IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 105
5560304

	BETWEEN	THE RAIL & MARITIME TRANSPORT UNION INCORPORATED Applicant
	AND	KIWIRAIL LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Geoff Davenport and Guido Ballara, Counsel for Applicant Peter Chemis and Jennifer Howes, Counsel for Respondent
Investigation Meeting:	27 August 2015 at Wellington
Submissions Received:	18 August 2015, from the Applicant 25 August 2015, from the Respondent
Determination:	30 October 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Rail & Maritime Transport Union Incorporated (RMTU) has applied for removal of the whole of proceedings between it and KiwiRail Ltd (KiwiRail) to the Employment Court pursuant to s 178 of the Employment Relations Act. The background by which the RMTU's application has arisen is as follows:[1]

[2] The Rail & Maritime Transport Union Incorporated (RMTU) and KiwiRail Ltd (KiwiRail) are parties to a Multi-Employer Collective Agreement (the MECA).

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[1] Information derived from MBIE report, dated 17 April 2015: "*Summary of Labour Inspectorate Investigation of Alleged Breaches in Employment Standards of the Chinese Workers at KiwiRail's Workshops*, and the parties respective documents

[3] KiwiRail purchased locomotives from manufacturer CNR Corporation Limited (CNR), a state-owned company in China. On arrival in New Zealand the locomotives were found to contain asbestos.[2] Subsequent to the identification of those concerns approximately 40 members of CNR's workforce in China have travelled to New Zealand to remove the asbestos and rebuild the locomotives.

[4] Work was initially undertaken between March and November 2014. A second phase commenced in April 2015 and continues at the time of the Authority's investigation into this application.

[5] In August 2014 the Ministry of Business, Innovation and Employment (MBIE) received a complaint alleging that the CNR workers were paid US $40 per day (and therefore below minimum wage).

[6] MBIE's Labour Inspectorate undertook an investigation. It issued a report on 17 April 2015.[3] The Inspectorate noted the workers were employed by either one or other of two subsidiary companies owned by CNR. The companies each declined to disclose the workers' remuneration stating the information was private. One company said that the workers' salaries were paid in China and a further daily allowance for working overseas was paid at a rate higher than reported in NZ media.

[7] The workers also declined to provide information detailing their remuneration.

[8] The report stated that the information obtained tended to suggest that the workers were provided with adequate pay to meet their daily needs and were in receipt of appropriate meal and rest breaks, holidays and sick leave. It noted there was no evidence of the workers' welfare being undermined but observed that there was insufficient evidence to establish whether the workers' employment arrangements comply with New Zealand minimum employment standards particularly in regards wages. It found that it was unclear whether the law, as it relates to minimum standards, would apply or be enforceable against CNR.

[9] The Labour Inspectorate concluded that in all the circumstances it was more likely that minimum standards law would not apply.

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[2] There were additional concerns in respect to rust located in locomotives and a design flaw in the wagons.
[3] Ibid at n 1

RMTU's claims and Kiwi Rail's defence

[10] I have summarised the parties' positions so as to provide context to this application and to the matters of dispute between the parties. RMTU's claims are framed under four broad issues. Issues 1 and 2 concern obligations pursuant to the MECA. The RMTU alleges KiwiRail has outsourced work, some or all of which could be performed by its members. Alternatively it says, if Kiwi Rail is able to outsource the work, it is in breach of the MECA by failing to obtain an assurance from CNR that it pays at or above the hourly rate for work covered by the agreement.[4]

[11] Issue 3 alleges that Kiwi Rail is in breach of statutory duties of good faith.[5] It says Kiwi Rail's failure to both properly inquire with CNR and inform the RMTU whether the Chinese Workers are receiving minimum entitlements under NZ law, is in itself a breach of good faith. The RMTU further alleges that KiwiRail, either recklessly or wilfully, allows the workers to be exploited or potentially exploited. RMTU says Kiwi Rail's omissions amount to a breach of minimum code legislation, the Health, Safety in Employment Act, and obligations of "*social responsibility*" under the State Owned Enterprises Act.[6]

[12] At issue 4 the RMTU says the exploitation or potential exploitation of the Chinese workers is an employment relationship problem between it and Kiwi Rail.

[13] The RMTU seeks orders for Kiwi Rail to comply with its obligations of good faith and social responsibility, and desist from "*utilizing exploited foreign workers, or proceeding in reckless disregard as to whether those workers are exploited*". It seeks a declaration that the work being carried out by the Chinese workers is subject to New Zealand minimum code legislation.

[14] KiwiRail says its requirement for CNR to make good on the locomotives does not breach the MECA. It says the work in question is warranty work not covered under the MECA or work that would otherwise be undertaken by it. KiwiRail says that issue, and that its employees would not be involved with the work, was discussed with the RMTU. KiwiRail rejects the RMTU's claim that it has duties of good faith as described by the RMTU, particularly to advise and ensure the Chinese workers are

[4] Pursuant to cl 29.2.3
[5] Pursuant to s 4(4)(b), (c) and (d)
[6] Section 4(1) of the State-Owned Enterprises Act provides (amongst other matters) that every State enterprise shall be an organisation that exhibits social responsibility

receiving minimum entitlements when it has no knowledge or control over those matters and is not the workers' employer. It says the workers are employed by CNR and are not members of the union, nor is CNR party to the MECA and the RMTU has no relationship with CNR. It says the RMTU has no standing to seek a determination that the minimum code applies to the workers.

[15] The parties have attended mediation but have not resolved their differences.

Should the matter be removed?

[16] A decision to remove a matter to the Court without the Authority investigating is discretionary.

[17] RMTU says there are important questions of law that are likely to arise in the matter other than incidentally. Alternatively, it says the case is of a nature and of such urgency that it is in the public interest to have it removed. Finally, it asks the Authority, using its discretion, to find in its opinion that in all the circumstances the Court should determine the matter. Kiwi Rail opposes the application. It submits that the issues between the parties are factually specific and are matters that the Authority is best placed to determine.

Are there important questions of law that are likely to arise in the matter other than incidentally?

[18] The Authority must consider whether there is an important question of law that is likely to arise other than incidentally. A question of law is important if the answer to the question 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*"[7].

[19] The Authority must then exercise its residual discretion and consider whether there may be a good reason(s) against removal.[8] Those reasons may include, but are not limited to:

- whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority;[9]

[7] *Hanlon v International Educational Foundation (NZ) Ltd* [1995] 1 ERNZ at 7
[8] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [30]
[9] *McAlister v Air New Zealand Limited* EC Auckland AC 22/05 , 11 May 2005 at [10]

- the strength of the case for removal under one or more of the four tests [at s 178];[10]

- whether it is a case which will inevitably come to the Court by way of a challenge in any event;[11]

- the prospect of the loss for one or other of the parties of a general right of appeal bearing in mind that this is a legislative consequence of s 178.[12]

[20] Submissions of behalf of RTMU record that the following important questions arise other than incidentally:

(i) what is the extent of the statutory duty of good faith in this case?

(ii) does, as a matter of law, the duty of good faith under the ERA include the obligation on KiwiRail to comply with its statutory obligations of social responsibility?

(iii) does the duty of good faith in the context of these issues prevent KiwiRail from utilising exploited workers or proceeding recklessly as to whether or not they are exploited?

(iv) can an SOE, given its statutory obligations of social responsibility and good faith, utilise exploited foreign workers to perform work for the SOE?

(v) can an SOE, given its statutory obligations of social responsibility and good faith, undermine or breach the MECA through the utilisation of foreign workers?

(vi) does New Zealand law, namely the Minimum Wage Act and the Holidays Act, apply to the work of these Chinese workers during the months that they are working in New Zealand?

(vii) whether the RMTU is able to bring the question at (vi) to the Authority/Court as "an employment relationship problem"? Put

[10] Ibid at n 8 para [63]
[11] Ibid at n 9
[12] *Andrew v Commissioner of Police* EC Christchurch, CC21A/03, 31 July 2003

> another way, what is the interpretation of the scope of an "employment relationship problem'' and can that include concerns that exploited workers are, or may be, being used on KiwiRail's worksite by KiwiRail?

Discussion

[21] I have approached the questions forwarded by the RMTU by applying the test set out a s178(2)(a) and then assessing whether there is sound reason against removal.

[22] Question (i). I regard the question as too general to properly identify whether the question is important and arises other than incidentally in this matter. In the absence of that detail this question is insufficient to warrant removal to the court.

[23] I note however that questions (ii)–(v) appear to anchor question (i). These questions focus on that portion of RMTU's substantive claims that allege KiwiRail is in breach of statutory obligations of good faith which the RMTU says includes an obligation of social responsibility. I have assessed the questions keeping in mind the inquiry set out at question (i).

[24] The RMTU says that obligation arises from s 4(1)(c) of the State-Owned Enterprises Act 1986 which states that an SOE is

> "*an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so."*

[25] Question (ii). KiwiRail says at best the question arises incidentally. It says to be an important question of law the following proposition need to be sustainable: that KiwiRail has an obligation of good faith to its employees to ensure that CNR's employees are in receipt of minimum code entitlements and that this specific good faith obligation stems from KiwiRail's statutory obligation at s 4(1)(c) of SOE Act to exhibit "social responsibility".

[26] I agree with KiwiRail's assertion that the RTMU's question is difficult to sustain. The concept of good faith (in an employment context) is codified within the Employment Relations Act and applies to parties in an employment relationship. There is no mention in this legislation that the obligation of good faith includes a duty on an SOE to exhibit social responsibility. Nor does the SOE Act assert that the

obligation (on an SOE) to exhibit social responsibility forms part of good faith obligations as an employer.[13] At most question (ii) requires an uncomplicated exercise of statutory interpretation which the Authority is able to perform. In the absence of words contained in either statute to link an SOE's obligation to exhibit a sense of social obligations to statutory duties of good faith, I am not satisfied, in the context of this case, that this is a question of law that arises other than incidentally. This question does not satisfy the tests required for removal.

[27] Questions (iii)–(v) each commence on the premise that there is an affirmative answer to question (ii). I am not persuaded that there will be. However even if I am wrong I remain unconvinced that questions (iii)–(v) satisfy the test for removal. Each of these questions have a second limb which I have assessed as follows:

[28] Question (iii). The answer to whether KiwiRail is "utilising" the workers; that the workers are "exploited"; and/or that KiwiRail has proceeded "recklessly" as to whether or not the workers are exploited, are matters that need to be decided on the facts and are appropriate for the Authority to determine at first instance.

[29] Questions (iv) and (v). I accept KiwiRail's submissions that these questions are a recasting of question (iii). The answer to whether an SOE's MECA has been undermined or breached can be resolved by an examination and determination of the facts and where appropriate, the contractual provisions.

[30] Questions (vi) and (vii) are also entwined. Either directly or indirectly each question raises a preliminary matter as to whether the RMTU has standing to progress its claim with respect to the status of the Chinese workers. I shall return to this during my assessment of question 7.

[31] Question (vi). The RMTU refers to the importance of minimum code legislation as a primary means to prevent exploitation of workers. It says as a matter of public policy minimum entitlements should not be side stepped by New Zealand employers using foreign workers. I have no doubt that the question is important. It may arise other than incidentally following an inquiry into standing. However even If I accept the assertion that the RMTU has standing, for the purpose of assessing whether this question of law should be removed to the Court I would consider there is

[13] RMTU has not made a discrete claim that KiwiRail is in breach of s 4(1)(c). This is likely on the basis that neither the Court nor the Authority had jurisdiction to decide matters under the SOE Act.

good reason not to remove. The Authority frequently determines conflict of laws issues and I accept KiwiRail's submission that the issue as to what law (New Zealand or the Republic of China) governs the workers should be determined on the facts which the Authority is capable of doing.

[32] Question (vii). This question puts at issue whether the RMTU is able to bring question (vi) as a claim. Whilst I consider the answer to this question may determine whether claim (vi) can be progressed by the RMTU I do not consider it raises an important question of law which, when answered, will determine the substance of the issues at question (vi). It follows that the question does not meet the threshold for referral to the Court.

[33] If however my assessment is mistaken the Employment Relations Authority has exclusive jurisdiction to make determinations about employment relationship problems.[14] I regard that jurisdiction includes determining at first instance the existence or otherwise of an employment relationship problem between the parties. That is squarely the core issue at question (vii).

Is the case of such a nature and of such urgency that it is in the public interest that it be removed to the Court?

[34] Section 178(2)(b) requires *both* the nature *and* the urgency of the case to be such that it is "in the public interest" to order removal to the Court.

[35] The RMTU says the interest in the matter is wider than just the parties. Emphasis was again placed on the importance of minimum code legislation and that 27 workers remain in New Zealand. Reference was also made to media coverage as regards the status of the Chinese workers. However the concept of public interest refers to public welfare as opposed to public curiosity.[15] There is no dispute that CNR workers have been in New Zealand since April 2014. This is a long period of time which detracts from the RMTU's claim that the matter is urgent and should be removed to the Court immediately.

[36] The elements required to justify a removal pursuant to s 178(2)(b) have not been met and I decline to make an order to that effect in these circumstances.

In all the circumstances should the Court determine the matter?

[14] s 161(1) Employment Relations Act
[15] *Vice Chancellor of Lincoln University v Steward (No 2)* [2008] ERNS 249 at [35]

[37] Separate to the issues raised in this application, the RMTU has raised substantive claims which will require interpretation of some provisions contained within the MECA. A removal to the Court would effectively deprive the parties of a substantial right to challenge first instance findings. This is a factor against removal.

[38] Given the number of claims made by the RMTU and the range of matters at issue the Authority's investigation is likely to be more complex than usual but I do not consider those matters are sufficient grounds on which to order removal in accordance with s 178(2)(d).

Conclusion

[39] I have found that this is not a matter that should be removed to the Court at first instance.

[40] The Authority will be in contact with the representatives of the parties to make arrangements to progress an investigation into the issue of standing and the RMTU's claims. Should the RMTU wish to exercise its right to seek special leave of the Court for an order removing this matter to the Court I request counsel to advise the Authority as soon as is possible so that arrangements for the progression of this matter may be adjourned or stayed.

Costs

[41] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority