

[4] Ms Sewell on behalf of the Department opposes the application for an order for removal submitting that there is no basis upon which an order for removal could be made to the Employment Court.

Removal Application and discussion

General Principles of Removal

[5] 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.

[6] 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 Court¹.

[7] In *Auckland DHB v X (No2)*² the Court provided guidance on how the Authority's residual discretion in s 178(2) must be exercised:³

[T]he 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.

Urgency

[8] Mr Henry and Ms Knapp submit for the Applicant that the matter is of such a nature and of such urgency that it is in the public interest that it be immediately removed to the Court on the basis that:

- a. The Applicant has suffered long outstanding sexual abuse and similarly, long ignored complaints of the said sexual abuse. As it is anticipated that both issues will be disputed by the Respondent, expert cross examination will be required;

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

² [2005] ERNZ 551

³ *Ibid* at para 29

- b. The cross examination of witnesses, number of witnesses to be called and/or summonsed, the extensive nature of the claims and seriousness of the issues is not appropriately dealt with in the informal Employment Relations Authority structure; and
- c. The Department is a government body whereby the management and/or treatment of its employees and servants is of significance to the public interest in the proceedings.

[9] Ms Sewell submits for the Department that it is of relevance that the first day of the Investigation Meeting has already occurred ahead of this Application having been made, and further that it is relevant that the Authority's investigation was unable to be completed on the scheduled days because the Applicant advised that she was not sufficiently prepared.

[10] The Department submits that given these circumstances alone, the Authority should not use its discretion to grant the Application in view of the fact that the Authority's investigation process is already well in progress.

[11] As regards the application of s 178(2)(b) of the Act, Ms Sewell further submits that the Applicant's claims do not meet either of the requirements of s 178(2)(b) as there is nothing in the nature of the case that raises a public interest for it to be removed to the Employment Court, and there is no urgency on the basis that:

- i.* The Applicant's claim is not urgent in that she is not claiming reinstatement or any other remedies that might require the matter to be heard as a matter of urgency; and
- ii.* The Applicant has not allowed the Authority to deal with her claims in a timely manner.

Determination

Urgency

[12] The Applicant tendered her resignation to the Department in May 2011, three years ago. The Statement of Problem was not filed in the Authority until 27 July 2012, almost one year later. The Statement of Problem did not seek urgency at that time.

[13] Progressing the matter to an investigation meeting has been a difficult process given the lack of clarification of the Applicant's claims which has hindered the Department being able to respond appropriately, although I note that it has been co-operative in the process and

has attended a number of mediations in an attempt to resolve the concerns of the Applicant. Additionally I note that the process has not been assisted by the many changes of counsel representing the Applicant.

[14] Following numerous case management conference calls and the issuing of minutes by the Member in an attempt to assist the Applicant in identifying her claims, the matter was finally set down for a 4 day investigation meeting on 25 to 28 February 2014.

[15] The Respondent was prepared to proceed at that time, and had ensured the attendance of several witnesses, including those called on behalf of the Applicant but employed by the Department. However that investigation meeting was adjourned after the first half day of hearing after the Applicant declared herself unprepared to proceed.

[16] The resumed investigation meeting is currently scheduled to proceed on 10 and 11 June 2014. Whilst the Respondent will be ready to proceed at that time, there is some doubt that the Applicant will be in a position to proceed given a recent health issue requiring treatment. Alternative dates have been offered in August 2014 but are still to be confirmed.

[17] I observe that such delay as there has been to date in the process has emanated from the Applicant and not the Authority nor the Department. I consider that in light of the availability of a hearing in the Authority in either June or August 2014, it is unlikely that removing the matter to the Employment Court would advance the hearing of the matter given the requirements of scheduling in that Court.

[18] Considering all these circumstances, I find that there is no public interest met by the matter being removed to the Employment Court on the basis of urgency.

Public Interest

[19] The Applicant's personal grievance claims of alleged sexual harassment and the subsequent mismanagement of that complaint by her employer, the Department, arise within the context of the employment relationship. Pursuant to s161 (1) of the Act: "*The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.*"

[20] The Authority is an investigative body and I find that the personal grievance claims in this matter are factual areas which the Authority has been statutorily charged with investigating. As such it is more appropriate that the matter be dealt with at first instance in the Authority, and in this respect I note that there is an absolute right of challenge to the Court.

[21] I find that the Applicant's personal grievance claims are of a nature that is appropriately dealt with by the Authority.

[22] I do not consider that the fact that the Applicant was an employee of a Government Department makes the matter one of public interest of itself. Cases involving Government Department employees are not infrequently heard and satisfactorily resolved in the Authority.

[23] Accordingly I find that there is nothing in the nature of this case that makes it in the public interest to remove it to the Employment Court.

In All the Circumstances

[24] In light of my findings as outlined above, I do not consider that this matter should be removed to the Court pursuant to s 178(2)(d) of the Act.

Costs

[25] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority