

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 178  
3082496

BETWEEN AHMED ALKAZAZ  
Applicant

AND ENTERPRISE IT LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person  
Robbie Bryant, counsel for the respondent

Investigation Meeting: On the papers

Submissions received: 13 January and 4 February 2020 from the applicant  
28 January 2020 from the respondent

Date of determination: 4 May 2020

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**DETERMINATION OF THE AUTHORITY**

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**The history**

[1] On 22 December 2017 the Authority issued a determination which found that Ahmed Alkazaz was unjustifiably dismissed by Enterprise IT Limited (e-IT or the company).<sup>1</sup> Mr Alkazaz was awarded lost wages and compensation.

[2] Mr Alkazaz did not challenge the Authority's determination. However, he did apply to re-open the Authority's investigation. The Authority determined not to re-

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<sup>1</sup> *Ahmed Alkazaz v Enterprise IT Limited* [2017] NZERA Auckland 400, file number 3005551.

open the investigation into Mr Alkazaz's claims (the re-opening determination).<sup>2</sup> That determination is the subject of a challenge in the Employment Court.

[3] The re-opening determination gave e-IT 28 days from the date of the determination, 30 September 2019, to file a memorandum seeking costs in the event the parties were unable to resolve that matter by agreement. E-IT's memorandum was received in the Authority on the morning of Tuesday 29 October 2019, before the Authority's opening time. Mr Alkazaz objected as in his view the application should have been received on Monday 28 October. That day was a public holiday; Labour Day. In addition Mr Alkazaz has at points suggested that the application was filed two days late, referring to one of those days being a working day. He has not specified which day he is referring to and I can take that no further.

[1] E-IT maintained that as the 28<sup>th</sup> day was a public holiday on which the Authority's offices were closed, it was entitled to file the following day. In the alternative, leave was sought to file the costs memorandum out of time.

[2] The Authority informed the parties that having considered the Interpretation Act 1999, the costs application was received in time.

[3] Mr Alkazaz asserted that there was an important question of law involved and sought to have the costs proceeding suspended and the matter removed to the Court. The Authority suspended the timetable for the filing of costs submissions.

[4] Mr Alkazaz then applied for removal of the matter to the Court. Removal was opposed by e-IT, which suggested that Mr Alkazaz could simply add any challenge he had to a costs determination to the challenge to the re-opening application which was already before the Court. Mr Alkazaz rejected that suggestion.

[5] The Authority decided to determine the removal application on the papers. Submissions were received.

[6] Under s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all of the evidence or submissions received but have stated findings and expressed conclusions.

### **The removal application**

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<sup>2</sup> *Ahmed Alkazaz v Enterprise IT Limited* [2019] NZERA 560, file number 3036052.

[10] The application concerns the costs proceedings. The grounds on which Mr Alkazaz seeks removal are not entirely clear cut, looking at the application and submissions. Reference is made specifically to the Act's s 178(2)(a) (important question of law) and s 178(2)(d) (the Authority considers the Court should determine the matter). However, points are also made regarding all four grounds for removal under s 178(2) of the Act.

[1] E-IT opposes the application on the ground that Authority's decision to accept the costs application is one concerning its procedure, the matter is part-way through its investigation and none of the s 178 grounds are satisfied.

### **Timing and part of the proceeding**

[2] Section 178 includes a reference to removal being "without the Authority investigating" the matter or part of it. Mr Alkazaz's substantive claim in file number 3036052, namely to have the Authority re-open its investigation, has been investigated and determined by the Authority. Under s 178(1) and (2) of the Act it is clear that part of a proceeding may be removed, rather than the whole proceeding. I consider the way clear for a removal application solely on the costs part of the proceeding.

[3] E-IT suggests it is too late as the Authority is part way through its investigation into costs. The Authority's investigation into costs was to involve the receipt of e-IT's costs submissions, followed by Mr Alkazaz's submissions. The removal issue arose regarding receipt of e-IT's submissions. I do not consider that removal is prevented at this point given that all the material was to be submitted in writing. However, it is a factor which can be seen to weigh against removal should any of the grounds for removal be established.

### **Important question of law**

[4] Unfortunately the question of law which Mr Alkazaz considers to be important is not entirely clear. Or perhaps he sees several important questions. Some of his references appear to be about whether the Authority's decision, that e-IT's costs memorandum was received on time, was right. Mr Alkazaz characterises the issue about whether the costs application was received in time as an important question of law. However, this seems muddled by his suggestion that the Authority failed to seek reasons why e-IT filed the memoranda when it did, or did not file it earlier. Mr

Alkazaz suggests that the Authority granted the company leave was granted to file the costs application late, which is not the case. Mr Alkazaz refers to the important question as “*how the Authority handles such instructions and timeframes*”.

[15] It is clear that the removal application does not suggest important questions of law regarding costs.

[5] The importance of a question of law has been described as a relative one, to be measured in the relation to the case in which it arises.<sup>3</sup> Is the question decisive of the case or an important aspect of it?

[6] The question of whether e-IT’s costs submissions should have been accepted could prima facie be seen as important to the question of whether the company could most the file the submissions out of time, if needed, after Mr Alkazaz raised his concern.

[7] The Authority has the power under ss 219 and 221 of the Act extend the time within which things may be done. Although the leave question has not been decided, I do note that at most the costs application could be argued to be received one day after it was due. E-IT maintains that there was no prejudice and nothing received from Mr Alkazaz indicates that there was. There is the prospect of leave being granted in such circumstances.

[8] Given that, I do not assess the questions raised by Mr Alkazaz as an important one in the context of this case.

### **Nature and urgency in the public interest**

[9] Mr Alkazaz asserts that the case is of such a nature and urgency that it is in the public interest to remove it. This refers to the wording in s 178(2)(b) of the Act. Mr Alkazaz mentions the public interest in this case in 2017, which I assume refers to media reporting of the Authority’s initial determination. I have reservations about whether that would be sufficient to categorise costs regarding the re-opening application as something in the public interest.

[10] In any event I can see no urgency in dealing with the costs application in the public interest.

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<sup>3</sup> *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at [7].

## **Proceedings before the Court**

[22] The de novo challenge to the re-opening determination is before the Court so there is the prospect of s 178(2)(c) of the Act being applicable. That challenge involves the same parties as are involved here. Although there is some connection between the issues, I am not satisfied that questions regarding whether costs submissions were rightly received, or how the Authority should have handled that receipt, are sufficiently related to the question of whether the Authority should have reopened its investigation into Mr Alkazaz's dismissal grievance.

## **All the circumstances**

[11] Mr Alkazaz submits that costs are dependent on the Court's decision on the challenge of the Authority's determination not to re-open its investigation. However, in many cases where Authority determinations are challenged, the Authority goes on to deal with costs in the meantime. I am not persuaded that the circumstances of this case are such that the Court should determine the matter.

## **Procedural issue**

[12] Under s 178(6) of the Act matters, or parts of matters, about the procedure the Authority has followed or is following are not able to be removed to the Court. E-IT argues that this is a procedural matter.

[13] The same wording regarding procedures is used in s 179, where a determination about the procedure the Authority has followed, is following or is intending to follow may not be the subject of challenge to the Court. I accept e-IT's submission that statements in the leading authority on that wording in s 179, *H v A Ltd*<sup>4</sup>, are useful in considering s 178. The full Court there concluded that the effect of a decision was more important than the nature of the power. Did the decision have an irreversible and substantive effect?<sup>5</sup>

[14] Reference was also made to an earlier full Court decision in *Keys v Flight Centre (NZ) Ltd*<sup>6</sup> where procedure was said to be limited to the "manner in which the Authority conducts its business and does not include outcomes ...".

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<sup>4</sup> *H v A Ltd* [2014] NZEmpC 92.

<sup>5</sup> Above n 4 at [25] – [26].

<sup>6</sup> *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 at [51].

[27] In so far as Mr Alkazaz's removal application relates to the Authority not directing e-IT to provide reasons as to why its costs memorandum was filed on 29 October 2019, it is a matter of procedure. It is about the manner in which the Authority undertook its investigation. Mr Alkazaz's broader reference to the important question of law being "how the Authority handles such instructions and timeframes", appears also to relate to procedural matters. How the Authority handles such matters does not affect the rights and obligations of the parties.

### **Conclusion on removal application**

[7] Mr Alkazaz's application is declined. He has not established any of the grounds for removal under s 178(2) of the Act. In addition, at least some of the questions Mr Alkazaz wants to raise are matters of the Authority's procedure and thus cannot be the subject of removal due to s 178(6)(a) of the Act.

### **Costs and next steps**

[8] Costs on this application are reserved and the parties are invited to resolve that issue. If necessary, it will be considered along with costs on the re-opening application.

[9] The Authority will be in touch with the parties regarding a timetable for conclusion of the costs questions.

**Nicola Craig**

**Member of the Employment Relations Authority**