

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 637  
3075672

BETWEEN            THOMAS VISAGE  
                                 Applicant  
  
AND                    WORKSAFE NEW ZEALAND  
                                 Respondent

Member of Authority:     Michael Loftus  
  
Representatives:           Ashley Sharpe, counsel for Applicant  
                                 Greg Cain and Jessica Taylor, counsel for Respondent  
  
Investigation Meeting:     On the papers  
  
Submissions Received:     Various exchanges between 27 September and  
                                 30 October 2019  
  
Determination:             6 November 2019

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**DETERMINATION OF THE AUTHORITY**

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[1]     The applicant, Thomas Visage, claims the respondent, Worksafe New Zealand (Worksafe), has both unjustifiably disadvantaged and then unjustifiably dismissed him.<sup>1</sup> He also claims Worksafe breached the duty of good faith and its obligation to provide a safe workplace.

[2]     Worksafe strenuously denies the claims.

[3]     The substantive claims are now scheduled for an investigation meeting but it would appear participation in various preparatory discussions has given Mr Visage cause to consider the issues. As a result he now considers it more appropriate the

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<sup>1</sup> File 3041415

Employment Court hear his claims in the first instance and asks his substantive claims be removed.

[4] Worksafe opposes the application.

[5] It is the removal application this determination addresses.

### **Discussion**

[6] Section 178(2) of the Employment Relations Act 2000 provides:

The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(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; or

(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.

[7] Mr Visage's prime assertion is there is an important question of law that arises other than incidentally.<sup>2</sup> The question is:

Is an employer who has undertaken to partner with its employees (through a collective agreement) to deliver "*an absolute commitment*" to ensuring the health, wellbeing and safety of the employee and to accord that obligation "*the highest priority*" thereby at law held to have assumed responsibility for **all** losses suffered by the employee where the employer fails to discharge that obligation, irrespective of whether such losses are reasonably contemplated or not.

[8] It is argued the question poses issues wider than the simple determination of liability as they are of general importance affecting all of the respondent's employees.

[9] Mr Visage is also of the view there are additional issues which might persuade me to consider removal. While not expressly stated these appear to constitute a request I consider removal pursuant to s 178(2)(d). They are that:

- a. There are going to be significant differences between the parties which will render credibility a material issue. It is said that makes this a

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<sup>2</sup> Section 178(2)(a) of the Employment Relations Act 2000

matter better determined by way of an adversarial process before the Court as opposed to an investigative one before the Authority.

- b. Mr Visage also asserts it is inevitable the matter will be challenged *de novo* irrespective of which party succeeds in the Authority. It is submitted that as the witnesses are from diverse locations and include medical practitioners who would be required to be absent from their practices this would impose unreasonable additional costs given the duplication of hearings.
- c. A second cost issue arises as Mr Visage says he has only been capable of proceeding as a result of counsel agreeing to charge in the event of success though the arrangement does not cover multiple hearings. As a result he only has *one shot* with legal assistance.
- d. Finally it is argued there was, at the time of lodging the application, a large amount of documentary material which might prove or disprove the parties' claims but which, it is alleged, the respondent had not disclosed. It is argued a Court process will enable formal discovery *if necessary by way of interlocutory application*. It is also said this has a direct bearing on costs as, again, it requires *a process (albeit to different levels) that would be duplicated in any de novo challenge*.

[10] The prime assertion is removal should occur given the existence of an important question of law. The difficulty with this is the question does not, in my view, pose an important legal issue. The question involves potential remedies should Mr Visage be successful.

[11] On this, and notwithstanding Mr Sharpe's attempt to convince me otherwise, I agree with Mr Cain. The principles involved in assessing damages are well established and frequently practiced in the Authority. This is, to be blunt, the Authority's bread and butter.

[12] As to a possible effect on others it should be remembered this is a personal grievance. Assuming Mr Visage is successful remedies will depend on his personal situation and the effect the employers wrongdoing had on him. It does not extend to his colleagues and I note the provision said to give rise to the question might not

apply to all as not all are necessarily covered by the collective agreement. As already said, I fail to accept the existence of an important question of law.

[13] It is, I suspect, the ancillary issues which are the real reason behind this application and, in particular, Mr Visage's fear he may be disadvantaged should the matter proceed to the Court after an Authority determination.

[14] One of the points raised here is the likelihood of challenge. I find that unpersuasive. As the Employment Court has previously said, such claims should be treated with considerable caution.<sup>3</sup>

[15] In rejecting this argument I also note the Court's observation in *Stewart* that *An investigation by the Authority may give the parties insights they did not have prior to that process or lead to a compromise they did not anticipate*. This is an observation not dissimilar to Mr Cain's submission removal might deprive both parties of the ability to appeal from the Employment Court as that is limited to points of law and excludes arguments about the construction of an employment agreement. Mr Cain appears correct when he says that would render an appeal in this matter difficult given it appears one of the most significant claims concerns an alleged breach of contract.

[16] Removal has the potential to deprive both parties of rights they would normally enjoy. The potential cost argument does not, in my view, outweigh that consideration and given I am unaware of any decision which supports a contention cost constitutes a grounds for removal in this jurisdiction.

[17] There is then the argument credibility is likely to be a significant factor and that renders the claim more suited to the Courts adversarial approach as opposed to the Authority's investigative one. Again I disagree. The Authority regularly deals with credibility issues and as was said by one of my colleagues there is no evidence that the asking of questions by an investigator is any less successful at eliciting the truth than the asking of questions by counsel.<sup>4</sup> This is especially true given counsel has an opportunity to question in any event.<sup>5</sup>

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<sup>3</sup> *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at [40]

<sup>4</sup> *Auckland District Health Board v X* (Employment Relations Authority Auckland, 10/6/2005, AA171A/05, Member King)

<sup>5</sup> Section 160(2A) of the Employment Relations Act 2000

[18] Turning now to the argument regarding discovery. For two reasons this also fails to convince. First a telephone conference with the parties on 30 October would lead me to conclude that with one exception the issues have now been resolved. With respect to that issue I note the second point which is that while the Authority does not have powers of discovery in the conventional sense, it does have the power to require the production of relevant evidence.<sup>6</sup> The remaining discovery item is one that has been raised but which Mr Visage has failed to convince me is relevant to the extent I should consider demanding the production of relevant documents.

[19] Finally both parties discuss the issue of delay in their submissions. While I accept the application has taken what Mr Sharpe describes as a tortuous route, I have to say virtually all delay must be attributed to issues Mr Visage has had in advancing his application and cannot be laid at Worksafe's door. I also agree with Mr Cain when he says that to remove now is more likely to result in further delay as, for various reasons mainly attributable to issues of case management alluded to in Mr Visage's application ([9](d) above), the Court is extremely unlikely to be able to schedule a fixture prior to that already in place in the Authority.

### **Conclusion**

[20] For the above reasons I conclude this is not a matter that should, or in all probability given the law can, be removed to the Employment Court. The application fails.

[21] Costs are reserved though I suggest they best await consideration as part of the wash up after the substantive claim is determined.

Michael Loftus  
Member of the Employment Relations Authority

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<sup>6</sup> Section 160(1)(a) of the Employment Relations Act 2000