ORDER PROHIBITING PUBLICATION OF APPLICANT'S NAME OR IDENTIFYING PARTICULARS

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 117
EMPC 117/2022

IN THE MATTER OF	an application for special leave to remove a matter to the Employment Court
BETWEEN	QDY Applicant
AND	COUNTIES MANUKAU DISTRICT HEALTH BOARD Respondent

Hearing: On the papers

Appearances: A Fechney, advocate for applicant
R Rendle, counsel for respondent

Judgment: 4 July 2022

JUDGMENT OF JUDGE J C HOLDEN

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[1] The applicant has an employment relationship problem before the Employment Relations Authority (the Authority). She claims she was unjustifiably dismissed and unjustifiably disadvantaged by the Counties Manukau District Health Board (the CMDHB) and that the CMDHB breached its contractual and good faith obligations to her.

[2] The applicant was employed by the CMDHB as a nurse. She declined to be vaccinated for COVID-19. After the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) was issued, the CMDHB determined that the role held by the applicant had to be performed by a vaccinated person. The applicant's

employment was terminated by the CMDHB on 9 July 2021 on the grounds she was no longer able to fulfil her contracted role as a result of the Order and her status as an unvaccinated person.

[3] The applicant says this means her employment was terminated for redundancy, giving rise to redundancy entitlements under the applicable multi-employer collective agreement (MECA). The CMDHB disagrees.

The Court may grant special leave to remove proceedings

[4] The applicant applied in the Authority to have the proceedings removed to the Employment Court.[1] In a determination dated 20 March 2022, the Authority declined that application.[2] The Authority also has declined urgency.[3] The applicant now applies for special leave to remove the proceedings to the Court.[4]

[5] Where the Authority declines to remove a matter to the Court, and a party seeks special leave, the Court applies the criteria set out in s 178(2)(a)–(c) of the Employment Relations Act 2000 (the Act) and may grant special leave to remove if it considers:

(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.

[6] The Court does not have the broader, residual power that the Authority has whereby the Authority may order removal where it is of the opinion that in all the

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1 Employment Relations Act 2000, s 178.
2 *QDY v Counties Manukau District Health Board* [2022] NZERA 103 (Member Larmer).
3 At [51].
4 Employment Relations Act 2000, s 178(3).

circumstances the Court should determine the matter.[5] The Court does, however, retain a discretion to refuse leave even where one or more of the factors in s 178(2)(a)–(c) are made out.[6]

The applicant relies on s 178(2)(a) and (b)

[7] The current application is based on the grounds in s 178(2)(a) and (b), being that an important question of law is likely to arise in the matter other than incidentally and that the case is of such a nature and of such urgency that it is in the public interest that it be removed to the Court.

[8] The applicant says:

(a) the question before the Court is one of law and fact;

(b) this is one of the first cases that the Court will hear relating to employment rights and obligations arising from the pandemic;

(c) the process undertaken by the respondent ought to have been considered a restructure process in law, giving rise to redundancy entitlements;

(d) there is a likelihood of challenge; and

(e) there is the possibility that third parties may apply to intervene.

[9] The CMDHB disputes that there is an important question of law that is likely to arise in the matter other than incidentally. It says the principles in relation to disputes about the application and operation of collective agreements are well established and that the Court has already considered cases relating to the Order, including the employer's procedural requirements and the reasons for termination of employment.

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5 Employment Relations Act 2000, s 178(2)(d).
6 *Visagie v WorkSafe New Zealand* [2020] NZEmpC 8 at [3].

[10] It says there is no public interest or urgency considerations in this case that require the immediate removal to the Court. It notes that the applicant's employment with the CMDHB terminated on 9 July 2021 and that she is only seeking monetary remedies.

[11] The CMDHB also submits that challenge inevitability does not provide standalone grounds for granting an application for removal but may be considered if one of the grounds in s 178(2)(a)–(c) is made out. It says that the New Zealand Nurses Organisation has declined to assist with this matter, calling into question whether there would be any likely applications to intervene. It submits that the Authority is the appropriate forum for this matter in accordance with the express objects of ss 143(f) and 143(fa) of the Act.

The Authority is to offer speedy, low-level resolution

[12] The overall scheme of the Act when it comes to resolving employment relationship problems is that they should be resolved quickly and at the lowest level possible. The Act recognises that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship.[7] Outside direct discussion between the parties, mediation is to be the primary problem-solving mechanism for employment relationship problems.[8]

[13] One of the objects of the Act is to reduce the need for judicial intervention.[9] If judicial intervention is required, it generally should be by the lowest level specialist decision-making body that is not inhibited by strict procedural requirements.[10] Under the Act, the Authority is that body for almost all matters. It is investigative and is to resolve employment relationship problems speedily and informally by establishing the facts and making determinations according to the substantial merits of each case, without regard to technicalities.[11] It may call for and take into account such evidence and information, from the parties or from any other person, as in equity and good

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7 Employment Relations Act 2000, ss 101(ab) and 143(b).
8 Section 3(a)(v).
9 Section 3(a)(vi).
10 Section 143(f).
11 Section 157(1); and Employment Relations Authority Regulations 2000, r 4(1).

conscience it thinks fit, whether strictly legal evidence or not.[12] It may follow whatever procedure it considers appropriate, provided it complies with the principles of natural justice and acts in a manner that is reasonable, having regard to its investigative role.[13]

[14] The intention is that most determinations will initially be delivered orally or that the Authority will give an oral indication of its preliminary findings on the matter with a written determination to follow.[14] If it is not practicable for the Authority to provide an oral determination or an oral indication of its preliminary findings, the Authority may reserve its determination, in which case it must provide a written determination as soon as practicable and within three months of the investigation concluding, unless the Chief of the Authority decides exceptional circumstances exist.[15]

[15] Here, the preliminary determination declining removal was written, and it was issued approximately three months after the last set of submissions were filed. As noted, the matter has not been accorded urgency and, in her submissions filed on 20 May 2022, the applicant advised that the Authority had not scheduled a case management conference to discuss the timing of an investigation meeting.

Important questions of law may be removed to the Court

[16] Despite the intention that most matters will be dealt with quickly in the Authority, the Act contemplates that difficult and/or important questions of law will be heard by the Employment Court, and, if necessary, by higher Courts.[16]

[17] Challenges to determinations under s 179 are one way matters get to the Court, but there are others.

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12 Sections 160(1)(a) and (2).
13 Sections 160(1)(f) and 173.
14 Sections 174, 174A(2) and 174B(2).
15 Section 174C.
16 Sections 143(e) and (g).

[18] The Authority may refer a question of law to the Court for its opinion and delay its investigation until it receives the Court's opinion, provided that it may not seek an opinion regarding procedure.[17]

[19] It also may remove a matter to the Court on its own motion or on the application of a party.[18] As noted, where there is an application, the decision is initially for the Authority, but where the Authority declines the application to remove a matter, the party may apply for the special leave of the Court to have the matter removed.[19]

[20] Removal under s 178 is contemplated in relatively limited circumstances. Some confusion has been caused by a statement from the Court of Appeal reflecting this expectation but then referring to the "particular caution expected in cases that have not been fully investigated by the Authority".[20] Removal under s 178 will *only* occur in cases that have not been fully investigated by the Authority. Where removal is being considered, there is no presumption in favour of, or against, removal to the Court.[21] In each case, the Authority initially, or the Court if special leave is sought, must consider whether the case is one that meets one or more of the applicable criteria in s 178(2) and is more appropriately dealt with by the Court at first instance.[22]

Important question of law is likely to arise

[21] The question of law arising in a matter is 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.[23] It is not necessary that the question of law is difficult or novel.[24] It need not have an impact beyond the particular parties.[25]

[22] Ms Fechney, advocate for the applicant, acknowledges that the questions of law she has identified may not be as neatly framed as they could be but maintains that

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17 Section 177.
18 Section 178(1).
19 Section 178(3).
20 *Labour Inspector v Gill Pizza Ltd* [2021] NZCA 192, [2021] ERNZ 237 at [48].
21 *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [21].
22 Section 178(2)(a)–(d) for the Authority and s 178(2)(a)–(c) for the Court.
23 *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC) at 7.
24 *Hall v Dionex Pty Ltd* [2013] NZEmpC 27, [2013] ERNZ 32 at [12]; *Kazemi v RightWay Ltd* [2018] NZEmpC 3 at [11].
25 *Johnston*, above n 21, at [22].

an important question of law is likely to arise in the matter other than incidentally. To consider that issue, it is useful to step back and look at what the case is about.

[23] The applicant says that she was entitled to refuse the vaccination and that what followed was a "no fault" termination resulting from a change in the requirements for the role and/or to the applicant's terms and conditions of employment. In essence, the applicant argues that, on the promulgation of the Order, her role (as an unvaccinated nurse) was redundant. This, she says, meant that the CMDHB ought to have approached the situation as a restructuring, and that she was entitled to access the redundancy entitlements under the MECA.

[24] There are two overlapping principal issues here. First, there is whether the CMDHB's actions, and how the CMDHB acted, were what a fair and reasonable employer could have done in all the circumstances at the time the applicant's employment was terminated;[26] second, there is whether the applicant was entitled to receive the redundancy entitlements under the MECA.

[25] In considering the first issue, it may be necessary to consider whether the applicant's role was "redundant". There are, of course, many cases concerning the definition of redundancy and employers' obligations on redundancy, and the Authority routinely considers redundancy cases. The argument raised here, however, does not appear to have been previously considered by the Court, including in the other cases that involved vaccination mandates.[27]

[26] Further, while the definition of "redundancy" as a termination of employment "attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer" is one that has widely been used, it does not provide a complete answer.[28] It is not as broad as the circumstances described in s 4(1A)(c) of the Act, which may be seen as analogous to a potential redundancy, of "an employer … proposing to make a decision that will, or is likely to,

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26 Employment Relations Act 2000, s 103A.

27 A very similar argument was raised in *GF v New Zealand Customs Service* [2021] NZERA 382. The Authority did not find it convincing but, in the end, did not need to deal with it as the claim for redundancy compensation was dropped, see at [55] and [115].

28 *G N Hale & Sons Ltd v Wellington Caretakers IUW* [1991] 1 NZLR 151 (CA) at 158.

have an adverse effect on the continuation of employment of 1 or more of [the employer's] employees". The CMDHB acknowledges that a redundancy situation may arise where there have been sufficient changes to an existing role.[29] Here, the Court is being asked to include as a potential redundancy situation the scenario where the requirements for a role change and the incumbent does not possess the new requirements.

[27] The second issue requires interpretation of the MECA. The CMDHB submitted that the principles of contractual interpretation have recently been settled by the Supreme Court.[30] However, although this is correct, the process of contractual interpretation is still a question of law.[31] Therefore, although there will be facts to resolve, determining this issue will involve a question of law because it involves questions of contractual interpretation. That task ultimately may not be difficult, but that does not mean it is not important.

[28] The applicant seeks compensation for redundancy. The findings on the issues identified will likely determine that claim. They also will likely inform the position of other employees who lost their jobs after they failed to get vaccinated and the approach their employers were required to take to their situations. It seems to me that important questions of law are likely to arise, both in the context of the applicant's case and more broadly. The test in s 178(2)(a) is met.

Public interest in removal

[29] Section 178(2)(b) is raised in the alternative. It requires the case to be both of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court. The applicant's employment was terminated in July 2021, but her proceedings were not commenced until November 2021. The applicant seeks monetary amounts only. Those things mean the case is not urgent in the sense a Court judgment is required to prevent or lead to an immediate outcome. The test in s 178(2)(b) is not, however, binary; each case will need to be considered in context to

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29 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [39]–[42].
30 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
31 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [20].

determine whether the level of urgency involved in the case, and the nature of the case, means it is in the public interest that it be removed to the Court.

[30] Many people have had their employment affected by vaccination orders, which were made in the exceptional circumstances of the COVID-19 pandemic. There are other people who were covered by the same MECA as covered the applicant who similarly lost their employment after they failed to be vaccinated. There then are other people whose circumstances will be quite different. This includes people covered by different redundancy provisions and/or people whose employment was terminated after the commencement of Schedule 3A of the Act on 26 November 2021. Despite those differences, the Court's judgment also may provide guidance in those circumstances.

[31] Given the contentiousness of the vaccine mandates, and the impact they have had on people's ongoing employment, it would have been helpful for everyone affected to have had the benefit of an early judgment of this Court on the issues identified by the applicant. For the same reasons, while the claim for urgency was stronger when these proceedings were first filed, it remains in the public interest for this case to be determined by the Court as soon as practicable. The test in s 178(2)(b) is met.

No reason not to remove – special leave granted

[32] While the CMDHB opposes removal, it seems to have taken that position as a matter of principle, rather than because it sees any particular disadvantage in having the matter dealt with by the Court at first instance. The CMDHB addresses the additional factors raised by the applicant in favour of removal, and refers to the general policy of the Act to have most matters dealt with by the Authority before they might proceed to the Court. While I acknowledge the points made, having found the case meets the tests in s 178(2)(a) and (b), I see no reason to exercise my discretion to decline to order removal.

[33] The application for special leave is granted. The matter is removed to the Employment Court. The Registrar is to arrange for a directions conference to progress it to a conclusion.

Non-publication order made

[34] The applicant has applied for non-publication of her name. That is not opposed by the CMDHB. I accept that there is a sound basis to make an order for non-publication for similar reasons to those accepted in other cases involving vaccination orders.[32] Accordingly, there is an order prohibiting publication of the applicant's name and identifying details unless and until further order of the Court.

[35] Costs are reserved.

J C Holden
Judge

Judgment signed at 12.45 pm on 4 July 2022

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[32] *GF v New Zealand Customs Service* [2021] NZEmpC 162; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, (2021) 12 HRNZ 824; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064.