

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 43
3126694 & 3126696

BETWEEN ALISTAIR ROSS GORDON
 HUMPHREY
 Applicant

AND CANTERBURY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Philip Cheyne

Representatives: Carolyn Heaton, counsel for the Applicant
 Andrew Shaw, counsel for the Respondent

Submissions Received: 18 January 2021 from the Applicant
 26 January 2021 from the Respondent

Date of Determination: 4 February 2021

DETERMINATION OF THE AUTHORITY

A. This matter (file number 3126694) is removed to the Employment Court to hear and determine the matters without the Authority investigating them.

Employment relationship problem

[1] Dr Humphrey is a public health physician and had been employed by the Canterbury District Health Board (and its predecessors) within its community and public health division since 2000. Dr Humphrey was dismissed on 14 October 2020.

[2] Dr Humphrey for most of the time since 2000 has also held an appointment as Canterbury's Medical Officer of Health (MOH). A MOH has statutory powers and

obligations under the Health Act 1956. Dr Humphrey says he is likely to lose this statutory appointment as a result of his dismissal.

[3] In November 2019, a number of managers and clinicians wrote to the CDHB chief executive. CDHB then decided to commission an independent investigation into the allegations. Dr Humphrey says he sought special leave for two weeks in March 2020, but his request to return to work in April was refused. Following the independent investigation, CDHB decided to undertake a disciplinary process. That ended by CDHB's Acting Chief Executive (Dr Peter Bramley) writing to Dr Humphrey on 14 October 2020 confirming his decision to dismiss Dr Humphrey.

[4] In his letter of 14 October, Dr Bramley stated that he had concluded that Dr Humphrey's employment relationship with CDHB was untenable and that it was irremediably untenable, resulting in an irretrievable breakdown in Dr Humphrey's employment relationship with CDHB. Dr Bramley also had concluded that Dr Humphrey's actions in respect of Dr Ramon Pink and Environment Canterbury had brought CDHB into disrepute, amounting to misconduct, for which Dr Humphrey would receive a written warning. Any grievance arising from the warning is not a consideration in respect of determining the removal application.

[5] Dr Humphrey raised personal grievances with CDHB on 29 October 2020.

[6] Dr Humphrey then lodged a statement of problem in the Authority setting out his personal grievance claims. Dr Humphrey seeks reinstatement and other remedies. He also made an application for interim reinstatement, supported by his affidavit and undertaking in respect of damages. These applications are under file number 3126694. CDHB says in its reply that its investigation and disciplinary process and decision to dismiss Dr Humphrey was one that was open to a fair and reasonable employer in all the circumstances. Alternatively, if Dr Humphrey has a personal grievance, it says that any remedies should be significantly reduced and that reinstatement is not practicable nor reasonable.

[7] File number 3126696 is Dr Humphrey's application for proceedings under file number 3126694 to be removed to the Employment Court to hear and determine the matter without the Authority investigating it.

[8] As agreed, the removal application was investigated on the papers. Counsel for Dr Humphrey lodged and served submissions in support. Counsel for CDHB lodged and served a reply. CDHB confirmed its position that it neither supports nor opposes the removal application. This determination resolves the removal application.

Grounds for removal

[9] The Authority may order removal in the following situations: if an important question of law is likely to arise in the matter other than incidentally; the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately; the court already has proceedings before it which are between the same parties and which involve similar or related issues; or if the Authority is of the opinion that in all the circumstances the court should determine the matter.¹

[10] I will summarise the arguments advanced for removal.

Important question of law

[11] The application partly is based on s 178(2)(a) of the Employment Relations Act 2000 (ERA).

[12] Dr Humphrey was dismissed for incompatibility. CDHB decided that Dr Humphrey did not accept responsibility for the untenable nature of the employment relationship, meaning that measures to restore the relationship would be unsuccessful. CDHB sought and referred to the written views of some of Dr Humphrey's colleagues. Dr Humphrey says that CDHB did not properly consider the conflicting loyalties and tensions inherent in his statutory role as a MOH, and did not make a genuine attempt to address relationship difficulties with colleagues arising from the conflicting loyalties and tensions. Dr Humphrey says that CDHB as a fair and reasonable employer did not properly consider the consequences of a MOH being prevented from continuing in a public health career.

[13] An employee in the role of MOH has contractual and statutory obligations to their employer. A MOH also has statutory powers. As an example, I am referred to the power to

¹ Employment Relations Act 2000, s 178(2).

requisition land, buildings and crafts in an outbreak of an infectious disease.² A MOH has statutory protection under s 129 of the Health Act 1956, save in specified circumstances.

[14] The role of MOH involves public advocacy to further the protection and welfare of the population. There is a tension between being alert to threats to public health and the potential impact for society and individuals of public health pronouncements. A MOH works with senior health and other professionals who exercise significant powers and duties in demanding circumstances. Leadership is key to the MOH role.

[15] CDHB must show incapacity of the necessary degree which is wholly or substantially attributable to the employee. Dr Humphrey says that CDHB was not justified in suspending him from the workplace and then not putting in place measures to assist his return to the workplace.

Public interest

[16] The application is partly based on s 178(2)(b) of the ERA.

[17] The role of MOH is especially important during a global pandemic. It is in the public interest to remove the matter so that there can be certainty of a result obtained as quickly as possible.

[18] Dr Humphrey deposes that there is little prospect of him obtaining employment in Canterbury or elsewhere in New Zealand, with his designation likely to be removed as a consequence of his dismissal. These effects are profound and cannot be remedied by damages alone. Dr Humphrey seeks a fully reasoned judgment at first instance, rather than an investigation and determination which would be followed by a de novo challenge by the dissatisfied party.

In all the circumstances the Court should determine the matter

[19] The application also relies on s 178(2)(d) of the ERA.

[20] Matters commenced in December 2019. It has been a lengthy and expensive process so far for him and CDHB. It would be more economical for Dr Humphrey to achieve the certainty of a judgment, rather than a determination, followed by a de novo challenge.

² Health Act 1956, s 71.

[21] I am referred to *Johnston v Fletcher Construction Co Ltd*.³ The Court observed at [33] that the overarching point is whether the particular case is better suited to an Authority investigation case or to the Court's more formal adversarial processes.

[22] Given the issue of incompatibility, there are likely to be a significant number of witnesses for each party addressing the substance. There will also be witnesses for the CDHB and Dr Humphrey to give evidence about the lengthy investigation and disciplinary processes.

[23] There are no factors in this case indicating that it should not be removed to the Court to hear and determine the matter without the Authority investigating it.

Findings

[24] I find that there are grounds under s 178(2)(a) of the ERA sufficient to permit the removal of the matter to the Court.

[25] Dr Humphrey as a MOH in exercising his powers and fulfilling his obligations under that statutory appointment has protection from civil liability under s 129 of the Health Act 1956. The interplay between the statutory powers, obligations and protection under that Act, Dr Humphrey's contractual and statutory obligations to his employer under the ERA and CDHB's ability to establish justification for the dismissal involves important questions of law. The questions are likely to be more than incidental.

[26] I find that there are grounds under s 178(2)(b) of the ERA to permit the removal of the matter to the Court. There is a public interest in the final resolution of Dr Humphrey's claim for reinstatement, given the prospect that his dismissal might result in the discontinuance of his statutory appointment as a MOH. I accept counsel's submission that the role of MOH is especially important during a global pandemic.

[27] I further find that there are grounds under s 178(2)(d) of the ERA to permit the removal of the matter to the Court. There is likely to be a substantial number of witnesses. The matter is likely to take a substantial amount of time. Substantial resources would be required of both parties. CDHB does not oppose the application and I accept the submission that there are no factors indicating that the matter should not be removed.

³ [2017] NZEmpC 157

[28] For these reasons, I find that in all the circumstances the Court should determine the matter.

Costs

[29] Neither party sought costs on the removal application.

[30] I see no reason to reserve costs. Costs will lie where the fall.

Philip Cheyne
Member of the Employment Relations Authority