

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 253
EMPC 268/2024**

IN THE MATTER OF an application for special leave to remove at
matter to the Employment Court

BETWEEN NICHOLAS JOHNSTON
Applicant

AND TE WHATU ORA – HEALTH NEW
ZEALAND
Respondent

Hearing: On the papers

Appearances: A Fechney, advocate for applicant
A Russell, counsel for respondent

Judgment: 18 December 2024

JUDGMENT OF JUDGE KATHRYN BECK

Background

[1] Mr Johnston has applied for special leave of the Court for an order that an employment relationship problem be removed from the Employment Relations Authority to the Court for hearing and determination. It is contended that important questions of law are likely to arise other than incidentally. Leave is required under s 178 of the Employment Relations Act 2000 (the Act) because the Authority previously declined to remove the matter.¹

¹ *Johnston v Te Whatu Ora – Health New Zealand* [2024] NZERA 420 (Member Szeto).

[2] Mr Johnston was formerly employed by Te Whatu Ora – Health New Zealand (Te Whatu Ora) as a community occupational therapist from 10 January 2022. It appears that he struggled to integrate into his role, and he acknowledges that there were issues in the first months of his employment. He underwent various assessments in mid-2022, and he was informed on 16 August 2022 that Te Whatu Ora had decided that he was medically unable to carry out his role. As a result, he was assigned alternative duties until November 2022.

[3] On 18 August 2022, Te Whatu Ora wrote to the Occupational Therapy Board of New Zealand (OTBNZ) making a notification of concern under ss 34 and 45 of the Health Practitioners Competence Assurance Act 2003 (HPCA Act). On 9 November 2022, on the basis of information provided by Te Whatu Ora, OTBNZ made an order that Mr Johnston's registration be suspended.

[4] On 6 December 2022, the parties met and Mr Johnston was notified that his employment would be terminated as a result of his registration being suspended, which meant that he was no longer able to hold an annual practising certificate.

[5] On 7 December 2022, he raised a personal grievance with his employer for unjustified dismissal. In the personal grievance letter, it was alleged that Te Whatu Ora had acted with haste and prior to further information being provided by OTBNZ. It was alleged that the decision to terminate Mr Johnston was predetermined and that Te Whatu Ora desired to remove him from his role without meeting its obligation to support him as a person with a disability.

[6] In a subsequent letter dated 10 November 2023, Mr Johnston's advocate, Ms Fechny, stated that the termination process began with the notification to OTBNZ because it led to the suspension of Mr Johnston's licence, which led to his dismissal. She alleged that the notification was made prematurely and that Te Whatu Ora was required to formally address with Mr Johnston whether he was practising below the required standard of competence before it was able to make a notification to OTBNZ. Further, she alleged that Te Whatu Ora failed to consider whether there were any reasonable accommodations available even though it had reached a view that Mr Johnston was unable to perform his role.

[7] Subsequently, Mr Johnston lodged a statement of problem in the Authority. In its statement in reply, Te Whatu Ora claimed that the notification to OTBNZ could not be challenged as no personal grievance had been raised in relation to it and that there was no causal link between the notification and Mr Johnston's dismissal. Further, it said that the specific provisions of the HPCA Act are not subject to general employment relations requirements and that the immunity contained in ss 34 and 45 applies to any notifications under the HPCA Act made by the respondent.

[8] Sections 34 and 45 of the HPCA Act relevantly provide:

34 Notification that practice below required standard of competence

(1) If a health practitioner (health practitioner A) has reason to believe that another health practitioner (health practitioner B) may pose a risk of harm to the public by practising below the required standard of competence, health practitioner A may give the Registrar of the authority that health practitioner B is registered with written notice of the reasons on which that belief is based.

...

(4) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.

45 Notification of inability to perform required functions due to mental or physical condition

(1) Subsection (2) applies to a person who—

- (a) is in charge of an organisation that provides health services; or
- (b) is a health practitioner; or
- (c) is an employer of health practitioners; or
- (d) is a medical officer of health.

(2) If a person to whom this subsection applies has reason to believe that a health practitioner is unable to perform the functions required for the practice of his or her profession because of some mental or physical condition, the person must promptly give the Registrar of the responsible authority written notice of all the circumstances.

(3) If any person has reason to believe that a health practitioner is unable to perform the functions required for the practice of his or her profession because of some mental or physical condition, the person may give the Registrar written notice of the matter.

...

(6) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.

[9] After Mr Johnston filed his statement of problem, he also applied for the matter to be removed to the Court for resolution. The Authority declined the removal application. Mr Johnston has now filed an application for special leave of the Court for an order that the matter be removed to the Court.

[10] Although expressed in various ways, I understand that the questions which are identified as being important questions of law are:

- (a) When considering the relationship between the HPCA Act, the Act, and the Human Rights Act 1993, at what point can an employer justifiably hold a “reason to believe” that their employee is practising below the required standard of competence?
- (b) Can a personal grievance, or proceedings in general, ever be brought against an employer for notifying OTBNZ of concerns about a practitioner or do the immunity provisions apply?

Legal framework for special leave application

[11] The removal provisions of s 178 state that the Authority may order the removal of a matter to the Court to hear and determine it without the Authority investigating it in select circumstances. Where the Authority declines to remove any matter, the party applying for removal may seek the special leave of the Court for an order that the matter be removed to the Court. In any such case, the Court may order the removal of a matter if one of the following applies:²

- (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
- ...

² Employment Relations Act 2000, s 178(2).

[12] This case focuses on the criteria set out in s 178(2)(a) and (b).

[13] In considering whether a question of law arises other than incidentally to a case, it will be sufficient if the resolution of the question may have an effect on the outcome of the case if it were to fall for determination.³ As the Court is not in a position to consider the merits of a claim when considering a removal application, it will ordinarily be satisfied that a question of law is likely to arise other than incidentally where that question arises from the pleadings and where it may have an effect on the outcome.⁴

[14] A question of law under s 178(2)(a) does not need to be complex, tricky or novel to warrant being called important, although that will normally be sufficient.⁵ It may be important if the answer is likely to have a broad effect or could assume significance in employment law generally. However, 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 is strongly influential in bringing about a decision in the case, or a material part of it.⁶

[15] This case also engages s 178(2)(b), which permits removal if a matter gives rise to public interest in the matter being removed immediately by reason of the nature of the case as well as its urgency.

[16] In assessing the s 178 criteria, there is no presumption in favour of or against removal.⁷ Further, while there is no discretion to order removal, the Court retains a discretion to decline an application for special leave.⁸ Exercising this discretion may require an assessment of the context or any other matter relevant to the statutory ground relied on in order to determine whether special leave should be declined.

³ *Clerk of the House of Representatives v Witcombe* [2006] ERNZ 196 (EmpC) at [32].

⁴ *LDJ v EZC* [2024] NZEmpC 109, [2024] ERNZ 446 at [11]–[12].

⁵ *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].

⁶ *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 (EmpC) at [35].

⁷ *Johnston*, above n 5, at [21].

⁸ At [30]–[33].

[17] Finally, no inference may be drawn as to the prospects of success of either party from the outcome of an application for special leave.

Submissions

[18] Ms Fechny, on behalf of Mr Johnston, noted that he is claiming that the decision to terminate his employment was predetermined and that the predetermination began at the point that the notification was made. She submitted that the notification was a pre-emptive attempt to remove Mr Johnston without meeting the obligation to support him. Further, she submitted that the notification was a critical element of the employer's decision-making process that is being challenged. Therefore, she submitted that the notification to OTBNZ forms part of his personal grievance for unjustified dismissal.

[19] In respect of the first question of law, Ms Fechny submitted that the notification was premature and breached the employer's obligations to explore reasonable accommodations or pursue a formal performance management plan. She submitted that employers are not absolved from conducting any procedural steps before making a notification. She submitted that there is an important question of law as to whether Te Whatu Ora could have had sufficient "reason to believe" the relevant information for the purposes of making a notification to OTBNZ without taking various procedural steps.

[20] In relation to the second question of law, Ms Fechny submitted that there is a real question as to whether the immunity provisions in ss 34(4) and 45(6) of the HPCA Act prevent any claims from being filed against an employer in the employment jurisdiction. She submitted that the provisions should be interpreted narrowly as ouster provisions.

[21] Further, in respect of s 178(2)(b), Ms Fechny submitted that there is public interest in the proceedings because they relate to the interests of a broader class of health practitioners, particularly practitioners with disabilities, who are inherently vulnerable in employment settings. She submitted that it is a matter of public interest

to establish clear and equitable standards that protect the employment rights of disabled practitioners while also ensuring public safety.

[22] Mr Russell, counsel for Te Whatu Ora, noted that there has been no personal grievance filed against it in relation to the notification to OTBNZ. He submitted that the issue of whether a personal grievance was barred by ss 34 and 45 of the HPCA Act is therefore not relevant to the proceedings. He argued that the notification could, at best, be relevant as background to Mr Johnston's personal grievance for unjustified dismissal.

[23] He also submitted that the employment institutions do not have jurisdiction to assess whether an employer has fairly made a notification under the HPCA Act. In particular, he submitted that an employer does not need to follow any process before making a notification under that Act. Further, he submitted that the immunity provisions in that Act may be invoked in any proceedings where the issue of notification arises.

[24] In relation to the issue of public interest, he submitted that the case is not urgent and has not been pursued with any urgency. Finally, he argued that the Authority is best suited to investigate the matter.

Analysis

Removal under s 178(2)(a)

[25] Ms Fechney's first question can be re-phrased as follows: "Is an employer required to act in accordance with its obligations of good faith before making a notification under s 34 or s 45 of the HPCA Act?" If a process conducted in good faith is required, Ms Fechney's position is that an employer cannot have reason to believe anything until that process has been followed. She says that a number of procedural steps are required. Mr Russell says that no procedural steps are required.

[26] I accept that this first question of law is an important question of law. It raises issues surrounding employers' obligations when notifying professional bodies and

engages the issue of notification processes being strategically utilised by employers to avoid employment law obligations.

[27] The second question is closely connected to the first question. In assessing what obligations, if any, an employer has to an employee before making a notification, the Court will need to assess whether the immunity provisions in ss 34(4) and 45 of the HPCA Act have the effect that no process is required or that the Court cannot hear proceedings even where no process has been followed.

[28] If the ouster provisions apply in the manner proposed by Mr Russell, they would appear to be in tension with s 4(1A)(c) of the Act, which provides that the duty of good faith requires employers to consult with employees prior to making decisions that are likely to have an adverse effect on the continuation of their employment.

[29] It may be that employers only have good faith obligations which arise after making a notification rather than prior to making a notification. Ms Fechny acknowledged that the actions of Te Whatu Ora in notifying OTBNZ did not necessarily disadvantage Mr Johnson per se at the time they were made. She emphasised that if the notification had led to additional support, further training or a formal diagnosis, that might have provided a clearer understanding of his needs and any potential accommodations required to perform his role effectively. However, that issue will need to be considered at a hearing on the issue.

[30] Both parties noted that the provisions of the HPCA Act were previously considered by the Court in *Evans-Walsh v Southern District Health Board*.⁹ However, that case involved a claim relating to an alleged breach of a settlement agreement where the plaintiff claimed that, because the parties had entered a settlement agreement, the employer could not have reached any conclusions about the allegations against the employee. Thus, *Evan-Walsh* involved post-termination obligations rather than the intersection of the HPCA Act with the good faith obligations in the Act. Although its findings will be relevant to any assessment of the issues in the present case, I do not consider it conclusively resolves those issues.

⁹ *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46, (2018) 15 NZELR 840.

[31] The issue for the Authority or Court to determine is whether Te Whatu Ora's actions in dismissing Mr Johnston were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or actions occurred.

[32] Accordingly, the answer to the first question¹⁰ will have an effect on the outcome, as will the answer to the second question. The answers to the questions are likely to be decisive of material or important parts of the case.

[33] Therefore, the questions identified are important and will arise other than incidentally. I also consider that the questions arising are important because they are complex, tricky and novel.

Removal under s 178(2)(b)

[34] I accept that there is some public interest in the proceedings in that they involve allegations of Te Whatu Ora strategically utilising the notification process under the HPCA Act. However, s 178(2)(b) requires that the proceeding be of "such urgency" that it is in the public interest to remove the matter immediately to the Court. In the circumstances, I do not consider that there is sufficient urgency to justify removal on this ground.

Is removal appropriate?

[35] In assessing the s 178 criteria, there is no presumption in favour of or against removal. The respondent argues that even if the requirements are met, caution should be exercised against removal. It says the Authority is best suited to deal with the proceeding.

[36] It is correct that the Authority is a low-level informal investigative body. However, the Court is equally able to make necessary accommodations in relation to dealing with sensitive evidence and neurodiverse parties and/or witnesses. Further, Parliament specifically contemplates, by creating a mechanism for removal, that there

¹⁰ As set out at [25] above.

will be situations where it is appropriate for the Court to be the arbiter of fact in the first instance.

[37] Mr Russell also submitted that the Court should only become involved after the Authority has investigated the matter. I accept that removal will lead to the loss of an automatic right of appeal through the loss of the right to challenge. However, that is a matter that affects both parties equally and is a neutral factor for the purposes of this assessment. Further, it is an outcome that is specifically contemplated by the Act in cases where the questions of law are such that it is appropriate to remove them.

[38] He also submitted that Mr Johnston's delay in progressing his claim militates against granting leave. I accept that Mr Johnston has not pursued his claim with much urgency. However, in light of the complex issues arising in this case, I consider that the Court will likely be best placed to expedite the resolution of the parties' dispute.

[39] Finally, Mr Russell submitted that the parties' costs are likely to be higher in the Court than in the Authority. I accept that may be the case but observe that parties are also able to recover more extensive costs in relation to Court proceedings. Further, in the circumstances of this case, where technical legal issues are involved, the likelihood of a challenge is increased, so removal of the matter may ultimately lead to an overall reduction in costs to the parties.

[40] I consider that removal of the proceedings is appropriate in all the circumstances.

Conclusion

[41] I consider it is appropriate that the proceedings be removed to the Court and make an order accordingly. The questions of law set out above are important questions that are likely to arise other than incidentally.

[42] The applicant should file and serve a statement of claim within 30 days of the date of this judgment. It will not be necessary to pay a filing fee.

Costs

[43] Costs are reserved. If the parties are unable to agree, Mr Johnston will have 30 days from the date of this judgment within which to file and serve any memorandum and supporting material, with Te Whatu Ora having a further 14 days within which to respond. Any reply should be filed and served within a further seven days.

Kathryn Beck
Judge

Judgment signed at 2.30 pm on 18 December 2024