Attention is drawn to the order in paragraphs [7] to [14] prohibiting publication of certain information in this matter.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 108
3261519

BETWEEN	YQO Applicant
AND	MYN Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael O'Brien, counsel for YQO Daniel Church, counsel for MYN
Submissions:	14 and 19 February 2024 from the Applicant 16 February 2024 from the Respondent
Investigation Meeting:	On the papers
Determination:	26 February 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, YQO, seeks an order for removal to the Employment Court pursuant to s 178(2) of the Employment Relations Act 2000 (the Act), on the grounds that:

> a. an important question of law is likely to arise in the matter other than incidentally;
> b. …
> c. …
> d. the Authority is of the opinion that in all the circumstances the court should determine the matter.

[2] The Respondent, MYN, opposes removal on the basis that none of the grounds pursuant to s 178(2) are met.

[3] MYN has applied for an interim and a permanent non-publication order of the name of the company, its directors, and any other identifying particulars.

The Authority's Investigation

[4] The Authority has determined this matter by agreement with the parties on the papers, that is based upon the application and submissions therein received from YQO and from MYN.

[5] Written submissions were received from Mr O'Brien for YQO and Mr Church for MYN. Whilst I have not referred to all the submissions made by the parties in this determination, I have fully considered them.

[6] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Non-Publication Orders

[7] MYN seeks interim non-publication orders on the basis that YQO has made "a number of serious and incendiary accusations" against MYN and its directors in her Statement of Problem, including accusations of "blackmail" and potentially fraudulent behaviour in respect of its sales figures. These untested allegations have the potential to cause serious reputational damage to the company and its directors if they become a matter of public record.

[8] YQO does not oppose interim non-publication orders being granted to MYN, but it is further submitted that she also seeks non-publication orders in relation to herself. MYN concurs that an interim non-publication order would be appropriate in respect of YQO herself, since identification of her risk's identification of MYN and/or its directors.

[9] The principle of open justice and the importance of that concept has been emphasised by the courts on many occasions, noting the judgments in *H v A Limited, XYZ v ABC, Crimson Consulting Ltd v Berry* and the Supreme Court decision in *Erceg v Erceg*.[1]

[10] In the latter case, the Supreme Court noted that a high standard must be met before departing from the principle of open justice.[2] As a consequence there must be specific adverse consequences or other sound reasons to order non-publication.

[11] I have carefully considered this issue. It is a serious matter to issue a non-publication order which sets aside the important principle of open justice.

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[1] *H v A Ltd* [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017]NZ EmpC 40; *Erceg v Erceg* [2016]NZSC 135
[2] *Erceg n1 above at [63] and [69]*

[12] In this case I find the allegations made by YQO in the Statement of Problem are serious in nature and have the potential to cause reputational damage to MYN before the claims are tested by evidence and investigation.

[13] On that basis, I consider that there are grounds sufficient to justify the making of an interim order.

[14] Accordingly until the matter is heard by the Authority, I order that the names of the parties and any information which might lead to their identification is prohibited from publication.

Brief Background Facts

[15] YQO commenced employment in the capacity of a Sales Manager with MYN on 5 June 2023. She was provided with an individual employment agreement which she signed on 18 May 2023 (the Employment Agreement).

[16] The Employment Agreement contained a trial period clause which stated:

> **Trial period**
>
> The first 90 days of employment will be a trial period, starting from the first day of work.
>
> During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.
>
> During the trial period, the employer's normal notice period doesn't apply. Instead, either the employee or the employer may end this agreement by giving one weeks' notice. Document 4.1 before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.
>
> If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, eg discrimination, harassment or unjustified disadvantage.
>
> During the trial period, the employer and employee must treat each other in good faith.

[17] Shortly after her employment commenced YQO overheard a conversation between two senior employees of MYN which she believed pointed to serious wrongdoing in relation to sales figures, and she claims to have raised concerns about what she had overheard verbally on three occasions with a director of MYN.

[18] On 13 July 2023 YQO was asked to attend a meeting off-site with two of the management team. Later that day, she was informed in writing that her employment was to

end pursuant to the trial period clause in the Employment Agreement on one week's notice, effective that day.

[19] On 21 July 2023 YQO's counsel wrote to MYN raising personal grievances for unjustifiable dismissal and unjustifiable disadvantage.

[20] On 7 November 2023 YQO lodged a Statement of Problem in the Authority claiming personal grievances for unjustifiable dismissal and unjustifiable disadvantage and raising a personal grievance for MYN's "retaliatory actions against her for the making of one or more protected disclosures pursuant to s 103(k) ERA 2000."

[21] MYN lodged a Statement in Reply denying that YQO was unjustifiably disadvantaged.

[22] On 8 November 2023 YQO lodged an application for removal of the matter to the Court. That same day, 8 November 2023, MYN lodged a Notice of Opposition to the removal application.

[23] This determination addresses the application for removal of this matter to the Employment Court.

Submissions by YQO

[24] In support of its application to have this matter removed to the Employment Court, counsel for YQO relies on the following grounds pursuant to s 178(2)(a) and (d) of the Act as follows.

Section 178(a) Important Questions of Law

[25] Counsel for YQO submits that there are four important questions of law which meet the grounds for removal. The first three questions are related and stated as:

> **Question 1**
>
> Is an employer entitled to rely on the operation of s 67B of the Act in dismissing an employee where that dismissal is a retaliatory action within the meaning of s 103(1)(k) of the Act?
>
> **Question 2**
>
> If so, does that prevent an employee from bringing a claim in respect of the dismissal if that dismissal is a retaliatory action within the meaning of s 103(1)(k) of the Act?

Question 3

How does s 103(1)(k) of the Act (introduced on 1 July 2022) operate in practice?

[26] YQO submits that there arises a fourth question which is:

Question 4

By including a specific reference to good faith in a trial period, is an employer entitled to rely on the trial period clause where it has failed to act in accordance with the contractual requirement?

Removal

[27] Sections 178(1) and (2) of the Act state:

178 Removal to court :

(1) The Authority may, on its own motion, or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

(2) 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.

The Legislation

[28] For the purposes of this determination, the relevant legislation is set out in s 67A and 67B of the Act and s 103(1)(k) of the Act. Section s 67B (1) to (3) of the Act states:

67B Effect of trial provision under section 67A

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

(3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (k).

[29] Section 103(1)(k) of the Act states:

> That the employer has retaliated, or threatened to retaliate, against the employee in breach of section 21 of the Protected Disclosures (Protector of Whistleblowers) Act 2022 (because the employee intends to make or has made a protected disclosure).

Submissions of YQO

[30] YQO submits that the expressed intent of Parliament in enacting s 67B(3) of the Act is that the operation of a trial period does not preclude an employee from raising a personal grievance for, *inter alia*, retaliation for making a protected disclosure.

[31] Consequently it is submitted that it cannot be true that an employee dismissed pursuant to a trial period can take no action in respect of the dismissal, but also not be prevented from bringing a personal grievance under s 103(1)(k) of the Act. It is submitted that the Court is best placed to resolve this issue of statutory interpretation which is posed for Questions 1 and 2.

[32] It is submitted that if the trial period is found to have been complied with by MYN in dismissing YQO, then whether or not s 67B of the Act prohibits her from pursuing a grievance under s 103 of the Act will be decisive of an important part of the case. This is on the basis that the questions of law posed are likely to assume significance in employment law generally in other cases of trial period dismissals combined with protected disclosures. It is submitted that:

a) There is no substantive precedent regarding the Protected Disclosures Act 2022 (the PDA 2022) from any body or court.

b) There is a strong public interest in having these difficult issues/questions of law determined by the Court in the first instance because new employees are uniquely positioned to uncover serious wrongdoing in companies (and make protected disclosures); and so it is of high importance that the Court sets out the applicable law, notably whether employers can legally dismiss employees pursuant to a trial period, where that dismissal is in retaliation within the meaning of s 21 of the PDA 2022.

c) Given the extension of trial periods being extended to potentially apply to all employment relationships, the questions of law posed could conceivably apply to all employment relationships.

[33] In relation to Question 4 YQO notes that s 67B(5)(a) of the Act expressly states that the employer is not required to comply with the statutory duty of good faith set out in s 4 of the Act when deciding whether or not to dismiss the employee pursuant to a trial period.

[34] It is submitted for YQO that in the Employment Agreement the parties expressly contracted to deal with each other in good faith, therefore MYN cannot rely on the trial period clause if it did not comply with the mechanics of that clause.

[35] It is submitted that if MYN was required to comply with good faith in accordance with the Employment Agreement, and it is found to have failed to do so, then Question 4 is engaged. If MYN is found not entitled to rely on the trial period provision in those circumstances, then YQO may proceed with her claim for unjustifiable dismissal.

[36] On that basis it is submitted that viewed in isolation from Questions 1,2 and 3, Question 4 may be decisive of a large part of the matter.

[37] It is further submitted that while the Authority retains a residual discretion to refuse to remove a matter to the Court even if it finds an important question of law is likely to arise other than incidentally, this is not a case where the exercise of that discretion would be appropriate.

[38] It is submitted that the public interest arguments which have been raised are relevant to the exercise of that discretion against the background that the legal issues/questions raised have not previously been considered.

[39] It is further noted that there is little factual disagreement between the parties on substantive issues thus that this case will not come to be decided on the facts, but on the application of the law to the facts. It is submitted that this is a heavily legal matter and the Court is therefore the appropriate venue to hear it further.

[40] It is further submitted that a challenge is almost inevitable in the event that the Authority gives a substantive determination.

[41] Finally it is submitted that even if the Authority determines that no important issues of law arise, it should still exercise its overall discretion to remove under s 178(2)(d).

Submissions of MYN

[42] It is submitted for MYN that the effect of removal pursuant to s 178 of the Act is to effectively bypass the Authority. The Authority may only remove a matter if one or more of the tests set out in s 178(2) of the Act are satisfied, and it is submitted that none are in this case.

[43] In regard to important questions of law in Questions 1, 2 and 3, it is observed that YQO submits that there is a conflict between the operation of s 67B of the Act and the scheme of the PDA 2022 which gives rise to a question of statutory interpretation which the Court is best placed to determine. However it is submitted by MYN that there are difficulties with this submission, these being:

(i) The questions posed presupposes two points on which the parties strongly disagree, and which have not been investigated by the Authority; the first being that YQO made "protected disclosures" while employed by MYN, and the second being that MYN "retaliated" against her for doing so. Both of these presumptions are strongly disputed by MYN;

It is submitted that the Authority is best placed to determine the number of disputed questions of fact in this case using its investigative powers and processes.

(ii) It is submitted that even if the Authority were persuaded that YQO in principle has a prima facie valid personal grievance for retaliatory dismissal under s 103(1)(k) of the Act, there is still 'no important question of law' which needs to be determined. This is because YQO's contention that a dismissal under a valid trial period clause can be challenged by a personal grievance is untenable on the basis that the wording of s 67B of the Act is clear and unambiguous.

It is submitted that is because the wording of s 67B (2) of the Act and the policy intent behind the subsection which is to provide employers with legal immunity from any claims in respect of a dismissal made under a valid trial period clause, does not allow for a "loophole". Even if there is some sort of conflict between the scheme of the PDA 2022 and s 67B(2) of the Act, this is something that the Authority is capable of determining and it is well-placed to do so.

(iii) The claim of "retaliation' is just one of the many claims YQO raised in the Statement of Problem, therefore any question regarding the implications of the protected disclosures regime will not be 'decisive' of the case as a whole.

[44] It is submitted in summary that Questions 1, 2 and 3 posed by YQO do not meet the test of being "decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it.".

[45] In regard to Question 4, it is submitted that it does not meet the common law test for an 'important' question of law either. It is observed that the Authority is well placed to determine issues around good faith, noting that good faith obligations are an overarching feature of the Act.

[46] It is submitted that there is no case for removal under s 178(2)(d) of the Act because this is a case which involves significant dispute between the parties, including but not limited to, what occurred during the employment relationship prior to 12 July 2023. The Authority is best placed to use its investigative processes to determine these issues.

[47] In summary it is submitted that this particular case is best determined by the investigative process of the Authority, given both the factual issues involved, and taking into account proportionality and costs issues. This case involves relatively straightforward personal grievance claims and a claim for wage arrears. The witnesses and hearing time required is likely to be relatively low. The nature of YQO's claims, and the likely costs to both parties of an Authority investigation meeting versus a Court hearing makes the present case best suited for an Authority investigation.

[48] It is also submitted that the Authority should exercise its residual discretion to decline removal on the basis YQO was employed by MYN for only a very short period of time (under two months). Any employment relationship problem which arose during that period is best resolved by the Authority. A Court hearing is manifestly out of proportion to the length of the employment relationship.

Should the Removal Application be granted?

General Principles of Removal

[49] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[50] As observed by the Court of Appeal in *A Labour Inspector* v *Gill Pizza Limited & Ors:*

> … 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. [3]

[51] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[4].

On the basis of important questions of law

[52] Case law establishes that a question: "will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about the decision of that case or a material part of it"[5]. It is submitted that the test is not whether the question of law is novel,

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[3] *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors* [2020] NZCA 192
[4] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]
[5] *McAlister v. Air New Zealand Ltd* AC22/05, 11 May 2005

but rather that, if there is an important issue of law, it is Parliament's intent that it should be removed to the Employment Court.

[53] The first three questions described as questions of law are posited on the interaction between the Act and the PDA 2022 in relation to trial periods.

[54] Trial period provisions have been in place for many years now and the Authority has knowledge of, and is well versed in, applying the legislation to the varied sets of facts which are presented to it in those cases that arise for determination.

[55] In regard to the inter-relationship between the provisions of the PDA 2022 and sections 67B and s 103(1)(k) of the Act, whilst these questions will require a degree of statutory interpretation to take place, the Authority has experience in applying the principles of statutory interpretation.

[56] I also observe that Schedule 2 (1) of the Act states that, in regard to the construction of employment agreements and statutory provisions;

> (1) The Authority may, in performing its role, deal with any questions related to the employment relationship, including-
>
> (a) …
>
> (b) any question connected with the construction of this Act or of any other Act, being a question that arises in the course of any investigation by the Authority.

[57] Accordingly I find that the Authority has the experience, and is statutorily able, to determine any interpretative issues.

[58] More fundamentally, before the statutory implications fall to be determined, it will be necessary to undertake a factual enquiry into whether or not YQO made a protected disclosure, whether or not MYN did, or should have, recognised it as such, and/or whether or not MYN took retaliatory action against YQO as a result. This is a factual enquiry that the Authority with its investigative powers is well equipped, and tasked by Parliament, to undertake.

[59] As regards the fourth question of law presented by YQO, the Authority has extensive experience in addressing claims based upon the good faith provisions of the Act.

[60] I do not find that the application of good faith in a given contractual context presents an important question of law requiring removal of the case to the Court.

[61] Again, it is not accepted by MYN it did not act on good faith towards YQO. That will need to be established on the facts, and the Authority is an investigative body tasked with undertaking such an enquiry.

[62] In conclusion I do not find that an important question of law arises such as to support removal being granted on the basis of s 178(2)(a) of the Act.

The Authority is of the opinion that in all the circumstances the Court should determine the matter

[63] The basis for removal on this ground is submitted by YQO to be that it is a heavily legal matter which the Court is therefore the most appropriate venue to hear. MYN's position is that the facts are in dispute and the Authority is therefore the appropriate venue.

[64] It is the role of the Authority to establish the facts and in my view, Parliament intended the Authority to be a cost-effective and experienced forum properly equipped to resolve employment relationship problems in which there are disputed facts.

[65] The Authority is well versed on applying the law in respect of trial periods and the ambit of good faith duties between the parties. In addition, the Authority can, and does, determine cases which involve a degree of statutory interpretation.

[66] Having carefully considered the application for removal and the parties submissions, I do not find that the grounds for removing a matter to the Employment Court pursuant to s178(1) of the Act have been satisfied. Accordingly I decline to order the removal of this matter to the Employment Court.

Costs

[67] Costs are reserved pending the outcome of the substantive investigation.

Eleanor Robinson
Member of the Employment Relations Authority