

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 575
3156281

BETWEEN	TALENT PROPELLER LIMITED Applicant
AND	YJL Respondent

Member of Authority:	Marija Urlich
Representatives:	Richard Upton, counsel for the Applicant Ashleigh Fechny, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions received:	26 November 2021, from Applicant 19 November and 29 November 2021 from the Respondent
Determination:	22 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Talent Propeller Limited (Talent) applies to have applications 3093872 and 3140141 removed to the Court.¹ YJL opposes the application.

The Authority's investigation

[2] On 15 November 2021 Talent filed a removal application with urgency. On 16 November a case management conference was convened to timetable the removal

¹ Section 178 of the Employment Relations Act 2000.

application and deal with other matters associated with the substantive applications including vacation of the scheduled investigation meeting and rescheduling to dates in May 2022. Urgency was granted and a timetable for filing submissions and supporting evidence in respect of the removal application was set. The timetabling directions were recorded in a minute dated the same day.²

[3] The parties have complied with the timetable. No affidavit evidence was filed in support of removal. The parties' submissions are referred to below.

How can removal be sought?

[4] Implicit in any application for removal is that the application is properly before the Authority because the Authority has jurisdiction to determine the dispute between the parties. This is true for this application. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.³

[5] In addition the Authority has the ability to deal with any question related to the employment relationship including any question connected with the construction of the employment agreement, the Employment Relations Act or any other Act which arises during the course of any investigation.⁴

[6] As stated by the Court of Appeal in *Gill v Pizza*:

...removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.⁵

[7] This appears to be the situation here – an issue for which the Authority has jurisdiction to deal with appears to have arisen during the course of the investigation of this employment relationship problem. How then can removal be sought?

[8] The Authority is constrained in its ability to remove proceedings before it to the court by s 178(2) of the Act. Four grounds of removal are set out in s 178(2) of the Employment Relations Act. Talent seeks to rely on two of those grounds:

² Sixteenth Minute 3093872, 3140141 and 3156281, 16 November 2021

³ Employment Relations Act 2000, s 161(1).

⁴ Employment Relations Act 2000, schedule 2, clause 1.

⁵ *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors* [2020] NZCA 192.

- An important question of law is likely to arise other than incidentally; and
- The Authority is of the opinion that in all the circumstances the court should determine the matter.⁶

[9] In the event a party or parties applying for removal satisfy the tests set out in s 178(2) the Authority has residual discretion to determine whether or not the matter should be removed to the court.⁷ Any relevant factors against removal must be considered.⁸ In *NZAEPMU Inc v Carter Holt Harvey Ltd* the Court considered a range of factors in favour of declining removal including:

- It is not inevitable that there will be a challenge by any party to the Authority's determination. Outcomes in that forum are not necessarily stark wins or losses of everything at stake. The Authority's methodology and remedial powers enable it to craft solutions that parties can, by modifying their behaviours towards each other, live with. That is the scheme of the legislation Parliament intended to apply now and henceforth in employment relations.⁹

What is the test for an important question of law?

[10] In *Hanlon v International Educational Foundation (NZ) Inc* Chief Judge Goddard said in respect of the predecessor provision to s 178:

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.¹⁰

⁶ Employment Relations Act 2000, s 178(2)(a) and (d).

⁷ *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 561- 562.

⁸ *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at 83.

⁹ *Ibid* at 83 – 84.

¹⁰ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at [7].

[11] *Hanlon* confirms that the context of the case is a relevant factor in assessing the importance of a question of law.

[12] Questions of law do not need to be complex, tricky or novel to be important.¹¹ The s 178(2)(a) test is met if the issue arises other than incidentally so that the outcome turns on the answer.¹²

Discussion

[13] Talent submits this case involves important questions of law which have not been subject to judicial scrutiny namely:

- (i) Does the duty of good faith under section 4 of the Act apply to communications exchanged during the application for employment (even when those communications precede the formation of the formal employment relationship)?
- (ii) Is there any ability to impose a penalty against a party regarding conduct that occurred before an employment agreement was formed?
- (iii) In circumstances where an individual brings a personal grievance claim against his/her previous employer, does the outcome of that claim have any relevance as to whether a non-publication order should be ordered over their identity?

[14] Talent submits the questions of law posed involve statutory interpretation “of considerable general importance” particularly with regard to the s 4 good faith obligations and non-publication provisions of the Act and its schedules. Talent also submits these questions will be central, not incidental or peripheral, to the claims the parties bring against one another and that at least one of the questions is important.

[15] Careful consideration has been given to Talent’s submissions that the questions posed are central and not incidental to the employment relationship problem before the Authority. I do not agree – they are matters incidental to the factual issues before the Authority for resolution which include when the employment relationship between the

¹¹ *Johnson v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

¹² *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].

parties formed and when formation of the parties' employment agreement falls within the jurisdiction of the Authority. With respect to the non-publication order question the issue raised appears to be what factual matters might be relevant to non-publication orders sought which is an assessment of the merits of such an application. The Authority is well able to assess such issues, including those concerning jurisdiction, and draw on existing guidance as to good faith obligations, penalties and non-publication orders. Further the litigation context in which these issues have arisen draw against finding the test has been met – the context is set out in detail below and speaks for itself.

[16] Having considered whether the s 178(2) test has been met I must now consider whether the residual discretion not to remove this particular case should be exercised. Talent have raised a number of issues which it submits weigh in favour of removal and it submits further there are no factors against removal including no prejudice to YJL, the substantive investigation has not commenced, evidence has not been filed, the likely date of hearing and high likelihood of challenge. The principles for the Authority's exercise of that residual discretion were described in *Auckland District Health Board v X (No 2)* in this way:

...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.

The legislative scheme makes paramount, satisfaction of one or more of the express statutory tests for removal. The discretion then remaining is residual and should not be employed to re-litigate, avoid or defeat the statutory test or tests established. Rather, it should be applied to determine whether there may be a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests.

That is reinforced by the addition of the new fourth test for removal (subs (2)(d)) in the 2000 legislation. It cannot have been Parliament's intention to provide both for new broad discretionary grounds for removal and then the exercise of a second independent but otherwise identical discretion. The addition of the new subs (2)(d) reinforces the conclusion that the Authority's discretion under s 178 is both residual and intended to determine whether there are factors against removal.¹³

[17] In this particular case a factor against removal is part of Talent's claim has already been heard and determined by the Authority and the balance of Talent's claim and YJL's claim are scheduled for dates in May 2022, having been rescheduled twice.

¹³ *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 561- 562.

The parties have agreed that a further matter between them will be heard at the same time. In addition, a related dismissal application has been heard and determined by the Authority and a determination is pending by the Authority of an issue concerning provision of a relevant document. The employment relationship problems between the parties are squarely before the Authority the investigation of which is not yet complete.

[18] While the procedural history of this matter before the Authority has been occasioned by some complexity, including matters challenged to the Court, the matter is before the Authority for determination and progress with the investigation of the employment relationship problem is being made. Talent may, perhaps perceiving that the dispute is intractable or has intractable features, as indicated in its submissions, seek a ‘circuit-breaker’ by way of removal to the court. Parties come before the Authority because they are in dispute and seek resolution of that dispute using the statutory scheme. To remove a matter because it is perceived as intractable or difficult, or has features of such, does not weigh in favour of removal because such factors cannot be said to be unusual features of matters before the Authority. Indeed, it would not be in the public interest to remove matters on such grounds. With respect to the inevitability of challenge that may well be Talent’s view but it is not a given in light of the statutory scheme and the progress of this matter, including determinations which have not been challenged.

[19] Given the above matter, including the litigation context, though questions are raised, they do not meet the removal test of an important question. Similarly removal would not be in the public interest. However, even if one or two arms of the s 178 test are accepted as established, I consider the objects of the Employment Relations Act are good and sufficient reasons for exercise of the residual discretion not to remove this particular case.¹⁴

Should removal be granted?

[20] For the reasons set out above the application for removal is declined.

¹⁴ Employment Relations Act 2000, s 3(a)(i) and (vi).

Costs

[21] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority