

**NOTE: This determination
contains an order prohibiting
publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 59
3174922

BETWEEN	HLI Applicant
AND	VMZ Respondent

Member of Authority:	Peter Fuiava
Representatives:	E Lambert, counsel for the Applicant S Grice, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	30 August 2022 from the Applicant 17 October and 9 November 2022 from the Respondent
Determination:	9 February 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. HLI'S application for removal of employment relationship problem 3158483 to the Employment Court is unsuccessful.**
- B. The proceedings shall remain in the Authority for investigation and determination.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] This preliminary determination relates to employment relationship problem 3158483 which was the subject of a preliminary determination for interim

reinstatement.¹ In broad terms that proceeding concerns the application of the COVID-19 Public Health Response (Vaccinations) Order 2021 to HLI's employment as a tug engineer for VMZ; a port that receives cargo ships from around the world. HLI says that the Vaccinations Order did not apply to him and that he was unjustifiably dismissed by his employer. In the alternative, if the Vaccinations Order did apply, HLI states that he was an "exempt person" under the order and consequently he was not required to be vaccinated for his role.

[2] VMZ maintains that at the material time, it was obliged to follow the Vaccinations Order and that HLI was not an exempt person. The port further maintains that its dismissal of HLI's employment was substantively and procedurally justified in all the circumstances.

[3] HLI sought to be reinstated to his position on an interim basis but this was opposed by VMZ for reasons that are set out in my preliminary determination. Those details need not be repeated here but to note that I granted interim non-publication for the parties but declined interim reinstatement. Briefly stated, my reasons for declining interim reinstatement were that there was not an arguable case for permanent reinstatement, the balance of convenience favoured VMZ in light of HLI's post-employment conduct to various members of its management staff, and the overall justice of the case did not favour interim reinstatement.

[4] HLI subsequently challenged the determination on a *de novo* basis. More importantly, on 13 June 2022, he lodged with the Authority an application for removal of his employment relationship problem to the Employment Court. That application is also opposed by VMZ. This preliminary determination deals with HLI's application for removal which for the reasons given below is unsuccessful.

What are the issues?

[5] The issue requiring investigation is whether employment relationship problem 3158483 should be removed to the Employment Court.

¹ *HLI v VMZ* [2022] NZERA 164.

How has the Authority investigated matters?

[6] On 17 August 2022, a case management conference with the representatives was held. The interim non-publication order granted previously with the declined reinstatement determination was confirmed. It may be noted that the Employment Court has since granted a corresponding interim non-publication order which will lapse 14 days after any decision by the Authority to decline *permanent* non-publication.²

[7] At the case management conference, timetabling directions for the filing of written submissions were made by agreement and both counsel further agreed that the Authority could determine the removal application on the papers.

Discussion

[8] Under s 178 of the Act, the Authority may on its own initiative or by application by any party, order the removal of any matter to the Employment Court to hear and determine without the Authority investigating it.³ While s 178 of the Act confers on the Authority a discretion to remove matters to the court on certain grounds, the Court of Appeal has recently observed the following:⁴

... 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.

On appeal, the Supreme Court did not disagree with the Court of Appeal's view on this matter.⁵

[9] Section 178(2) of the Act sets out the relevant grounds that may result in a matter being removed to the Employment Court:

178 Removal to court

...

- (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 in the matter other than incidentally; or

² *HLI v VMZ* [2022] NZEmpC 201 at [40]-[41].

³ Employment Relations Act 2000, s 178(1).

⁴ *A Labour Inspector v Gill Pizza Ltd and Others* [2020] NZCA 192 AT [48].

⁵ *Gill Pizza Ltd and Ors v A Labour Inspector* [2021] NZSC 184.

- (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.

[10] In the event one or more of the above grounds permitted in s 178 are satisfied, the Authority has a residual discretion to determine whether or not the matter should be removed to the court. However, in exercising that discretion relevant factors against removal must be considered.⁶

[11] HLI's application for removal has been advanced on the basis of s 178(2)(a), (b) and (c) of the Act.

No important question of law under s 178(2)(a) arises

[12] HLI submits that an important question of law arises in this case which is whether he was an "affected person" for the purposes of the Vaccinations Order. In the alternative, HLI submits that if the Order did apply to him, he was exempt from it.

[13] Questions of law do not need to be complex, tricky or novel to be important.⁷ Rather, a question of law will arise incidentally where the outcome of the proceeding will turn on the answer.⁸ However, it was observed in *Johnston v Fletcher Constructions Co Ltd* that this could not be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may not suffice.⁹

[14] In broad terms, HLI's case concerns unjustified dismissal under s 103A of the Act which sets out the test for justification. Determining whether a dismissal was justified under s 103A is bolt standard work for the Authority. In her submissions, Ms Lambert referred to *Matsuoka v LSG Sky Chefs New Zealand Ltd* which is a decision where removal was granted by the Authority.¹⁰ However, that case was novel as it was held that there previously had not been any cases in the Authority or in the Employment

⁶ *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[31].

⁷ *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

⁸ *Tourism Holdings Ltd v A Labour Inspector* [2018] NZEmpC 95 at [22].

⁹ n 7, at [22].

¹⁰ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZERA Auckland 97.

Court regarding protection for employees under s 69(A) of the Act whose employment was affected by restructuring. The Authority also held that it was in the public interest for that case to be referred to the Employment Court.¹¹

[15] While there is the added element of the Vaccinations Order to consider in HLI's employment problem, the question of whether he is an affected person or not will be a fact specific inquiry that is unlikely to have broad effect or assume significance in employment law generally. My assessment of HLI's dismissal under s 103A of the Act will not require me to assess the validity of the Vaccinations Order which is matter for the High Court on an application for judicial review. Rather, my role is to resolve the employment relationship problem by establishing the facts and making a determination according to the substantial merits of the case without regard to technicalities.¹²

[16] At its core, the present case is one that the Authority encounters on a routine basis namely whether an employer's actions were fair and reasonable in all the circumstances at the time of an employee's dismissal. Ms Lambert states that she also intends to raise the issue of HLI being unlawfully locked out from his workplace. However, even so, this additional issue does not complicate matters significantly especially as the Authority has jurisdiction to consider any proceedings related to a strike or lockout.¹³

[17] Considered cumulatively, I find no important question of law likely to arise in this matter other than incidentally. The ground for removal under s178(2)(a) of the Act is not made out.

No public interest or urgency under s 178(2)(b)

[18] The second ground for removal was whether 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.

[19] It is noted that HLI's employment ended on 12 November 2021. The application for removal was not lodged with the Authority until 13 June 2022, seven

¹¹ n 10 at [18] and [19].

¹² Employment Relations Act 2000, s 157(1).

¹³ The Act, s 161(1)(l).

months later. It has not been demonstrated that HLI has acted with urgency and consequently this ground for removal has not been made out.

No longer any proceedings in the Employment Court

[20] The third ground for removal was s 178(2)(c) namely that the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[21] As noted above, HLI filed a *de novo* challenge of the preliminary determination. However, on 9 November 2022 the Employment Court declined the challenge.¹⁴ More recently, it has awarded VMZ costs for being the successful party.¹⁵ As there are no longer any proceedings in the court, this ground for removal has not been made out either.

Conclusion

[22] For completeness, I have considered s 178(2)(d) of the Act but I am not of the view “that in all the circumstances the Court should determine the matter.” Having considered the application for removal, I find no grounds for removing this matter to the Employment Court under s 178(2)(a) to (d). As none of the grounds have been made out, HLI’s application for removal must be declined. Employment relationship problem 3158483 is to remain in the Authority for investigation and determination.

Costs

[23] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority

¹⁴ *HLI v VMZ* [2022] NZEmpC 201.

¹⁵ *HLI v VMZ* [2023] NZEmpC 4.