IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 215
ARC 51/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DEBORAH OWEN Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

ARC 52/14

AND IN THE MATTER	of special leave to remove proceedings to the Employment Court
BETWEEN	DEBORAH OWEN Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	On the papers filed on 13 June and 16 July 2014
Appearances:	B Henry and P Templeton, counsel for plaintiff T Sewell, counsel for defendant
Judgment:	18 November 2014

JUDGMENT OF JUDGE M E PERKINS

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[1] Ms Owen commenced proceedings in the Employment Relations Authority (the Authority). She filed a statement of problem in July 2012. She claimed to have been unjustifiably dismissed and unjustifiably disadvantaged in her employment.

[2] A four day investigation meeting commencing on 25 February 2014 in the Authority was prematurely adjourned after the first morning of hearing. This occurred as a result of Ms Owen representing herself and finding that she was unable to proceed further without assistance. The resumed investigation meeting was set to re-commence on 10 June 2014.

[3] Ms Owen then employed counsel to represent her. Her claim was reformulated and an amended statement of problem was filed with the Authority. Ms Owen sought an order for a removal to the Employment Court pursuant to s 178(2)(b) of the Employment Relations Act 2000 (the Act). The grounds for this application were that the case was of such a nature and of such urgency that it was in the public interest that the proceedings be immediately removed to the Court.

[4] In a determination dated 16 May 2014, the Authority declined to make an order removing the proceedings to the Court.[1] In its determination, the Authority rejected the allegation as to any urgency required. It held that in any event the substantial delays, which had occurred to that point, were of Ms Owen's own making and as a result of her procrastination. It was noted that she had made "many changes of counsel" representing her. The Authority also rejected the argument that there were public interest factors, including Ms Owen's employment in a government department, which would justify removal. The Authority reiterated its role as a tribunal of first instance, charged with investigating claims such as those of Ms Owen.

[5] Ms Owen filed a challenge against the determination in the Court. In addition she filed an application to the Court for special leave to remove the matter to the Court pursuant to s 178 of the Act.

[6] Following the filing of the challenge and the application to the Court, it was agreed with counsel at a directions conference, that both matters could be dealt with on the papers, rather than convening a Court hearing. Accordingly, timetabling was set for the filing of submissions. These have now been received.

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[1] *Owen v Chief Executive of the Department of Corrections* [2014] NZERA Auckland 193.

[7] In view of the challenge, a separate application for removal was probably unnecessary. However, it appears to have been made out of an abundance of caution. It is also possible that in this case the grounds available to Ms Owen for removal differ slightly as between the application and the challenge.

[8] Nevertheless, in this case, the grounds put forward for the challenge and the separate application are similar and may be summarised as follows:

a) 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. In this regard it is argued that the more structured nature of a hearing in the Court with its adversarial approach, including extensive rights of cross-examination of witnesses, is to be preferred to the informal procedure applying in the Authority.

b) The employer is a government body whereby the management and treatment of employees is of significant public interest.

c) In all the circumstances and having regard to the nature of the allegations being made, the Court should hear the matter. It is pointed out that the claim has been reformulated in the middle of an adjournment, and the substantive issues should be heard afresh.

d) Those witnesses who have given evidence already, did so when Ms Owen was unrepresented and cannot therefore be challenged in any form including by cross-examination.

e) A fair determination complying with the interests of natural justice is no longer possible without a rehearing.

[9] The considerations to be taken into account in this case by the Court in dealing with both the challenge and the application for removal are prescribed by s 178 of the Act. The position is specifically covered by s 178(2). The Court may order removal or any part of the matter to the Court if an important question of law is

likely to arise in the matter, other than incidentally; or 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 the Court already has before it proceedings which are between the parties and which involve the same or similar or related issues. Where the Authority is considering the matter, the Authority may exercise its discretion to remove the application to the Court if it is of the opinion that in all the circumstances the Court should determine the matter. As far as the Court is concerned in this case, the only ground upon which the matter could be moved is if the Court is of the opinion that 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. It is to that criterion that Ms Owen's submissions on the point are directed.

[10] Mr Henry and Ms Templeton, counsel for Ms Owen, referred in their submissions to the authorities of *NZEMPU v Carter Holt Harvey Ltd*[2] and *Air New Zealand v Kerr.*[3] These decisions discuss the exercise of the discretion pursuant to s 178 of the Act and provide assistance in dealing with the present matter.

[11] In the *Carter Holt Harvey* case, the Court considered that while there were questions of law which would arise in the case (other than incidentally), the application for removal was nevertheless declined on the basis of the discretionary considerations that must be applied in addition to the establishment of at least one of the statutory tests under s 178. Those considerations relevant to the present application are:[4]

(a) Where there are a number of questions of disputed fact, that Parliament has intended they be dealt with at first instance by the Authority.

(b) The Authority is able to offer the parties a very prompt investigation meeting and determination of the problem.

(c) There is now a statutory right of challenge to a determination of the Authority and generally this may be by a de novo hearing.

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[2] *NZEMPU v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 (EmpC).
[3] *Air New Zealand v Kerr* [2013] NZEmpC 114.
[4] *Carter Holt Harvey* ,above n 2, at [38].

(d) 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 live with by modifying their behaviours towards each other. That is the scheme of the legislation Parliament intended to apply now and henceforth in employment relations.

(e) Further opportunities for mediation will occur if the Authority stage of dispute resolution is not excluded.

(f) To exclude investigative problem-solving and decision-making will deprive the parties of one general "right of appeal" in the sense that there are now significantly limited rights of challenge to a judgment of this Court even effectively at first instance: see s 214 of the Act. This is not a decisive factor because it applies to all cases removed and Parliament must have intended this consequence in appropriate cases.

[12] The *Air New Zealand Ltd v Kerr* case dealt more generally with the jurisdiction of the Court to hear challenges and applications such as that in the present case rather than dealing in detail with the exercise of the discretionary factors.

[13] Ms Sewell, counsel for the defendant, also referred to the discretionary factors set out in the *Carter Holt Harvey* case. She submitted that there was no issue of urgency in the present case, nor was there any issue of public interest in the Court determining the matter, such that removal ought to be granted. Having regard to the discretionary factors in the *Carter Holt Harvey* case, and the scheme provided in the Act, she submitted that the public interest would be better served by the matter continuing to be investigated by the Authority, particularly as the investigation process was already underway and should be allowed to run its course.

[14] There is no suggestion that there are important questions of law likely to arise in the case (other than incidentally). It is not of such a nature and of such urgency that it is in the public interest for it to be removed to the Court. Even if there were

considerations of urgency it is unlikely that the Court would be able to hear Ms Owen's substantive claims before the Authority could reconvene an investigation meeting. The argument that a Court hearing is to be preferred, it being of a more structured nature with its adversarial approach including extensive rights of cross-examination of witnesses, is not an acceptable submission. It runs counter to those policy factors which are referred to in the discretionary considerations discussed in *Carter Holt Harvey.* In any event, the Authority is bound to afford to the parties the right of cross-examination of witnesses.

[15] Telling in this case is the fact that if removal is allowed, the parties are then deprived of a general right of appeal against findings of fact at first instance. This is a significant point to be considered in applications for removal and a strong ground for establishing the principle that the discretion to order removal should be sparingly exercised.

[16] Counsel for Ms Owen have pointed to the fact that since the first investigation meeting was adjourned after one half day, Ms Owen's claims have been reformulated and in addition there will be injustice to Ms Owen if the investigation continued on the basis that the witnesses, who have already given evidence, are not recalled. I am mindful in dealing with this submission that it is not the function of the Court to advise the Authority in relation to the exercise of its investigative role. Nevertheless, I do not accept the inference of counsel for Ms Owen that in the present circumstances, having refused an order for removal to the Court, the Authority would simply proceed with the matter without the recall of witnesses to give evidence enabling them to be cross-examined while counsel for Ms Owen is present. The Authority is not a court of record. The evidence given so far would therefore not be available to counsel. While the Authority Member has not mentioned this point specifically in her determination, I am certain that Ms Owen and her counsel will be afforded the right to have the witnesses recalled and the investigation started afresh so that counsel can consider cross-examination as appropriate. The fact that part of the claim has been reformulated would lead to this conclusion as a matter of common sense. This issue is not grounds for exercising the discretion to order removal. I am quite sure that such a process was already in contemplation by the Authority Member when the removal was declined. I am

assuming in saying this, counsel for the defendant will be afforded the same right to cross-examine Ms Owen's witnesses.

[17] Having regard to all of the factors applying, and particularly the policy considerations to which Chief Judge Colgan referred in *Carter Holt Harvey*, this is an appropriate case for factual issues to be fully canvassed by the Authority under its investigation process. All of the factors in this case, when considered on balance, favour declining removal. Accordingly, the challenge is dismissed and the ancillary application is declined.

[18] Clearly there are substantive matters still to be considered in respect of Ms Owen's grievances. For this reason it would not be appropriate at this stage to make any order for costs until the matter has been finally determined on the merits. Costs are reserved and may be referred back to the Court in due course.

[19] The parties should now contact the Authority so that the investigation may continue.

M E Perkins
Judge

Judgment signed at 9.30 am on 18 November 2014