IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 664
3400844

	BETWEEN	ABC First Applicant
		DEF Second Applicant
		GHI Third Applicant
		JKL Fourth Applicant
	AND	MNO Respondent

Member of Authority:	Marija Urlich
Representatives:	Andrew McKenzie, counsel for the Applicants June Hardacre and Hamish Rossie, counsel for the Respondent
Investigation Meeting:	On the papers
Determination:	21 October 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 1 August 2025 the Authority ordered the applicants interim reinstatement to the payroll.[1] On 22 August the respondent applied for the substantive matter to be removed to the Court. By memorandum 11 September 2025

[1] *ABC & Ors v MNO* [2025] NZERA 468.

the applicants advise they generally support the removal application but doubt grounds for removal currently exist.

[2] The factual context of this employment relationship problem including timeframe of workplace investigation, criminal investigation and charges, suspension on pay and without pay and use of existing entitlement including annual leave is canvassed in the earlier determination. The broader factual context of this employment relation problem reaches back to May 2023 and the unpaid suspension to late May 2025.

The Authority investigation

[3] Subsequent to the application or removal being lodged a timetable for filing supporting affidavit evidence was made. The respondent filed an affidavit dated 25 September 2025 in support of the application. The applicants did not. On 10 October the Authority asked the parties to confirm all relevant information had been filed. The respondent confirmed such by return. The applicants have not provided a further response. It is appropriate to move to determine this matter.

[4] By consent this application is determined on the papers. As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the information received.

Why is removal sought?

[5] The respondent says the matter should be removed to the Court including:

(i) the nature of the matter lends itself to removal;
(ii) the facts are not complex so reducing the Authority's investigatory, fact-finding process;
(iii) investigation meeting dates are provisionally scheduled for substantive hearing in late November 2025 and a determination may not be issued until early to mid-2026;
(iv) this matter concerns ongoing employment relationships and the parties remain in limbo pending determination of the substantive matter;

(v) the wage costs and operational uncertainty created by the applicants being back on the pay roll in the meantime creates an unacceptable burden for the respondent;

(vi) there is little chance of recovery of wages if the matter is resolved in the respondent's favour;

(vii) the Court will be able to hear the matter in a more timely way and provide the parties with a measure of finality subject to limited appeal right; and

(viii) in these circumstances it is in the public interest that the matter is removed to the Court.

[6] The applicants generally support removal but doubt grounds currently exist. They have indicated through counsel an intention to amend their matter to include reimbursement of criminal defence costs.

How can removal be sought?

[7] Implicit in any application for removal is that the application is properly before the Authority because the Authority has jurisdiction to determine the dispute between the parties. This is true for this application. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.[2] The parties do not dispute the Authority is well placed to determine the applicants' personal grievance applications. In addition, the Authority has the ability to deal with any question related to the employment relationship including any question connected with the construction of the employment agreement, the Employment Relations Act or any other Act which arises during the course of any investigation.[3] Given this, 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.[4]

[8] The Authority is therefore constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act. Four grounds of removal are set out in

[2] Employment Relations Act 2000, s 161(1).
[3] Employment Relations Act 2000, schedule 2, clause 1.
[4] A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors [2020] NZCA 192.

s 178(2) of the Employment Relations Act. The respondent seeks to rely on two of those grounds:

- an important question of law is likely to arise other than incidentally; and
- the matter is of such a nature and of urgency that it is in the public interest that it be removed immediately to the Court.[5]

[9] In the event a party or parties applying for removal satisfy the tests set out in s 178(2) the Authority has residual discretion to determine whether or not the matter should be removed to the court.[6] Any relevant factors against removal must be considered.[7] In *NZAEPMU Inc v Carter Holt Harvey Ltd* the Court considered a range of factors in favour of declining removal including:

> It is not inevitable that there will be a challenge by any party to the Authority's determination. Outcomes in that forum are not necessarily stark wins or losses of everything at stake. The Authority's methodology and remedial powers enable it to craft solutions that parties can, by modifying their behaviours towards each other, live with. That is the scheme of the legislation Parliament intended to apply now and henceforth in employment relations.[8]

What is the test for an important question of law?

[10] In *Hanlon v International Educational Foundation (NZ) Inc* Chief Judge Goddard said in respect of the predecessor provision to s 178:

> It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. 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

[5] Employment Relations Act 2000, s 178(2)(a) and (d).
[6] Auckland District Health Board v X (No 2) [2005] ERNZ 551 at 561- 562.
[7] NZAEPMU Inc v Carter Holt Harvey Ltd [2002] 1 ERNZ 74 at 83.
[8] Ibid at 83 – 84.

> 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.[9]

[11] *Hanlon* confirms that the context of the case is a relevant factor in assessing the importance of a question of law. Questions of law do not need to be complex, tricky or novel to be important.[10] The s 178(2)(a) test is met if the issue arises other than incidentally so that the outcome turns on the answer.[11]

Discussion

[12] The key issue between the parties is the lawfulness of unpaid suspension in context including the parties' employment agreement, policies and procedures and the broader context of charges and pending trial. Interim orders have been in place since August 2025. Those orders have not been challenged. The applicants have each provided undertakings in respect of damages. The substantive matter is scheduled to be heard in late November 2025. The matter has been live between the parties since May 2025 and nests within a factual context extant from May 2023.

[13] The respondent submits the important question of law is central, not incidental or peripheral, to resolution of the employment relationship problem. I accept an important question of law is likely to arise in the matter other than incidentally because it concerns whether there was a lawful basis for the respondent to suspend the applicants' employment without pay. This is a question of law and may well be an important question however, whether the outcome turns on the answer is not certain given the factual matters traversed in the earlier determination including matters of process and the statutory good faith setting of these employment relationships. Further, there are significant cases in this jurisdiction which deal with suspension and the considerations and impact of suspension without pay including those involving charges and the obligations of government agencies.[12] With respect to whether and to what degree the public interest is engaged, the matter is progressing before the Authority and may be disposed of in a cost effective and appropriate way.

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[9] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at [7].
[10] *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].
[11] *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].
[12] *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA).

[14] Having considered whether the s 178(2) test has been met I must now consider whether the residual discretion not to remove this particular case should be exercised. The respondent raises a number of issues which it submits weigh in favour of removal including the risk of the undertakings not being met, the financial and operational burden on the respondent and the likelihood of challenge including other current litigation involving the respondent in this jurisdiction. The principles for the Authority's exercise of that residual discretion were described in *Auckland District Health Board v X (No 2)* in this way:

> …the inquiry must not be on the desirability or undesirability of removing cases, generally, because Parliament has decided some should be removed. Rather, it should be on whether it may be undesirable to remove a particular case. The legislative scheme makes paramount, satisfaction of one or more of the express statutory tests for removal. The discretion then remaining is residual and should not be employed to re-litigate, avoid or defeat the statutory test or tests established. Rather, it should be applied to determine whether there may be a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests. That is reinforced by the addition of the new fourth test for removal (subs (2)(d)) in the 2000 legislation. It cannot have been Parliament's intention to provide both for new broad discretionary grounds for removal and then the exercise of a second independent but otherwise identical discretion. The addition of the new subs (2)(d) reinforces the conclusion that the Authority's discretion under s 178 is both residual and intended to determine whether there are factors against removal.[13]

[15] I decline to exercise my residual discretion in favour of removal. The matter has been afforded priority by the Authority, including this application and the interim application and the investigation of the substantive matter can be concluded and may well be able to be determined by the end of this year. The employment relationship problem between the parties is squarely before the Authority the investigation of which is not yet complete. The applicants have all provided signed undertakings in respect of damages. The respondent raises serious issues as to the public interest including the burden on the respondent agency of this ongoing employment relationship problem. Parties come before the Authority because they have such a problem and seek resolution using the statutory scheme. To remove a matter because it is perceived as difficult or burdensome, or has features of such, does not weigh in favour of removal because such factors cannot be said to be unusual features of matters before the Authority. Indeed, it would not be in the public interest to remove matters on such grounds. With respect to the inevitability of challenge that may well be a view held, but it is not a given in light

[13] Auckland District Health Board v X (No 2) [2005] ERNZ 551 at 561- 562.

of the statutory scheme and the progress of this matter, including a determination which has not been challenged. Further, the parties remain in an employment relationship and may still yet be able to find resolution of this problem.

[16] Given the above, including the litigation context to date, though questions are raised, they do not meet the removal test and removal would not be in the public interest. If one or two arms of the s 178 test are accepted as established, I consider the objects of the Employment Relations Act are good and sufficient reasons for exercise of the residual discretion not to remove this particular case.

[17] For the reasons set out above the application for removal is declined.

[18] A case management conference is to be convened to discuss next steps in the substantive investigation.

Costs

[19] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority