

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 620
3240759

BETWEEN

ITANIA NIKOLAO
Applicant

AND

WAIKATO REGIONAL
COUNCIL
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
Andrea Dunseath, advocate for the respondent

Investigation Meeting: On the papers

Submissions Received: 14 September 2023 for the applicant
13 October 2023 for the respondent

Date of Determination: 24 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Itania Nikolao was a Zone Manager with the Waikato Regional Council (the Council).

[2] Ms Nikolao originally lodged her application with the Authority when she was still employed. She identified a number of concerns including a performance improvement plan and a warning.¹ She had earlier raised a personal grievance for unjustified action which disadvantaged her. The Council replied to the Authority that it had acted in a fair and reasonable manner.

¹ File no 3236119.

[3] Ms Nikolao then lodged an application to have the proceeding removed to the Employment Court.² This was opposed by the Council.

The Authority's investigation

[4] Ms Nikolao applied informally for urgency to be given to her original proceeding but that was declined by the Duty Member.

[5] The Authority called a case management conference about the removal application with Ms Nikolao and the Council's representative. Descriptions were given of the process that usually occurs if a matter is dealt with by the Authority and the situation with removal applications. Ms Nikolao wished to take some time to consider which option she preferred. Two weeks was allowed at her request. The parties agreed that, if the removal application proceeded, an "on the papers" determination would be issued after a timetable allowing for any affidavits or submissions to be filed.

[6] After her consideration, Ms Nikolao told the Authority that she wanted all of her claims, including the removal, investigated. The Authority informed her that it took her comment to mean that she wished to pursue removal. No comment to the contrary was received.

[7] At the case management conference Ms Nikolao had also indicated that she would amend her claim to add an unjustifiable dismissal grievance as she had now been dismissed by the Council. An amended statement of problem with appendices was received. The dismissal grievance will also be part of the removal application consideration below.

[8] Ms Nikolao also provided a "Letter of Memorandum" document which included comment on the removal application. The Council's submissions sought to have the application declined. No material in reply was received.

[9] This determination does not record everything received from the parties but states findings, expresses conclusions on issues necessary to dispose of the matter and specifies orders made as a result.³

² File no 3240759.

³ The Act, s 174E.

The grounds for removal

[10] Removal may be granted if the Authority considers that any or all of the following grounds in s 178(2) of the Act are satisfied:

- (a) An important question of law is likely to arise other than incidentally;
- (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;
- (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.

[11] The grounds specified in Ms Nikolao's removal application were that she was "personally affected, loss of dignity, humiliation, and injury to feelings, including loss of benefits ie wages".

Approach to important question assessment

[12] Chief Judge Goddard provided guidance on the predecessor to s 178(2)(a) of the Act in *Hanlon v International Educational Foundation (NZ) Inc*. In summary, questions of law are to be measured in relation to the case at hand, being decisive or strongly influential to all or a material part of the case.⁴

[13] Questions of law need not be complex, tricky or novel to be important.⁵ To meet the test under s 178(2)(a) the issue must arise other than incidentally, so that the outcome will turn on the answer.⁶

No important question of law

[14] No particular question of law was identified by Ms Nikolao. She no doubt considers her employment relationship problem important to her, but more is required to meet the test here.

⁴ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

⁵ *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

⁶ *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].

[15] I have been unable to identify an important question of law in her unjustified disadvantage or unjustified dismissal personal grievances.

No public interest warranting immediate removal

[16] Ms Nikolao has a personal interest in her employment relationship problem. She does not however identify anything about the case of such a nature or urgency that the public interest would warrant immediate removal. I am also unable to identify anything of that nature here and so s 178(2)(b) is not satisfied.

No other proceedings in the Court

[17] At one point Ms Nikolao informed the Authority that she was progressing the matter in the Employment Court. She also provided to the Authority a Court form, being an Application for Leave. These things suggested she may have initiated proceedings in the Court. However, further investigation suggests otherwise. The Council is not aware of any Court proceeding against it being filed by Ms Nikolao.

[18] In conclusion there is no basis for removal under s 178(2)(c) of the Act.

Other circumstances do not warrant removal

[19] The Authority also has an ability under s 178(2)(d) to remove matters where it considers that in all the circumstances the Court should determine the matter. No other reasons were specifically identified by Ms Nikolao. It cannot be concluded that the circumstances here mean the matter should be removed.

No basis to remove

[20] In the absence of any of the grounds in s 178(2) being satisfied, the conclusion must be reached that removal is not warranted. This is not an assessment about the strength of Ms Nikolao's grievance claims.

[21] The application for removal is declined.

Costs

[22] Costs are reserved and will be dealt with, if necessary, at the completion of the proceedings between the parties.

Next steps

[23] Ms Nikolao's employment relationship problem is to remain with the Authority. Given that a dismissal grievance has now been added, I will consider whether the parties should be directed back to mediation before the Authority investigates the employment relationship problem.

[24] The parties are to inform the Authority by **3 November 2023** of their position on returning to mediation.

Nicola Craig
Member of the Employment Relations Authority