

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 441/09
5086872

BETWEEN DENISE ISAAC
Applicant

AND THE MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: K J Anderson

Representatives: M Ryan, Counsel for Applicant
S Turner, Counsel for Respondent

Investigation: On the Papers

Submissions received: 29 October 2009 from Respondent
Nil from Applicant

Determination: 9 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 31st August 2009, a *Statement of Problem* was received by the Authority. This was accompanied by an application for the removal of this matter to the Employment Court. While the application is not as specific as it could be, following a conference call with the parties on 27th October 2009, I understand from Mr Ryan that the application for removal is made on the ground that: *the Court already has before it proceedings which are between the same parties and which involve the same or similar issues.*¹ The proceedings currently before the Court were initiated by the applicant on 2nd July 2008.²

¹ Section 178 (2)(c) Employment Relations Act 2000.

² ARC 47/08.

[2] A *Statement in Reply* was received by the Authority on 18th September 2009. This was accompanied by a *Notice of Opposition* to the application for removal. A conference call was convened by the Authority on 27th October 2009, whereby the parties agreed, following subsequent instructions from the respondent to Ms Turner, that the Authority should decide the application for removal on the papers. The Authority subsequently received brief submissions for the respondent via a letter received on 2nd November 2009.

Background Facts

[3] Ms Isaac originally brought claims to the Authority of: unjustified disadvantage, discrimination on the ground of disability, and a breach of the duty of good faith. A determination was issued on 5th June 2008.³ The Authority did not uphold any of Ms Isaac's claims. As an employment relationship between the parties remained intact and Ms Isaac had been absent from work on medical grounds for some time, the Authority directed the parties to mediation to attempt to resolve two issues. A graduated return to work program for Ms Isaac and, the reasons why Ms Isaac could not be employed at the Westgate office of the Ministry of Social Development ("MoSD").

[4] The parties duly attended mediation on 1st July 2008. Agreement was reached on an outline for facilitating a return to work for Ms Isaac.

[5] On 2nd July 2008, Ms Isaac filed a de novo challenge to the determination of the Authority.

[6] On 19th September 2008, Ms Isaac resigned from her employment alleging that the reason for her resignation was that she was placed: "*...in a work situation which they [MoSD] are aware is emotionally and physically unsafe for me.*" Via a letter of the same date, Ms Isaac's lawyer informed MoSD that Ms Isaac's resignation was in fact a constructive dismissal brought on by the unjustified actions of her employer creating such a disadvantage that resignation was the only option left to her.

³ AA 200/08

[7] The *Statement of Problem* received by the Authority alleges unjustified disadvantage and unjustified constructive dismissal along with claims of a breach or breaches of section 4 of the Employment Relations Act 2000 (the Act).

The Argument for Removal

[8] The grounds advanced in support of the application are sparse and appear to be based to some extent on a re-litigation of the matters heard previously by the Authority (AA 200/08), with the addition of alleged breaches of a memorandum of understanding that was apparently produced from mediation which took place on 1st July 2008. It is alleged that these breaches left Ms Isaac with no option but to resign from her employment with MoSD.

[9] It is advanced for Ms Isaac that the most recent claims of constructive dismissal and unjustified disadvantage are the same or similar or related issues between the parties as those lodged with the Court on 2nd July 2008 (ARC 47/08).

The Arguments in Opposition to Removal

[10] The respondent says that Ms Isaac's claim of constructive dismissal does not involve the same or similar or related issues to the matter that is currently before the Court, hence the criteria set down by s178(2)(c) is not satisfied.

[11] It is also posited that Ms Isaac's constructive dismissal claim relates to one particular matter: Was there a breach of the terms of the memorandum of understanding which led to her resignation?

[12] The respondent also says that the current proceedings before the Court are based on entirely different facts and events that can be dealt with separately and there is no "*overlap*" in the issues currently before the Court and the Authority respectively.

[13] Finally, MoSD says that it potentially loses the right to challenge the factual findings of the Authority if removal is ordered.

Analysis and Conclusions

[14] It seems to me that the discretion of the Authority to order the removal of a matter to the Court begins with an analysis of whether this matter involves “*the same or similar issues*” as the proceedings currently before the Court. An examination and comparison of the Authority’s determination under challenge (AA 200/08) and the *Statement of Problem* (31 August 2009), reveals some similar issues, albeit it could be said that they relate more to background facts rather than the substance of Ms Isaac’s claims. Nonetheless, it is apparent to me that the matters raised in the *Statement of Problem* are of such a concurrent nature that a sufficient nexus exists to conclude that the criteria provided by s178(2)(c) is sufficiently satisfied.

[15] That then takes me to the residual discretion provided by s178(2) whereby:

The Authority may order the removal of the matter or any part of it to the Court ... (emphasis added)

It has been held by the Employment Court that this residual discretion should be exercised to determine whether there are any relevant factors against removal of a matter.

Further, the inquiry must not be on the desirability or undesirability of removing cases, generally, because Parliament has decided some should be removed. Rather, it should be on whether it may be undesirable to remove a particular case.⁴

[16] I am mindful of the argument for the MoSD that removal could result in the potential loss of a right of challenge regarding a determination of the Authority and that any appeal from a decision of the Employment Court on a question of law, can only be by leave of the Court of Appeal. However, against this is the fact that challenges to the Employment Court are often de novo in nature and hence involve a total rehearing of the same issues, often at further substantial cost to the parties. In regard to appeals from the Employment Court to the Court of Appeal, these are relatively rare.

[17] I am also mindful of the background to the matters in dispute. Despite the objects set out in s101 of the Act, it seems that, as with too many other matters which come before the Authority, this dispute is on a determined litigious route rather than

⁴ *Auckland District Health Board v White* (unreported) AC 33/05, Colgan J, 29 June 2005.

taking the less adversarial course of further constructive discussion, or by further alternative dispute resolution such as mediation. So, even if the current matters were to be first determined by the Authority, there is a distinct possibility the parties will arrive at the Court's door sooner or later with substantial costs being incurred along the way, notwithstanding that there may be a less than satisfactory outcome for all concerned, particularly from a financial perspective. It seems to me that it will be a more effective use of the resources of both parties for this particular matter to be removed to the Court. [Having said that, I would suggest the parties may wish to revisit their perceptions of the outcome they are wishing to achieve vis a vis the cost of doing so.]

Determination

[18] Having weighed the respective merits for and against removal to the Court, I conclude that on balance, it is appropriate that this matter be removed to the Court. It is so ordered.

K J Anderson
Member of the Employment Relations Authority