating bonuses.

[29] Secondly, parties having "vastly different positions" over a matter that is worth a lot of money is not unusual in employment disputes. As Pragma submitted, the Authority's role is to investigate and determine those disputes irrespective of how far apart the parties' positions may appear to be.

[30] Thirdly, the inclusion of a director as a respondent in an application to the Authority, as Mr Wilson has done with his claim that Mr Mistry aided and abetted breaches of the employment agreement, is part of the schema of the Act that expects such claims would normally be resolved through an Authority's investigation rather than an adversarial hearing in the court. This is clear from s 133 of the Act. The section does allow for removal of penalty claims to the court but begins by declaring the full and exclusive jurisdiction of the Authority to deal with penalty claims. The mere fact of a claim against a director was not a factor bringing Mr Wilson's application outside the normal run of events.

[31] Fourthly, the supposed "inevitability" of challenge to the court or the prospect that going straight to the court would save costs for the parties were not sound reasons for removal.

[32] The objects of the Act in seeking to reduce the need for judicial intervention and to have most matters determined by a specialist decision-making body would be rendered meaningless if every party who said they would challenge any determination made at that primary investigative level was then permitted to bypass the Authority and go directly to the court on the basis of their subjective declarations early in the proceedings.[5]

[33] Similarly, the potential cost burden, if one or other parties were to challenge the Authority's determination to the court, does not outweigh consideration that removal at this stage would deprive them of rights to have the matter first investigated and determined in the Authority, as Parliament clearly intended most matters would be, and

[5] *Dr Y v Bay of Plenty District Health Board*, ERA AA 132/06 (20 April 2006).

then to have the right of challenge to the court.[6] The parties should, of course, be mindful of the level of costs being incurred throughout. Any contribution to their costs awarded to the successful party by the Authority would likely be set from the starting point of its usual daily tariff and then applying other relevant principles about costs in the Authority, including that any award should be modest.[7]

Outcome

[34] For the reasons Mr Wilson's application for removal of his application to the Employment Court is declined.

Costs

[35] Costs are reserved pending the outcome of the substantive matter.

Robin Arthur
Member of the Employment Relations Authority

---

[6] *Visage v WorkSafe New Zealand* [2019] NZERA 637at [16] and *Clerk of the House of Representatives v Witcombe* [2006] ERNZ 196 at [23]-[24].
[7] See www.era.govt.nz/determinations/awarding-costs-remedies.