IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 708
3064953

	BETWEEN	PETER HUMPHREYS Applicant
	AND	SIAN JIMENEZ HUMPHREYS First Respondent
	AND	CHIEF EXECUTIVE OF THE MINISTRY OF HEALTH Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person. Sally McKechnie, counsel for the second respondent
Investigation:	On the papers and by telephone conference
Determination:	16 December 2019

DETERMINATION OF THE AUTHORITY

A. This matter is removed to the Employment Court to hear and determine.

Employment Relationship Problem

[1] On 28 June 2019 Peter Humphreys lodged an application seeking an Authority investigation of what he described as a health and safety concern arising from his employment as the carer for his high needs intellectually disabled daughter, Sian Humphreys. Because Mr Humphreys' work in caring for his daughter is funded under the Ministry of Health's Family Funded Care (FFC) policy, his daughter is deemed under the requirements of that policy to be his employer.

[2] The Humphreys family had recently moved house. Bathroom modifications needed for care of his daughter were not arranged and made before they moved. He

said the bathroom lacked suitable toileting and showering areas and created risks of falls and hot water burns, both for him and his daughter.

[3] Because of his daughter's inability to comprehend the requirements of employment, and because of the Ministry's role in FCC funding, Mr Humphreys sought a finding that he was really an employee of the Ministry, not his daughter. If such a finding were made, the Ministry could be held responsible for his health and safety at work, which Mr Humphreys considered should include arranging and paying for the bathroom modifications needed for safe care of his daughter.

[4] Such an employment relationship, if found to exist, would be formally be between the Chief Executive of the Ministry of Health and the relevant carer. In his statement in reply, lodged on 29 July 2019, the Chief Executive (hereafter referred to as "the Ministry") denied any such relationship.

[5] This denial meant the Authority would first have to determine a jurisdictional issue about Mr Humphreys' application. Unless the Authority found that the real nature of the relationship between Mr Humphreys and the Ministry was one of employment, it could not make any of the orders that Mr Humphreys sought about what the Ministry should do.[1]

[6] And the Ministry's statement in reply also pointed to two developments concerning the requirement of the FCC policy for recipients of funding to be the employer of their family carers.

[7] Firstly, on 7 July 2019, the government had announced plans to repeal Part 4A of the New Zealand Public Health and Disability Act 2000 (the PHD Act). This part of the PHD Act, inserted by amendments made in 2013 and titled "Family care policies", contained the provisions under which the FFC policy was made. The announcement said the government had heard from families about the need to remove the requirement for an employment relationship between a disabled person and their family member. Health Ministers would "consider alternative options which do not place unreasonable expectations on disabled people, their family or whanau". The announcement said the changes would come into effect in 2020 once legislation had gone through a Select Committee process.

[1] Employment Relations Act 2000, s 6(2) and (3).

[8] Secondly, the Ministry's reply referred to two cases that were then before the Employment Court. Both cases had been removed from the Authority for a ruling by the Court on the issue of whether the Ministry should be considered the employer of family carers working under FCC funding arrangements.[2] At that time those two cases were scheduled to be heard in August 2019. The Court had made arrangements for litigation guardians to be appointed for the two disabled people who were said to be the employers.[3] It had also granted leave for the Council of Trade Unions and the Human Rights Commission to be heard as interveners in those proceedings.[4]

[9] The Authority suspended any further steps in dealing with Mr Humphreys' application pending the anticipated assistance of Court decisions in those two cases. In mid-August media reports revealed both cases had been settled in mediation on confidential terms so there would be no Court hearings on them.

[10] At Mr Humphreys' request his application was then, on 19 August 2019, directed to mediation. On 25 September Mr Humphreys reported the mediation reached no resolution. He asked the Authority to proceed with an investigation of his application.

[11] The parties were advised that the Authority would hold a case management conference in December to consider arrangements for investigation of the preliminary jurisdictional issue in Mr Humphreys' application concerning the real nature of the relationship between him and the Ministry. Integral to that issue was the question of whether a severely disabled person receiving FCC funding had the capacity to enter into and participate in the requirements of the employment relationship said to exist under that policy.

[12] Before the case management conference was held further media reports revealed two new cases had been filed in the Employment Court about the issue of the capacity of severely disabled people to be employers and whether the Ministry of

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[2] EMPC 281/2018 and EMPC 368/2018, removed to the Court in *Moody v Chamberlain* [2018] NZERA Auckland 288 and *Robinson v Robinson & Chief Executive of the Ministry of Health* [2018] Auckland 353.
[3] *Moody v Chamberlain* [2019] NZEmpC 16 (15 February 2019) and [2019] NZEmpC 26 (12 March 2019).
[4] *Moody v Chamberlain* [2019] NZEmpC 43 (9 April 2019).

Health should be identified as the real employer.[5] Referred to as the *Fleming* case and the *Butt* case, both proceedings were filed directly in the Court, so the detail of those applications was not known to the Authority.[6]

[13] In messages sent to the parties before the December case management conference the Authority canvassed three options for steps that could be taken on Mr Humphreys' application in light of the *Fleming* and *Butt* proceedings in the Court and the government's declared intention to amend the legislation about family care and to remove the requirement for an employment relationship between the disabled person and their family carer.

[14] The three options were:

(i) to, once again, adjourn the Authority's investigation of Mr Humphreys' application, pending the outcome of the two new cases in the Court and whatever guidance might be found in those decisions; or

(ii) to schedule an investigation meeting so the Authority could hear and determine the jurisdictional issue in Mr Humphreys case, with available dates likely to be in the May/June 2020 period; or

(iii) to remove Mr Humphreys' application to the Employment Court for it to hear and determine.

[15] The Authority has a discretionary power to consider removal of a matter to the Court, either on the application of a party or on its own motion. Two of the criteria for doing so, relevant here, were if:[7]

> (a) an important question of law is likely to arise in the matter other than incidentally; or
> (b) …; or
> (c) …; or
> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[16] If one or more of those criteria is met, the Authority may remove the matter after considering whether it should exercise its residual discretion not to do so.

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[5] https://www.rnz.co.nz/news/political/401997/disability-advocate-takes-govt-ministers-to-court-over-employment-situation (29 October 2019) and https://www.rnz.co.nz/news/national/403529/family-files-court-papers-naming-govt-ministers-in-challenge-to-caring-for-disabled-children (18 November 2019).
[6] EMPC 340/2019 and EMPC 396/2019.
[7] Employment Relations Act 2000, s 178(2).

Further information

[17] Prior to the case management conference I asked for information from the Ministry about the situation with the *Fleming* and *Butt* cases and about progress with the legislative changes.

[18] By memorandum on 10 December counsel advised that the Ministry understood Cabinet was due to consider a decision on introducing legislation to repeal Part 4A of the PHD Act at its meeting on 16 December 2019.

[19] The memorandum described the *Fleming* and *Butt* cases as two "very similar" matters in the Employment Court, with the Ministry having lodged a statement of defence in the *Butt* matter but awaiting an amended statement of claim in the *Fleming* matter. However a further memorandum from Ministry counsel, lodged on 12 December and addressing the prospect of removing the Humphreys matter to the Court, expressed a different view. It said that, while the three proceedings each concerned FCC, the pleadings in each case involved "materially different fact scenarios, variations in the relief sought, different respondents and overlapping and distinct jurisdictional challenges".

Parties' views on the options

[20] In oral submissions at the case management conference Mr Humphreys asked the Authority to remove his application to the Court.

[21] He referred to the view of the Ministry's counsel, at least as expressed in the 10 December memorandum, that the *Butt* and *Fleming* cases were "very similar" to his. He said he understood the *Fleming* case was not as directly related to the issues arising from the FFC policy. However he said that his case was ready to go ahead in the Court now, whatever delays there might be in dealing with the other two cases.

[22] He was also concerned about the prospect of long delays in whatever legislative changes were contemplated by the government. He said he had been a plaintiff some years ago in litigation about the care of disabled people by family members. This was followed by delay in enactment of legislation creating the FCC policy and, ultimately, proving to be unsatisfactory. He said he wanted the opportunity to have his case heard and decided without further delay and that this should be done in the Court.

[23] The Ministry asked the Authority to adjourn any investigation of Mr Humphreys' application. It opposed removal to the Court. Counsel acknowledged the timeframes for reform of the law were frustrating for people in Mr Humphreys' situation but said the legislative processes had to be followed and, once complete, would "render moot" the solutions he sought.

[24] In response to a question counsel for the Ministry accepted the process of legislative reform planned for 2020 was of uncertain duration. Although the government intended changes to come into effect during 2020, counsel acknowledged it was possible this reform might not be completed in the remainder of the government's parliamentary term.

[25] While the *Humphreys*, *Fleming* and *Butt* proceedings each raised the same jurisdictional issue, counsel for the Ministry said the order in which the Court might eventually hear and decide them was not clear. Neither was it clear that the Court would hear those cases jointly. The Ministry's view was that, while there was an "apparent attraction" to the Court considering the three cases together, joint proceedings were impracticable due to various procedural difficulties with the content of the *Fleming* and *Butt* cases.

[26] However the Ministry's position was that, if the Authority did remove the *Humphreys* case to the Court, the Ministry would then ask for an adjournment in the Court anyway for the same reasons that it sought one in the Authority.

Removal to the Court

[27] For the following reasons, removal of the entirety of Mr Humphreys' application to the Court to hear and determine was appropriate and in the overall interests of justice.

An important question of law

[28] The preliminary jurisdictional issue easily met the statutory requirement that an important question of law was likely to arise other than incidentally. This issue was central to the matter, not incidental. It was also important as the answer would be strongly influential in deciding a material part of the case, with potentially significant

consequences in employment law generally.[8] It involved fundamental questions about the nature of the employment relationship, how it was formed and what capacity was required to be an employer or to meaningfully form an employment relationship. The Ministry's role as the provider of funds and then controlling many aspects of the work, either directly or through two agents delegated to carry out various functions under the FCC policy, raised questions that had to be addressed by certain tests applied when assessing the real nature of the relationship under the process directed in s 6(2) and (3) of the Employment Relations Act 2000 (the ER Act). While those tests largely concerned questions of fact, the application of the PHD Act (and policy made under it) in this particular case raised questions of law that would likely be strongly influential in any decision reached.

The Authority's opinion

[29] While the ground concerning an important question of law was clearly established, other factors also warranted removal on the ground that the Authority was of the opinion that in all the circumstances the Court should determine the matter.

[30] Firstly, the other matters before the Court meant that the jurisdictional issue in Mr Humphreys' case may conveniently, if the Court considers it appropriate to do so, be heard and determined jointly or in sequence with the *Butt* and *Fleming* cases.

[31] However, and secondly, even if the *Butt* and *Fleming* matters were not ready to proceed or the Court considered a joint hearing was not appropriate, Mr Humphreys' case had already been delayed by an earlier adjournment in the Authority.

[32] He was made to wait for the outcome of two other, earlier matters – the *Moody* and *Robinson* cases. Those two cases were removed to the Court on the same jurisdictional issue but both settled in mediation on unknown, confidential terms. As the *Moody* and *Robinson* matters were considered appropriate for removal on that jurisdictional issue, there was no apparent reason or difference in Mr Humphreys' case that suggested it should not be removed on the same grounds. And, if for some reason, the *Fleming* and *Butt* cases did not proceed in the Court, the important question of law arising in Mr Humphrey's case could still be considered on its own.

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[8] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

[33] Thirdly, if further adjournment was appropriate in hearing his application, whether due to imminence of legislative reform or for co-ordination by the Court of joint or sequential hearings with the *Fleming* and *Butt* matters, this could more conveniently and fairly done by procedural decisions made in one employment institution rather than across two.

[34] Fourthly, and related to the third reason, there was inevitable uncertainty about the pace of progress in legislative reform, with consequential uncertainty about how long the current FFC policy and the resulting jurisdictional issue might endure. Again, as a matter of fairness and practicality, one institution rather than two could conveniently make the procedural decisions about whether further delay in hearing and determining that issue was appropriate.

The residual discretion

[35] Having satisfied one or more grounds for removal, the Authority must still consider whether there are any factors that nevertheless weigh against ordering removal of a particular matter.

[36] In this case I did think carefully about whether the Authority could exercise a narrower discretion to remove just part of the matter, that is just the preliminary jurisdictional issue regarding the real nature of the relationship, or by referring (under s 177 of the ER Act) a question of law to the Court.

[37] Referral of a question of law to the court requires a statement of material facts, which in a case of this type might prove challenging to fully but concisely state and could, theoretically at least, restrict the Court from hearing and testing evidence as thoroughly as it could do in a case removed to it for hearing.[9]

[38] Similarly, removing only part of the matter was not likely to be practical or convenient for the parties in this case. However, if the Court had a contrary view and considered the matter was not properly removed (including by removing all of it, not just part), the Court could exercise its discretion to return the matter to the Authority for investigation.[10]

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[9] Employment Relations Authority Regulations 2000, r 11.
[10] Employment Relations Act 178(5).

[39] On balance, the delay to date in progressing Mr Humphreys' case, the importance of the issue regarding the existence or otherwise of employment relationships and capacity to form them, the dynamic and uncertain situation regarding legislative reform and possible synchronising with other matters before the Court, were all factors favouring exercise of the discretion to order removal. I was not persuaded any interests of justice weighed against doing so.

[40] On the Authority's own motion, this matter is removed to the Employment Court to hear and determine.

Robin Arthur
Member of the Employment Relations Authority