IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 264
5382499

	BETWEEN	SIMON MAXWELL EDWARDS Applicant
	A N D	TWO DEGREES MOBILE LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Michael O'Brien and Nura Taefi, counsel for Applicant Penny Swarbrick, counsel for Respondent
Submissions received:	25 and 26 July 2012
Date of Determination:	1 August 2012

DETERMINATION OF THE AUTHORITY

A. Mr Edwards' application for removal of a matter to the Employment Court is granted.

B. Costs are reserved.

Application for removal

[1] The Authority has considered an application by Mr Simon Edwards to have a matter removed to the Employment Court for hearing and determination without the Authority investigating it.

[2] The application, made under s 178 of the Employment Relations Act 2000, is opposed by Two Degrees Mobile Ltd the respondent party to the matter presently before the Authority.

[3] That matter arose from the circumstances in which Mr Edwards, an employee of Two Degrees, was given two months' notice by the company on 15 May 2012 that on the ground of redundancy his employment would terminate on 15 July. On 18 June he applied to the Authority for an order of interim injunction restraining Two Degrees from ending his employment.

[4] The application was heard by the Authority on 29 June and a determination declining it was issued on 3 July; [2012] NZERA Auckland 224. That determination was successfully challenged to the Employment Court, which gave judgment on 12 July granting the injunctive relief sought by Mr Edwards; [2012] NZEmpC 111.

[5] Judge Travis in the decision of the Court noted that the substantive claims were scheduled to be investigated by the Authority from 22 to 24 August 2012. The Court allowed for the possibility that its orders might need to be varied if the Authority changed the investigation meeting dates for any reason.

[6] Removal to the Court of the substantive claims was applied for on grounds by Mr Edwards on 5 July. Two Degrees gave notice of its opposition to removal on 19 July. Submissions in support and in opposition were received from counsel Mr O'Brien and Ms Swarbrick on 25 and 26 July and with the aid of those the Authority must now determine this preliminary matter.

[7] I consider that the application should be granted and that the matter before the Authority and scheduled to be investigated at the end of August should now be removed in its entirety to the Court.

[8] I am particularly persuaded to this course by the submission of Mr O'Brien about a particular question of law contended to be an important one and likely to arise in the matter other than incidentally. That question was proposed at para.27 of counsel's submissions, as follows:

> *Question of Law regarding effect of s.103A on redundancy cases*
>
> *27. In the Employment Court interim judgment* [of 12 July], *Travis J identified a number of further important issues of law that are likely to arise in this case. These set out at para.7* [of the judgment]*:*
>
> > … [T]here are some interesting issues of law likely to arise as to the effect of s.103A, as presently constituted by the legislature on redundancy cases. These include whether Simpsons Farms Limited v.

> Aberhart is still good law in light of those legislative changes and more recent decisions of the full Court on the effect of the requirement under s.103A for the Court to consider all the circumstances of the case in determining whether the actions of the employer were those of a fair and reasonable employer. On the face of it, those words may be wide enough to include an analysis of the business decision itself. This, however, is a controversial issue which will require submissions in due course.

[9] In relation to the above passage quoted by him from the Court's judgment Mr O'Brien submitted that in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, the Court had affirmed an employer's prerogative to restructure its workplace. He noted that since that decision in 2006 the relevant legislation had been amended in 2011 but that there has not yet been any judicial consideration of the current wording of the legislation requiring justifiability to be assessed in the light of "all the circumstances" at the time a dismissal occurs. Mr O'Brien submitted that there has yet to be judicial consideration of whether the Court can analyse or review an employer's business decision itself, the controversial issue the Court has raised in its interim judgement. It was submitted that this is an important question of law likely to arise in the matter other than incidentally and that therefore grounds are present under s 178 to support an order for removal by the Authority.

[10] In its *Simpsons Farms* decision the Employment Court gave full consideration to the application of s 103A, as it was at relevant times in 2006, before concluding that statutory changes in 2004 had not been intended to revisit longstanding principles about substantive justification for redundancy, particularly those exemplified by judgments such as that of the Court of Appeal in the leading case of *GN Hale & Sons Ltd v. Wellington etc Caretakers etc IUOW* [1992] NZILR 1079.

[11] In declining Mr Edward's application for interim injunction the Authority referred to that decision, noting in particular the Court of Appeal's finding that:

> *... an employer is entitled to make its business more efficient and an employee does not have a right to continued employment if the business can be run more efficiently without him.*

[12] It may be noted that s 103A of the Act as it was in 2006 included the same reference to "all the circumstances" as was retained in s 103 after its most recent amendment in 2011.

[13] A change that did occur in 2011 was the replacement of the reference to what a fair and reasonable employer "would" have done in all the circumstances to the current test, what a fair and reasonable employer "could" have done in the situation. The Court has determined that the change has relaxed the standard of justification required to be shown for a lawful dismissal: *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160.

[14] Another change since the 2011 amendment to s 103A has been a discretion expressly conferred on the Authority, or the Court, to consider "any other factors it thinks appropriate" in determining justification for a dismissal, including a redundancy dismissal. It seems there has not yet been an authoritative decision as to whether such factors may include the quality of the business decision itself of the employer.

[15] In delivering its judgment on 12 July the Court clearly had in mind issues of law likely to arise as to the effect of s 103A, as presently enacted, and also the effect of more recent decisions of the Full Court since the decision in *Simpsons Farms.*

[16] It is in my view an important question of law that arises in this case other than incidentally as to whether the Authority, if it investigates the matter before it, need look only at the genuineness of the employer's business decision or whether it must go further and review the quality of that decision. The possibility that the Court or the Authority could stand in the shoes of the employer and determine whether a business decision was sound is, as Judge Travis has stated, a controversial issue.

[17] It is I am satisfied also an important legal issue arising from the interpretation of s 103A of the Employment Relations Act and other provisions relating generally to personal grievance claims and their resolution. It seems desirable that that issue should be resolved as soon as possible and that removal by the Authority may also expedite further judicial consideration likely to be sought, whether in this case or another, from the Court of Appeal. Because of the importance of the issues raised by the Court both to this case and redundancy cases generally, I consider that any discretion the Authority has to decline a removal application should not be exercised in this particular case.

[18] The question proposed is an important legal one because the Authority has considered that the approach it should properly take to Mr Edward's case is to

examine, as it was put by the President of the Court of Appeal, Cooke P, in the *Hale* case, whether the alleged redundancy was being used as a camouflage for getting rid of Mr Edwards as an unsatisfactory employee. The approach is not to sit on appeal as to how the employer should run its business or how it should make decisions about that.

[19] Applying *Hale* the role of the Authority is to satisfy itself that the dismissal of Mr Edwards was decided and notified by Two Degrees because the company genuinely considered that he was surplus to its needs. The Court in its oral judgment has contemplated the possibility of a radical departure from those long and well established principles. I anticipate that the matter, having now been raised and identified by the Court, will inevitably become the subject of argument before the Authority it if continues with the investigation of this matter. A question of law for the opinion of the Court may be sought. Without an answer to it from the Court the Authority's determination, whatever it might be, on the issue is most likely to be appealed. Continuing with the investigation will merely add to the delay and expense in resolving Mr Edward's claim and may also lead to uncertainty among employers generally as to their rights and obligations in a redundancy situation.

[20] It is naturally of concern to Two Degrees that the Court has indicated a hearing date not until October at the earliest, before which time it is likely the Authority would have issued a determination following its August investigation. The Court's scheduling of its cases is not a factor the Authority can take account of.

[21] As to other questions of law raised in support of the removal application, on their own I would not have considered them to be sufficient grounds for removal. Those questions – predetermination, offer of consultancy role, possibility of re-deployment – are in my view partly legal issues of the sort that necessarily arise from any application of s 103A to the factual circumstances of each case. On that basis every personal grievance claim would be amenable to removal, as they involve some element of law as well as fact to be determined.

[22] A further distinct ground for removal was raised under s 178(2)(c), that the Court already has before it proceedings which are between the same parties and which involves the same or similar or related issues. I do not consider that ground is present at all in the circumstances. The only matter the Court has before it between the parties is a question of costs on the successful challenge, which was reserved by

Travis J in issuing his judgment of 12 July 2012. The substantive grievance claims have remained before the Authority and must be removed if the Court is to have any proceeding before it other than the costs question.

Determination

[23] For the above reasons the application for removal made by Mr Edwards is granted.

[24] The claim brought to the Authority by him under file number 5382499 is to be transferred to the Court in its entirety, for hearing and determination without the Authority investigating it.

Costs

[25] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority