

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 136
5514923

BETWEEN MAREWA GLOVER
Applicant

AND VICE-CHANCELLOR OF THE
UNIVERSITY OF
AUCKLAND
Respondent

Member of Authority: Vicki Campbell

Representatives: Helen White for Applicant
Phillipa Muir and Marie Hoolihan for Respondent

Submissions Received: 22 April 2015 from Applicant
6 May 2015 from Respondent

Determination: 13 May 2015

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The application for removal to the Employment Court is declined.**
- B. Costs on the application for removal are reserved until after a substantive determination.**

Removal Application

[1] This is an application to remove the substantive matter to the Employment Court without prior investigation by the Authority. The application is made pursuant to the Employment Relations Act 2000 (the Act) section 178(2)(a) on the grounds that two questions of law are likely to arise in the matter other than incidentally. The Applicant submits that the Authority should exercise its discretion under section 178(2)(d) and remove the matter to the Employment Court.

[2] The application for removal to the Employment Court is opposed by the Respondent on the basis that the questions posed by the Applicant do not meet the tests for removal set out in section 178(2). The grounds for removal set out in section 178(2) are:

- 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
- d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

Employment relationship problem

[3] The employment relationship problems the Applicant has asked the Authority to determine is whether she has been disadvantaged in her employment as a result of bullying including through “mobbing” (a form of bullying by more than one person) and/or that the Applicant was constructively dismissed.

[4] In determining the matters the Authority must consider the actions of the Respondent and whether what the Respondent did, and how it acted was what a fair and reasonable employer could have done in all the circumstances.

[5] During a case management call with the parties on 20 January 2015 the substantive matter was set down for investigation on 11 and 12 May 2015. Since that time the application for removal was lodged and the investigation meeting dates were vacated by agreement.

Issues

[6] The Authority needs to determine whether one or more of the grounds in section 178(2) of the Act are made out. The submissions from both parties has focussed on only the grounds set out in section 178(2)(a) and (d), however, for the

sake of completeness I have also considered whether the grounds set out in subsection (b) and (c) have been met.

An important and decisive question of law is likely to arise in the matter other than incidentally

[7] An important question of law is one that will arise other than incidentally. Its importance has to be measured in relation to the case in which it arises and is 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.¹

[8] As stated by the Court in *Centre for Advanced Medicine v Sprott*²:

There must be some good reason for removing the proceedings to the Court from the Authority which is designed to determine cases at the first instance.

[9] The Applicant submits that two questions of law will arise in the substantive matter:

- a) Is there a form of bullying known as mobbing and if so, what is the appropriate response to it? and
- b) What are the fair and reasonable obligations to employees when contracting them to an entity that is not only a wholly owned subsidiary but where the shareholder has reserved the right to override its interests of the entity and promote the interests of the University.

[10] With regard to the first question of law identified by the Applicant, the substantive issues include a complaint that the Applicant was subjected to a form of bullying known as mobbing. The Applicant submits that the question of what a fair and reasonable employer is obliged to do and the appropriate response to the actions of the staff who the Applicant alleges participated in the bullying is an important question of law.

[11] In its submissions the Respondent referred the Authority to the recent Court decision *Edwards v Board of Trustees of Bay of Islands*³ where the Chief Judge considered mobbing and cited an academic definition of mobbing as being:

¹ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1.

² Unreported, Employment Court, Shaw J, AC 20/05, 10 May 2005, at [6].

³ [2015] NZEmpC 6.

...an increasingly reported phenomenon whereby individuals gather others to participate in continuous malevolent action to harm, control or force another person out of the workplace.

[12] The Authority's conclusions about whether the Applicant was disadvantaged in her employment and/or constructively dismissed as a result of bullying and/or mobbing, will require an enquiry into the actions of the Respondent. This is a question of fact. The application of the legal tests applicable to the question about whether the Respondent has acted fairly and reasonably are well established.

[13] The second question of law identified by the Applicant relates to the obligations on an employer in a triangular relationship. The obligations of employers where a triangular relationship exist have been the subject of a number of Authority and Court decisions.

[14] I accept that the questions about whether the Applicant was disadvantaged in her employment and/or constructively dismissed are important to the Applicant. That however, does not make the questions important for the purposes of section 178.

[15] I do not find that the first ground is made out that an important question of law is likely to arise in this matter. The proceedings will require a factual enquiry and the application of established legal principals to the facts.

Section 178(2)(b) and (c)

[16] I am satisfied the issue of mobbing has previously been considered by the Authority and the Court and is not of such a nature that it needs to be removed to the Court.

[17] I find there are no matters of principle or public interest which support a finding that the Applicant's case needs to be resolved more promptly than others who are waiting to have their personal grievance applications heard.

[18] The Court does not currently have any proceedings which are between the same parties and which involve the same or similar related issues and therefore this ground has not been made out.

Should the Authority otherwise remove the matter

[19] The Employment Court has stated that the scheme of the Act is clear that personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the grounds in section 178(2) are established.⁴

[20] The parties' opportunity to have the matter dealt with at what is likely to be a lower cost in the Authority and to preserve its statutory right of challenge should not be lightly put aside.

[21] I have not found any of the grounds for removal in section 178(2) of the Act established. This is the sort of case that Parliament intended the Authority to investigate and determine and I am not otherwise minded to remove the matter to the Employment Court.

[22] The application is declined. The Authority will now proceed with the steps necessary to carry out its investigation and a case management call is to be arranged with the parties within seven days of the date of this determination for the purpose of setting new dates for the investigation meeting.

Costs

[23] Costs in respect of this application are reserved until after the substantive determination.

Vicki Campbell
Member of the Employment Relations Authority

⁴ Vice-Chancellor of Lincoln University v Stewart (No 2) [2008] ERNZ 249 at [43].