IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 275
5633726

	BETWEEN	ROBERTA RATU Applicant
	A N D	AFFCO NEW ZEALAND LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Simon Mitchell, Counsel for Applicant Max Williams, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions:	27 July 2016 from Applicant 01 August 2016 from Respondent 03 August 2016 from Applicant
Date of Determination:	15 August 2016

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Roberta Ratu seeks an order that her claims under AEA 5633726 against her employer AFFCO New Zealand Limited (AFFCO) be removed to the Employment Court to determine in the first instance.

[2] AFFCO opposes removal. It says there are no grounds to remove this matter to the Court. AFFCO wants the Authority to investigate and determine Ms Ratu's current claims in the first instance in accordance with its usual process.

[3] On 04 July 2016 Ms Ratu filed a Statement of Problem with the Authority claiming AFFCO had unjustifiably disadvantaged her and had breached her

employment agreement by requiring her to attend a disciplinary meeting on 05 June 2016 to discuss allegations of serious misconduct.

[4] A substantive investigation meeting for these claims was set down for 25 July 2016 but that date was vacated by agreement to enable the Authority to first determine this removal application.

[5] Ms Ratu is the Secretary of the New Zealand Meat Workers and Related Trades Union Inc (the Union) at AFFCO's Rangiuru Meat Plant. Ms Ratu's terms and conditions of employment are contained in an individual employment agreement based on an expired collective agreement between the Union and AFFCO.

[6] The background to this matter is that Ms Ratu was dismissed by AFFCO on 22 December 2015. Ms Ratu pursued interim reinstatement and an unjustified dismissal grievance as a result of her December dismissal. She also raised an unjustified disadvantage claim that arose from AFFCO stationing her to work in the Tripe Room.

[7] On 19 February 2016 I ordered AFFCO to reinstate Ms Ratu pending the outcome of her substantive grievance claims. A substantive investigation meeting was set down for 23 and 24 May 2016 in Tauranga to determine her dismissal grievance.

[8] On 23 May 2016 the parties resolved Ms Ratu's dismissal and suspension disadvantage grievances by agreement and a consent determination was issued that reflected that agreement. Accordingly, on 23 May 2016 Ms Ratu's interim reinstatement became permanent.

[9] The Authority gave an oral consent determination at the investigation meeting on 23 May which was recorded in a written consent determination dated 24 May 2016.[1]

[10] The determination of Ms Ratu's Tripe Room disadvantage grievance claim was initially placed on hold to enable the parties to focus their time and resources on her dismissal and suspension grievances determined.

[11] As part of a settlement of her dismissal and suspension grievances Ms Ratu agreed to withdraw her Tripe Room disadvantage grievance (filed under AEA

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5605232) without prejudice to her right to refile that as a separate stand-alone claim at a later date.

[12] The written record of the oral consent determination dated 24 May 2016 is subject to a non-publication order to preserve the confidentiality of the agreed terms of settlement. Because I was the Member who was involved in investigating Ms Ratu's original suspension and dismissal grievances and who issued the consent determination I am aware of the agreed terms of settlement.

[13] On 29 June 2016 AFFCO wrote to Ms Ratu requiring her to attend a disciplinary meeting on 05 July 2016 to discuss three allegations of serious misconduct. AFFCO has agreed to place this disciplinary process on hold until the Authority has been able to determine Ms Ratu's current claims under AEA 5633726, which includes this removal application.

[14] These allegations related to concerns that Ms Ratu made incorrect or misleading public statements about AFFCO and its shareholders or directors. The concerns which gave rise to the latest disciplinary allegations arise from incidences that occurred on 07 and 08 March 2016 and 10 May 2016.

[15] Ms Ratu says that these incidences, which have given rise to the latest disciplinary process, occurred prior to the consent determination being issued so were or must have been known to AFFCO at the time AEA 5605232 was settled.

[16] Ms Ratu says a fair and reasonable employer would not take disciplinary action against her for incidences that occurred after Ms Ratu's interim reinstatement but prior to the agreed settlement of her claims (bar the Tripe Room grievance) under AEA 5605232.

[17] AFFCO says that the settlement of AEA 5605232 involved issues arising from Ms Ratu's suspension and dismissal in December 2015 but did not involve the incidences that allegedly occurred in March 2016 and May 2016, which the current disciplinary process seeks to address.

[18] AFFCO says that the only matters which were compromised by the settlement agreement (and which were the subject of the oral consent determination) were the specific claims investigated and determined (by consent) by the Authority under AEA 5605232.

[19] AFFCO denies Ms Ratu's claims against it. AFFCO says it has not taken any disciplinary action against Ms Ratu but merely wants to speak to her within the context of a formal disciplinary process about specific concerns it has about the three incidences (which occurred in March and May 2016) that are of concern to it.

[20] Ms Ratu was seasonally laid off by AFFCO in March 2016 and AFFCO notified her of the current disciplinary process upon her re-engagement in June 2016. AFFCO says that it has not had a reasonable opportunity to conduct a disciplinary meeting with Ms Ratu regarding the March and May 2016 incidences because (as at 05 July 2016) she had only worked for it four days since the beginning of December 2015.

[21] On 20 July 2016 Mr Mitchell filed submissions on behalf of Ms Ratu which included references to without prejudice correspondence dated 20 May 2016 which was exchanged by the parties in the course of their communications relating to AEA 5605232.

[22] Mr Mitchell in his submissions acknowledged that he was aware AFFCO challenged the admissibility of the 20 May 2016 without prejudice letter prepared in respect of the AEA 5605232 matter. On that basis Mr Mitchell did not provide the Authority with a copy of that without prejudice letter, but instead quoted parts of that letter within his submissions.

[23] Mr Mitchell acknowledged in his submissions that the terms of settlement entered into between the parties regarding AEA 5605232 did not use the exact same form of words contained in the 20 May 2016 without prejudice letter but he says the settlement reached by the parties (which was recorded in the consent determination) reflected a "*very similar provision"*.

[24] Mr Max Williams, on behalf of AFFCO also filed submissions on 20 July 2016 in which he objected to Mr Mitchell quoting extracts from without prejudice communications regarding AEA 560232 to support Ms Ratu's AEA 5633726 claims.

[25] AFFCO says it has not waived privilege for the 20 May 2016 without prejudice communications and it does not consent to the content of its without prejudice communications being put before the Authority. Mr Williams also submits that the 20 May 2016 without prejudice letter is not relevant to the Authority's understanding of the terms of settlement reached by the parties under AEA 5605232.

[26] On 18 July 2016 AFFCO filed an application to exclude the without prejudice letter and/or disclosure of the content of those without prejudice communications. Mr Mitchell filed a memorandum on 20 July 2016 opposing AFFCO's application to exclude that evidence.

[27] I resolved the admissibility issues in favour of AFFCO and concluded that the 20 May 2016 without prejudice letter was inadmissible.

[28] On 21 July 2016 I directed Mr Mitchell to remove the disclosures he had made about the content of the without prejudice letter in his submissions for AEA 5633726 on the basis these were not going to be part of the evidence considered by the Authority when investigating and determining Ms Ratu's current claims.

[29] On 22 July 2016 Ms Ratu filed an application for removal to the Employment Court at Auckland of her matter lodged under AEA 5633726. Ms Ratu relies on s.178(2)(a) and (d) of the Employment Relations Act 2000 (the Act) on the basis that three important issues of law arise, namely:

> (a) Whether the Employment Relations Authority has jurisdiction for reasons of public policy to prevent a party from admitting admissible evidence;
>
> (b) Whether a settlement proposal made on a without prejudice basis in one proceeding between parties is admissible in another proceeding;
>
> (c) Whether an employer is able to raise as disciplinary matters, conduct of an employee of which it was aware at the time it consents to an order of reinstatement of the employee, or such an order is made.

[30] The parties filed submissions and have agreed that the removal application is to be determined on the papers.

Relevant law

[31] Section 178 of the Act allows the Authority to remove a matter to the Employment Court without investigating it if one of the four grounds of removal set out in s.178(2) of the Act are established.

[32] Section 178(2)(a) of the Act allows removal on the grounds an important question of law is likely to arise in the matter other than incidentally. Section 178(2)(d) of the Act enables the Authority to remove a matter to the Court if it is of the opinion, in all the circumstances, that the Employment Court should determine the matter in the first instance.

[33] Section 178(2)(d) gives the Authority flexibility to take into account factors other than those in s.178(2)(a)-(c) of the Act, so that is a mechanism to ensure that other relevant factors favouring removal to the Court may be properly considered.

[34] Issues relating to the Authority's procedure cannot be removed to the Court. Section 178(6) of the Act expressly precludes a party from removing an issue about the Authority's procedure (that it has followed, is following, or is intending to follow) or about whether the Authority may follow or adopt a particular procedure.

[35] Section 179(5) of the Act provides that procedural issues may not be the subject of a challenge to the Court. Section 188(4)(b) of the Act expressly states that it is not for the Court to advise or direct the Authority in relation to its investigative role, powers, jurisdictional procedures.

[36] The Authority's approach in this matter requires it to determine whether or not Ms Ratu's application for removal involves an important question of law that is likely to arise other than incidentally and/or whether or not in all the circumstances the Employment Court should determine her current claims in the first instance.

[37] If one or both of these statutory grounds for removal are met then the Authority must consider whether there are any relevant factors against it exercising its residual discretion to remove the matter to the Court.[2]

[38] This is distinct from considering whether the case should be removed. Instead the Authority's focus at that point is on whether there are factors that make removal to the Employment Court for determination in the first instance undesirable.

[39] The Employment Court in *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v. Carter Holt Harvey Ltd*[3] set out a number of discretionary factors to be considered when assessing whether or not the discretion to remove in s.178 should be exercised.

Issues

[40] The following issues are to be determined:

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[2] *ADHB v X (No 2)* [2005] ERNZ 551 at para.[29].
[3] [2002] 1 ERNZ 74 at para.[83]

(a) Does this matter involve an important question of law that is likely to arise other than incidentally?

(b) Is the Authority of the opinion that, in all the circumstances, the Employment Court should determine this matter in the first instance?

(c) Are there any factors which make removal to the Employment Court undesirable in this particular case?

(d) What, if any, costs should be awarded?

Does this matter involve an important question of law that is likely to arise other than incidentally?

[41] The mere fact that a question of law may exist does not automatically satisfy the requirements of s.178(2)(a) of the Act. The question of law must also be an important question of law.

[42] A question of law will be important if its resolution may potentially affect large numbers of employers or employees or both or if the consequences to the answer to the question of law are of major significance to employment law generally[4].

[43] A question of law will be important if its decisive of the case or if some important aspect of it or strongly influence shall, in bringing about a decision of it, or a material part of it.[5]

[44] Mr Mitchell identified three potential questions of law which he submits are important questions of law likely to arise other than incidentally. I deal with each of these in turn.

Question 1 – whether the Employment Relations Authority has jurisdiction for reasons of public policy to prevent a party from admitting admissible evidence

[45] I do not consider this is an important question of law that arises other than incidentally.

[46] The Authority deals with admissibility of evidence issues on a daily basis and it has a wide jurisdiction to identify what evidence will be admissible in respect of any particular matter it is investigating.

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

5 Ibid

[47] Section 160(1)(f) of the Act expressly permits the Authority to follow whatever procedure it considers appropriate. Part of the Authority's usual procedure involves identifying what evidence will be admissible. This may also include identifying specific evidence is not admissible, as was the case with the without prejudice letter in issue.

[48] Section 160(2) of the Act expressly permits the Authority to take into account such evidence and information as in equity and good conscience it thinks fit whether strictly legal or not.

[49] I consider the question Mr Mitchell has posed is effectively asking the Court to issue a decision which seeks to limit or restrict the Authority's power under s.160(2) of the Act. Whether or not any particular without prejudice communication is admissible in a particular case the Authority is investigating is within the Authority's exclusive jurisdiction.

[50] The Authority is expressly permitted to make decisions about admissibility of evidence in *"equity and good conscience it thinks fit, whether strictly legal evidence or not."* [6]

[51] It is open to the Authority to have regard to public policy considerations in addition to any other relevant or appropriate factors when considering whether or not to admit disputed evidence or information.

[52] Disputes between parties regarding admissibility of evidence are very common. In accordance with its express jurisdiction, the Authority deals with such disputes on a case by case basis which allows it to consider the particular circumstances of each dispute within the context of a particular matter.

[53] I therefore find that question 1 will not assist or affect large numbers of employers or employees or both, or that the consequences of the Court's answer to it are of major significance to employment law generally.

[54] I consider question 1 relates to decisions by the Authority about its process and procedure, which in accordance with s.178(6) of the Act are not grounds for removal.

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[6] Section 160(2) of the Act.

Question 2 – whether a settlement proposal made on a "without prejudice" basis in one proceeding between parties is admissible in another proceeding

[55] I do not agree that this is an important question of law that is likely to arise in Ms Ratu's case other than incidentally.

[56] I consider that question 2 involves a question about what evidence the Authority may or may not decide is admissible. On that basis I consider it is another example of a process or procedural issue which is not grounds for removal.

[57] Whether or not a particular without prejudice communication is admissible in a specific matter which the Authority is investigating should (as per s.160(2) of the Act) be subject to a decision by the Authority Member who with dealing with the matter, so that the particular circumstances of the situation can be appropriately considered.

[58] I consider question 2 is a general and hypothetical question which is posed in a vacuum. Admissibility of evidence decisions made by the Authority in cases before it always consider all the circumstances of a particular case so an answer by the Court to question 2 is unlikely to assist the Authority with the exercise of its power to admit evidence under s.160(2) of the Act because the Authority's power to consider evidnce and information is not limited to *"strictly legal evidence"*.

[59] The Employment Court has already provided guidance about when a settlement agreement restricts parties' ability to pursue other claims against each other in *Marlow v Yorkshire New Zealand Limited*[7].

[60] I realise that what is in issue in Ms Ratu's case are without prejudice communications leading up to a settlement agreement, but I consider the case law relevant to parties' ability to pursue a claim where the parties have previously reached an agreed settlement is likely to be more relevant in this case than a determination by the Court of a hypothetical question relating to without prejudice communications.

[61] I find that question 2 is not an important question of law that arises other than incidentally because its resolution does not affect large numbers of employers, employees or both. Nor is it likely to have major significance to employment law generally.

[7] [200] 1 ERNZ 206.

Question 3 – whether an employer is able to raise as disciplinary matters, conduct of an employee of which it was aware at the time it consents to an order of reinstatement of the employee, or such an order is made?

[62] I am not satisfied that this is an important question of law that arises other than incidentally.

[63] This question is at the heart of Ms Ratu's disadvantage grievance and breach of contract claims which are yet to be investigated by the Authority. I consider question 3 is another generalised and hypothetical question which attempts to limit the Authority's ability to investigate and substantively determine Ms Ratu's current claims.

[64] I do not accept that the answer to question 3 is of major importance. I consider that an answer by the Court to question 3, which is posed in broad terms, would only be of assistance to the employment institutions if it was examined within the context of a specific fact scenario, so that the particular facts and specific circumstances of a particular case are properly considered. That is exactly what the Authority has been set up to do in the first instance.

[65] I am not satisfied that question 3 is an important question of law. Its resolution will not affect large numbers of employers or employees or both. Nor am I satisfied that this question will be of major significance to employment law generally.

Is the Authority of the opinion in all the circumstances that the Court should determine this matter?

[66] I do not consider this is an appropriate matter to remove to the Court to determine in the first instance. None of the tests for removal in s.178(2)(a)-(c) of the Act have been met. I find that there are no other good reasons or grounds to remove this matter to the Court so s.178(2)(d) has not been met.

[67] The Authority is well placed to investigate and determine the issues which Ms Ratu is raising in her latest Statement of Problem. There is nothing unusual, novel, difficult or challenging about the claims that Ms Ratu is bringing before the Authority. It is well within the Authority's capabilities to deal with such matters, it has been set up to do so and it has extensive experience of doing exactly that.

[68] I consider this is an example of a party wanting to challenge a procedural direction by the Authority regarding admissibility. I do not consider that removal to the Employment Court in the first instance is an appropriate way of dealing with that.

[69] I do not accept Mr Mitchell's submission that removal is the most efficient way for the parties to be assisted by timely resolution of the substantive dispute. It is likely, given the various workloads of the respective employment institutions that Ms Ratu's claims can be investigated and determined more quickly by the Authority than the Employment Court.

[70] Neither party gave the Authority information as to when the Employment Court would be able to hear this matter were it to be removed. However from my understanding of the Employment Court's schedule, it is unlikely that this matter would have a substantive decision issued within the next three months, which is much more likely if the matter remains with the Authority.

[71] I also do not accept Mr Mitchell's submission that this matter involves important issues for the wider industrial relations community. The admissibility of the without prejudice communication was considered by the Authority within the context of Ms Ratu's particular case.

[72] It is possible that a different case with a different factual matrix and different claims may have a different outcome due to the Authority's wide power under s.160(2) of the Act to consider evidence and information whether strictly legal or not.

[73] The Authority has been designed to allow the parties an opportunity to resolve their issues in a speedy manner in a low level, lost cost forum. To remove this matter would deprive one party of the statutory right of challenge and that is undesirable in the circumstances.

[74] I consider this matter involves a relatively straightforward investigation into whether or not AFFCO has unjustifiably disadvantaged Ms Ratu and or breached her employment agreement by requiring her to attend a disciplinary meeting.

[75] I do not consider that Ms Ratu's claim is of an urgent nature or that there is any public interest in the matter being removed to the Employment Court. I am also not convinced that this matter will have any precedent value as the Authority's

substantive determination regarding Ms Ratu's claims is likely to be limited to the unique circumstances of her situation.

[76] There are no proceedings involving these parties currently before the Employment Court so it is not necessary to remove it to avoid unnecessary duplication of resources by the employment institutions.[8]

[77] Mr Mitchell submits that the issue of admissibility relating to the without prejudice letter dated 20 May 2016 makes it appropriate for the matter to be removed to the Court. I do not agree with that.

[78] I consider that submission is an attempt to override the Authority's preliminary decision regarding admissibility of evidence which did not go in Ms Ratu's favour. I consider that decisions regarding admissibility of evidence are a normal part of the Authority's usual investigation process and procedure so cannot be challenged and do not give grounds for removal to the Court.

Outcome

[79] I find that none of the three questions posed by Mr Mitchell meet the test for removal set out in s.178(2)(a) of the Act. I also find that s.178(2)(d) does not apply because in my opinion Ms Ratu's claims should be determined by the Authority in the first instance, not the Court.

[80] I find that none of the tests in s.178(2) of the Act have been met so there is no basis to order removal of this matter to the Court.

What, if any costs should be awarded?

[81] Costs are reserved pending the outcome of Ms Ratu's substantive claims.

Rachel Larmer
Member of the Employment Relations Authority

[8] I am aware of litigation involving AFFCO and the Union, but this current matter involves Ms Ratu personally rather than the Union.