

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 572
3077292

BETWEEN

BRIAN GILKISON
First Applicant

RAIL AND MARITIME
TRANSPORT UNION
INCORPORATED
Second Applicant

AND

LYTTELTON PORT COMPANY
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Geoff Davenport, counsel for the First and Second
Applicants
Rob Towner, counsel for the Respondent

Joint Application for
removal of matter to
Employment Court
Received: 3 October 2019

Date of Determination: 8 October 2019

DETERMINATION OF THE AUTHORITY

**A The proceeding in file number 3065972 is removed to the Employment
Court in its entirety.**

Employment Relationship Problem

[1] The Authority received a joint application by the first applicant, second applicant and respondent for the removal of the matter lodged with the Authority under file 3065972 to the Employment Court at Christchurch for hearing and determination.

Grounds on which the application is made

[2] Under s 178(2) of the Employment Relations Act 2000 (the Act) the Authority may order the removal of a matter to the Employment Court if it is satisfied that certain grounds exist for removal.

[3] The joint application is made on the grounds that important questions of law are likely to arise in the matter before the Authority and 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.

[4] By agreement the Authority has dealt with this matter on the papers.

Important question of law – s 178(2)(a)

[5] Counsel say that the litigation between the parties involves the application and interpretation of:

- (a) Section 103(1)(j)(i) of the Act in relation to
 - (i) whether the actions of an employer in suspending and/or dismissing an employee, who is also a health and safety representative, amount to adverse conduct for a prohibited health and safety reason; and
 - (ii) the scope and interpretation of this recently enacted section.
- (b) Section 4 and 238 of the Act in relation to whether the actions of an employer in suspending an employee who is a union delegate, thereby preventing them from representing a union member in an extant employment matter, amounts to a breach of one or both of these sections;

- (c) Section 4 of the Act in relation to whether commencing disciplinary action against an employee, for actions they carried out acting in their capacity as a union delegate and health and safety representative (as the first applicant claims he was doing), amounts to a breach of good faith in relation to the union or that employee; and
- (d) Sections 103A, 104 and 107 of the Act in relation to:
 - (i) whether the dismissal of the first applicant was justifiable or amounted to discrimination against the first applicant by reason of his involvement in union activity;
 - (ii) the interaction between these three sections.

[6] Counsel say in the joint application that the above questions of law arise in this matter and their determination by the Court will also provide important guidance to other employers, unions and employees on the operation and interpretation of these sections.

[7] Further that the important questions of law referred to above have not been the subject of a judgment of the Employment Court and that removal will expedite a judgment of the Employment Court.

[8] I agree that there are important questions of law in this matter arising other than incidentally including questions of law about s 103(1)(j)(i) of the Act which has not previously been the subject of judgment.

Case is of such a nature and urgency that it is in the public interest that it be removed – s 178(2)(b).

[9] Counsel say that the nature of the issues raised in this matter about the balancing of the rights of union representation and the right to address health and safety matter on one hand with the employer's right to carry out a disciplinary process are such that removal to the Court is in the public interest.

[10] Further that the circumstances are such that the Court should determine the matter. The first and second applicants have applied for urgency in the Authority and say that the outcome of any ruling would be significant for other unionised workforces. It is not

considered that the first applicant's application for reinstatement would be prejudiced by removal.

Discretionary considerations – s 178(2)(d)

[11] There are important questions of law in this case that arise other than incidentally. I do not find that the urgent and public interest matters favour the proceedings remaining in the Authority. Both of those matters favour the removal of the proceedings to the Employment Court.

[12] I am of the view that the discretion should be exercised to remove the matter lodged with the Authority in file 3065972 because of the important questions of law, public interest and urgency.

Determination

[13] I remove file 3065972 to the Employment Court for hearing and determination in its entirety.

Costs

[14] I reserve the issue of costs which will no doubt be dealt with by the Employment Court in due course.

Helen Doyle
Member of the Employment Relations Authority