

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 10
3046952

BETWEEN	LINDSAY JAMES BAIRD Applicant
A N D	WELLINGTON FREE AMBULANCE Respondent

Member of Authority:	Michele Ryan
Representatives:	J W Goddard, counsel for the Applicant P McBride, counsel for the Respondent
Documentation received	Application and submissions for the Applicant on 28 November 2018 Memorandum for the Respondent on 5 December 2018
Investigation Meeting:	On the papers
Determination:	11 January 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Lindsay Baird was dismissed from his employment with Wellington Free Ambulance (WFA) on 2 August 2018 on grounds of medical incapacity. He claims his dismissal was unjustified.

[2] Mr Baird further alleges he was unjustifiably disadvantaged by various actions undertaken by WFA in the 11 months preceding his dismissal. He says WFA failed to investigate his complaint of bullying nor did it properly investigate a complaint made against him which resulted in a final written warning without proper basis.¹ He says

¹ There is a dispute about whether some matters by which Mr Baird says he was unjustified disadvantaged were raised as personal grievances but these are not material to this application.

WFA breached its obligations to act in good faith regarding these matters, and did not provide him with a safe work place.

[3] This determination concerns an application made on behalf of Mr Baird to have his claims removed to the Employment Court without the Authority investigating those matters. WFA neither supports nor resists the application for removal.

Grounds for removal

[4] Section 178(2) of the Act sets out four separate grounds by which the Authority may grant removal of all or parts of an employment relationship problem to the Court.

[5] Mr Baird relies on ss 178(2)(a) and (2)(b) to remove his claims. The relevant provisions are as follows:

s 178(2) The Authority may order the removal of the matter, or any part of it to the Court if-

- (a) An important question of law is likely to arise other than incidentally; or
- (b) The case is of such a nature and of such urgency that it is in the public interest it be removed immediately; or

...

[6] Removal may be ordered if one of the grounds in s 178(2) has been met. The Authority holds a residual discretion to decline removal even where one of the criteria under s 178 has been met if there is good reason not to remove a matter.² These 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;
- the strength of the case for removal under one or more of the four tests [at s 178];
- 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 178.³

² *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [30]

³ *NZAEPMU v Carter Holt Harvey Limited* [2002] 1 ERNZ 74 at [38]

Is there an important question of law likely to arise other than incidentally?

[7] An important question of law is one that arises more than incidentally. In *Hanlon v International Education Foundation (NZ) Ltd*⁴ former Chief Judge Goddard observed the following:

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 decisive for the case or some important aspect of it or strongly influential in bringing about a decision or a material part of it.⁵

The questions

[8] Mr Baird's application records four questions said to be important. These are set out and addressed as follows:

QUESTION 1:

WHETHER A PERSONAL GRIEVANCE FOR UNJUSTIFIED DISMISSAL CAN BE VALIDLY RAISED AFTER NOTICE HAS BEEN GIVEN BUT BEFORE NOTICE HAS EXPIRED.

[9] QUESTION 1 stems from circumstances whereby Mr Baird informed WFA, in writing, of his personal grievance for an unjustified dismissal during the notice period before the dismissal had occurred.

[10] A statement of problem was sent to the Authority a month or so after Mr Baird's dismissal. That material outlined the basis by which he considered his dismissal unjustified.

[11] The law allows a personal grievance to be validly raised via the lodging of a statement of problem in the Authority provided the employer receives that documentation within 90 days of the event and the other statutory requirements are met.⁶

[12] WFA does not assert Mr Baird's personal grievance of an unjustified dismissal was not raised with it in time, or that the personal grievance has not otherwise met the requirements of the Act.

⁴ [1995] 1 ERNZ 1

⁵ *Hanlon*, above at [7]

⁶ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [13] and affirmed in *Pollard Contracting Ltd v Donald* [2014] NZEmpC 137 and *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117

[13] This factual matrix leads me to conclude that an inquiry into whether a personal grievance concerning Mr Baird's dismissal was validly raised during his notice period is not an issue that will need to be determined in this instance. The substance to QUESTION 1 is not "*likely to arise*" in this case and therefore does not satisfy the criteria set out at s 178(2)(a).

QUESTION 2:

WHETHER THE EMPLOYER OUGHT TO BE ABLE TO DISMISS AN EMPLOYEE BASED ON MEDICAL CAPACITY WHEN AN EMPLOYER HAS CAUSED OR CONTRIBUTED TO THAT INCAPACITY THROUGH ITS ACTIONS OR WHEN IT INTENDED TO CAUSE (OR SHOULD HAVE BEEN) AWARE THAT THE MENTAL DAMAGE OR INCAPACITY WOULD RESULT FROM ITS PROCESSES.

[14] The question of law, as stated, relies on a presumption that the applicant's incapacity is a result of the employer's prior actions. That matter is a question of fact that can only be determined after an examination of the events of which Mr Baird complains and the employer's actions in response to those. Whether QUESTION 2 is an important question of law "*likely to arise*" can only be assessed after the presumption on which the question is based is affirmed by evidence. A finding of that nature is uncertain at this juncture. As noted in *Ohms v Vice Chancellor AUT* there should be no room for speculation as to the relevance of an alleged important question of laws that is going to be determinative of the case.⁷ I am not satisfied QUESTION 2 meets the test at s 178(2)(a) of the Act.

QUESTION 3:

WHAT IS THE NATURE AND EXTENT OF THE EMPLOYER'S GOOD FAITH OBLIGATIONS REGARDING:

- (A) INVESTIGATION OF INTERNAL COMPLAINTS
- (B) INVESTIGATING ALLEGATIONS OF WORKPLACE BULLYING
- (C) FACILITATING AN EMPLOYEE'S RETURN TO WORK AFTER AN EMPLOYEE HAS SUFFERED WORK-RELATED MENTAL HARM
- (D) PAYING FOR AN EMPLOYEE'S MEDICAL COSTS IN CIRCUMSTANCES WHERE AN EMPLOYEE HAS SUFFERED A WORK-RELATED MENTAL HARM
- (E) ENSURING THAT EMPLOYEES UNDER INVESTIGATION DO NOT SUFFER UNDULY DUE TO THE MANNER IN WHICH AN INVESTIGATION IS CARRIED OUT
- (F) PROVIDING SUPPORT TO EMPLOYEES WHO HAVE SUFFERED MENTAL HARM DUE TO THE MANNER IN WHICH AN INVESTIGATION IS CARRIED OUT

⁷ *Ohms v Vice Chancellor AUT* [2013] NZEmpC 191 at [19]

[15] The concept of good faith (in an employment context) is defined at s 4 of the Act. In *Auckland City Council v New Zealand Public Service Association*⁸ the Court of Appeal observed that the content of an obligation of good faith will depend on the circumstances.⁹

[16] The sub-questions at QUESTION 3 also create room for speculation. Sub-questions 3(A) and (B) are broadly worded such that the scope of each question is uncertain.¹⁰ Sub-questions (3)(C)-(F) each rely on a range of particular facts existing before an assessment as to whether each individual sub-question is “*likely to arise*”. I am not satisfied the matters set out at QUESTION 3 satisfy s 178(2).

[17] I note, as a matter of substance, an investigation into the circumstances asserted in each instance set out at QUESTION 3 would need to be undertaken. It is only where positive findings on those matters can be made that an assessment as to whether good faith applies to any one of the expressed circumstances becomes relevant. The content of a good faith obligation is then determined by application of the statutorily defined concept to the particular circumstances. I consider such an inquiry would be factually intensive and is better suited to the investigative approach used by the Authority at first instance in any event.

QUESTION 4:

WHETHER A LESSOR STANDARD OUGHT TO BE APPLIED TO NOT-FOR-PROFIT ORGANISATIONS, SUCH AS THE RESPONDENT, WHEN CARRYING OUT EMPLOYMENT INVESTIGATIONS.

[18] Correspondence written on behalf of WFA dated 2 July 2018 suggests this question is not likely to arise, but for the sake of completion I have addressed it, as follows.

[19] The standard of investigation required by an employer (in a disciplinary setting) is determined by application of the statutory test (the justification test) at s 103A of the Act. That provision requires the institutions to determine on an objective basis whether the employer’s actions were; “*what a fair and reasonable employer*

⁸ *Auckland City Council v New Zealand Public Service Association* [2004] 2 NZLR 10; [2003] 2 ERNZ 386

⁹ Above at [23]

¹⁰ For example; it is not clear whether 3(A) concerns the extent of good faith between an employer and an employee who made a complaint under investigation or an employee who is the subject of a complaint under investigation. The content of an obligation of good faith will differ in each of these circumstances.

could have done in all the circumstances at the time the dismissal or action occurred.”

[20] Section 103(A)(3)(a) states the Authority or the court must have regard to the resources available to the employer when considering whether the employer sufficiently investigated allegations against an employee before taking action. But the legislation does not provide for a reduced or alternative standard according to the nature of an employer’s business.

[21] Whether WFA’s employment investigation meets the justification test will be determined by the application of s 103A to the facts of this matter. I am not satisfied QUESTION 4 identifies an important question of law.

Summary

[22] I am not satisfied the questions Mr Baird has placed before the Authority for the purposes of having his claims removed to the court are likely to arise and be determinative of his claims. There is no basis to remove his claims to the Court under s 178(2)(a).

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

[23] On Mr Baird’s behalf it is submitted that the critical nature of the work performed by WFA employees generates a high public interest in having WFA deal with its employees in good faith and in accordance with its policies. It is further submitted that Mr Baird’s claims need to be disposed of urgently in circumstances where the respondent’s conduct is said to reflect a pattern of unsafe HR practices.¹¹ Mr Baird says he feels compelled to do something those matters before the abuse of staff jeopardises the service.¹²

[24] As has often been noted by the Authority and the Court, there is an important distinction between a matter that may be interesting to the public and a matter of public interest which relates, amongst other things, to how the interests of the justice is best served. It is the later of these concepts that s 178(2)(b) refers to.

¹¹ Written statements drafted by three former employees including Mr Baird and a current employee each allege WPA failed to follow (unspecified) internal policies over the course of various employment investigations.

¹² Written statement dated 10 October 2018

[25] The nature of Mr Baird's case centres on his claims that WFA has not complied with various statutory, contractual and/or policy obligations it has towards him regarding a complaint made by him against colleagues and a complaint made against him. Those matters do not, of themselves, give rise to a public interest. Nor do I accept that the nature of WFA's business activities alters the personal nature of Mr Baird's claims such that a public interest is triggered.

[26] A removal to the court under s 178(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. I have not been persuaded that the nature of case warrants removal. It is therefore unnecessary to consider whether urgency is a material consideration.

Conclusion

[27] I have declined Mr Baird's application for an order to remove his claims to the Court. The Authority will convene an urgent case management conference call with the parties to discuss the progression of his claims before the Authority. Alternatively, if Mr Baird wishes to seek special leave from the Court¹³ to have his case removed, the Authority should be notified of that event as soon as is reasonably possible.

[28] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

¹³ s 178(3)