

application, but contests the joinder application on the footing that it is more appropriate that the question of joinder be considered by the Court.

Issues

[5] The Authority must determine the following questions:

- (a) Should the matter be removed to the Employment Court;
- (b) Should there be joinder of this file with another file (5574473);
- (c) Should a statement in reply be filed by A Limited; and
- (d) Should the Authority confirm the suppression orders applying in the Employment Court?

Should the matter be removed to the Employment Court?

[6] It is apparent from the pleadings before the Authority that the primary ground on which H relies is that contained in s.178(2)(c) of the Employment Relations Act 2000 (the Act), that is to say, that the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[7] Moreover, that reliance on subsection (2) is supported by a reference to the overall discretion that the Authority has to decide whether to order removal or not.

[8] This is a case where the application to remove the matter to the Court is not contested. The absence of opposition is, I am satisfied, a factor which I ought to consider in respect of the residual discretion that I have.

[9] It is apparent from the application before me that there are significant issues of dispute between the parties and, I am satisfied that there is a nexus between the substantive matter dealt with by the Employment Court involving these parties and the present proceeding in the Authority. Although the substantive proceedings in the Court have concluded, the effect of the current application in the Authority is in a real sense a perpetuation of the dispute which the Court has already engaged on.

[10] In those circumstances, I consider that the test under s.178(2)(c) of the Act has been satisfied.

[11] Moreover, I think the range of factors set out by H in submissions made on H's behalf also support the removal of the matter pursuant to s.178(2)(d) of the Act. Those factors include that the Employment Court is familiar with the litigation between these parties, that some of the allegations H makes against A Limited may involve questions of law which ought more properly to be addressed by the Employment Court, and that the importance of the matter to the parties would likely result in a challenge to any decision of the Authority in any event.

[12] Finally, I turn to the Authority's residual discretion. It is clear that even if the grounds for removal are made out, the Authority still has a residual discretion to decline to order removal: *NZEPMU Inc v. Carter Holt Harvey Ltd* [2002] 1 ERNZ.

[13] I do not discern any factors which militate against removal and there is one that seems to me to encourage it, namely the fact that the application by H is not opposed by A Limited.

[14] Accordingly, I conclude that it is appropriate that I order that the whole of the matter be removed to the Employment Court for the Court to hear and determine, without the Authority investigating the matter.

Should this file be joined with file 5574473?

[15] H argues that the Authority ought to join the two matters together, effectively in the interests of administrative and judicial convenience. The other file in question (5574473) is a matter where A Limited is the applicant and H is the respondent. That other file just referred to involves an application by A Limited for orders concerning a dispute about the interpretation of a provision in an operative employment agreement to which H is a party. Accompanying those pleadings is an application for removal of that file to the Employment Court on a similar basis to the argument advanced by H for the removal of this present matter.

[16] H submits that the two files involve the same parties, traverse similar issues and therefore the provision in s.221 of the Act allowing joinder ought to be used by the Authority to join the two matters together.

[17] A Limited resists that application, essentially on the footing that if the two files in question are to be removed to the Employment Court, then the proper course

is to not join the files but remove them both to the Employment Court in order for the Court to determine how best to deal with the matter within its own process.

[18] I decline to order joinder. I accept the argument advanced by A Limited that the correct course of action is to consider the files individually and allow the Court to determine its own process and consider, if the Court sees fit, whether the matters should be joined.

[19] In reaching that conclusion, I am satisfied I am correctly applying the law as it applies in the Authority given that the effect of s.221 of the Act is to require the Authority to contemplate joinder where that would enable the Authority “*to more effectually dispose of any matter before it*”. I am satisfied that this decision is in accord with that provision, given that the decision the Authority has made on the disposition of the matter, is that the matter is to be dealt with in the Employment Court.

Is a statement in reply required from A Limited?

[20] I am satisfied that it is appropriate for the usual requirement that a statement in reply be filed and served not to apply in the present case. A Limited is accordingly excused from the obligation to file a statement in reply.

[21] This is because the effect of the Authority’s decision in this present determination is to remove the matter to the Employment Court where timetabling orders by the Court will determine the requirements on A Limited.

Ought the suppression orders applying in the Court apply in the Authority?

[22] I am satisfied that in order to ensure that the effect of the suppression orders granted by the Employment Court are to continue, it is proper that precisely the same orders should be replicated in this Authority and I so order.

Determination

[23] I have decided that this matter will be referred to the Employment Court for hearing and disposition by the Court without the Authority investigating the matter.

[24] I have declined to order joinder with another file (5574473) because I do not consider it will assist the Authority in effectually disposing of the matter given that in practice the matter is to be considered and disposed of in the Employment Court.

[25] I have waived the requirement for A Limited to file a statement in reply because the matter is to be dealt with by the Employment Court.

[26] I have adopted and continued the suppression orders imposed by the Employment Court in respect of these proceedings in this Authority.

Costs

[27] Costs are reserved.

James Crichton
Member of the Employment Relations Authority