Attention is drawn to the Order Prohibiting Publication of certain Information (Refer paragraph [80] – [83])

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

I TE RATONGA AHUMANA TAIMAHI TĀMAKI MAKAURAU ROHE

[2019] NZERA 616
3069954
3071812

	BETWEEN	BEO Applicant
	AND	VICE CHANCELLOR OF THE UNIVERSITY OF AUCKLAND Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Anthony Russell, Counsel for the Applicant Philippa Muir, Counsel for the Respondent
Investigation Meeting:	24 October 2019
Submissions and/or further evidence	24 October 2019 from Applicant 14 & 24 October 2019 from the Respondent
Determination:	29 October 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant has applied for an interim and permanent injunction restraining a disciplinary meeting proposed to be held with her by the Respondent, the Vice Chancellor of the University of Auckland (VUA).

[2] The Applicant also applies for an interim and permanent injunction restraining VUA from breaches of an employment agreement.

[3] The Applicant further applies for an interim and permanent injunction requiring VUA to comply with the employment agreement.

[4] VUA opposes the application for an interim and permanent injunction restraining a disciplinary meeting proposed to be held with her by VUA.

[5] VUA claims that it has complied with the Applicant's employment agreement at all times.

[6] VUA opposes the application for an interim and permanent injunction restraining VUA from breaches of the Applicant's employment agreement and/or requiring VUA to comply with the Applicant's employment agreement.

Issues

[7] This determination addresses the following preliminary issues:

a. Should the matter be removed to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act)?

b. Should a non-publication order be granted prohibiting the publication of the Applicant's name and identifying particulars?

Brief Background

[8] The Applicant claimed she was sexually harassed by a work colleague.

[9] On 19 November 2018 the work colleague reported that he had been falsely accused of sexual harassment by the Applicant to coerce him into continuing professional collaborations with her.

[10] The Vice Chancellor of the University of Auckland delegated two colleagues to undertake an investigation into the complaint against the Applicant and to make a finding as to whether misconduct or serious misconduct may have occurred.

[11] A preliminary investigation report was prepared with the preliminary findings which were that the work colleague's complaint was principally upheld, and that the Applicant's behaviour amounted to serious misconduct.

[12] Accordingly the Applicant was invited to a disciplinary meeting to provide her with an opportunity to respond to the allegations. This meeting has not taken place yet due to the Applicant being on sick leave.

[13] On 7 August 2019 the Applicant filed a Statement of Problem with the Authority seeking *inter alia* an interim and permanent injunction restraining the disciplinary meeting proposed to be held with her by VUA.

[14] The Applicant is now seeking removal to the Employment Court (the Court) of the matter and a non-publication order.

Should the matter be removed to the Employment Court under s 178 (2) of the Employment Relations Act 2000 (the Act)?

[15] The Authority may, pursuant to s 178 of the Act order removal of a matter to the Employment Court without the Authority hearing it provided that the Authority is satisfied that one of the grounds of s 178(2) of the Act have been met. The grounds as set in s 178(2)(a) (b) and (d) of the Act are

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

Submissions of the Applicant

[16] The Applicant applies to have the matter removed to the Court in reliance on s 178(2)(a), (b) and (d) of the Act.

Important Question of law s178(2)(a)

[17] It is submitted pursuant to s 178(2)(a) of the Act that an important question of law is likely to arise in the matter other than incidentally, being;

a) Does the Authority have jurisdiction to grant an interim and permanent injunction restraining an employer's disciplinary process?

b) If the Authority does have jurisdiction to restrain an employer's disciplinary investigation, then what factors/considerations should apply when considering whether it exercises that jurisdiction?

[18] It is submitted that the Authority has a specific power of interim reinstatement under s 127 of the Act and a power for an interim order of reinstatement under s 55 of the Parental

Leave and Employment Protection Act 1987. However the jurisdictional basis on which it does so is unclear.

[19] It is submitted in this case that a key consideration is whether the Applicant can halt the disciplinary investigation by means of an interim, and ultimately permanent, injunction because of the severe and life changing impact of such an investigation on her health.

[20] The Applicant notes that the statutory basis to enable the Authority to issue an interim injunction to halt a disciplinary process was raised and noted as of 'interest' by the current Chief Judge in *Ports of Auckland Ltd v Findlay* but then not pursued by the Court:

> The Plaintiff did not pursue an argument that the Authority, and this court on a challenge, lacked jurisdiction to grant the order sought. Mr Heron QC acknowledged that the full Court's judgment in *Credit Consultants Debt NZ Ltd v Wilson* would have presented a hurdle for the plaintiff in this regard. The plaintiff decided not to tackle that hurdle, and rather concentrated its arguments on the usual factors applying to an application for interim orders. That means that interesting issues that might otherwise have arisen as to the scope of the Authority's powers, in light of the relevant statutory provisions conferring jurisdiction, do not need to be dealt with.[1]

[21] The Applicant further submits that guidance on what considerations should apply when determining whether to grant such an order has not been judicially assessed.

Public interest or urgency s 178(2)(b)

[22] It is submitted that the Applicant's claim, particularly based on the documented and severe deterioration in her health and its current precarious state, is a significant opportunity to consider this issue in the appropriate forum, being the Employment Court.

[23] The allegations involved in the case are of a sensitive nature, being of sexual harassment at a public institution. The circumstances of the matter are unusual, as it is submitted that the Applicant is being disciplined for allegedly falsifying allegations against another employee.

[24] The industry sector in which the Applicant is employed is restricted in nature and it is submitted that injunctions are necessary to prevent negative impacts on her career which may be irreversible.

[25] It is submitted that nature and urgency of the case are such that judicial intervention rather than low level dispute resolution is required.

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[1] *Ports of Auckland v Findlay* [2017] NZEmpC 45 at [22]

The Authority's General Discretion to remove s178(2)(d)

[26] Given the existing delay and potential unavailability of investigation meeting dates in the Authority, it is submitted that the Court may be better placed to deal with the matter on a prompt basis.

[27] Any dismissal would essentially be career-ending for the Applicant because of her niche employment. It is submitted that a challenge to the Court is virtually inevitable. In *McAlister v Air New Zealand Ltd* Shaw J said that the inevitability of a challenge was a factor in favour of removal..[2]

[28] It is further submitted that the Applicant has incurred significant legal fees responding to a complicated investigation. Her resources are limited compared to the resources of the Respondent and it would be more efficient and cost effective to pursue a final resolution to her claim once in the Court.

Submissions of the Respondent

[29] The Respondent opposes the removal of the matter to the Court.

Important Question of law s 178(2)(a)

[30] The Respondent cites *McAlister v Air New Zealand Limited (McAlister)* in which the Court summarised the principles to be applied in dealing with an application for special leave noting in relation to the need to identify an important question of law:

> The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.[3]

[31] It is submitted by VUA that there are no questions of law in this case that meet this threshold. There is not an important question of law about whether or not the Authority has jurisdiction to grant interim and/or permanent injunctions as it is well-established that the Authority does have jurisdiction to do so pursuant to s 162 of the Act as noted by the full Court in *Credit Consultants Debt Services NZ Ltd v Wilson (Credit Consultants)*[4]

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[2] McAlistair v Air New Zealand Limited AC 22/05

[3] Above n 1

[4] *Credit Consultants* [2007] ERNZ 205 at [47], [47] and [66]

[32] There is not an important question of law whether the Authority has the jurisdiction to grant an interim and permanent injunction restraining an employer's disciplinary investigation because it is well established that the Authority does not have jurisdiction to restrain an employer's disciplinary investigation. In *Russell v Wanganui City College* it was stated that*:*

> In the ordinary course of things an employer is entitled to conduct an investigation into the conduct and performance of an employee that is of concern to it and, indeed, bound to do so in the ordinary course of its business as being an employer.[5]

[33] Further, that in *McMahon v Gould* the Court held that it was a "grave" matter to interfere with an employer's process, and that there must be "real" danger of injustice.[6] Also in the case of *Wackrow v Fonterra Co-operative Group Ltd* the Court held that: "care must be taken before the Court forestalls an employer's disciplinary process".[7]

[34] It is submitted that in the ordinary course, an employee who is subject to disciplinary action which they believe is unjustified, should properly challenge that by pursuing a personal grievance.[8]

[35] It is noted as well established that injunctive relief should only be granted to restrain reasonably imminent unlawful action.[9]

[36] Whilst it is accepted that the Authority has jurisdiction to grant interim and permanent injunctions relating to breaches of employment agreements, in this case it is premature to do so as the investigation is still underway.

[37] It is submitted that the Applicant has not discharged the onus of establishing that an important question of law is likely to arise. As observed in *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Limited:*

> The statutory test is not whether there is an unsettled, controversial, or novel point of law. Rather, an important question of law must be shown to be likely to arise in the proceeding other than incidentally.[10]

[38] It is submitted that the Authority is well placed to consider the legal and factual matters in determining the Applicant's claims for interim and permanent injunctions, in particular the

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[5] *Russell v Wanganui City College* [1998] 3 ERNZ 1076 and [1999] 1 ERNZ 654 (p 1082)
[6] *McMahon v Gould*(1982) 1 ACLC 98, 101

[7] *Wackrow v Fonterra Co-operative Group Ltd* [2004] 1 ERNZ 350
[8] N6 at para 91
[9] IKumar v Elizabeth Memorial Homel [1998] 2 ERNZ 61 at p67; *Kimber v New Zealand Fire Service* (Unreported Employment Relations Authority Auckland , 11/01/01 AA 3/01
[10] New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Limited [[2002] ERNZ 71 at [30]

Authority routinely deals with such applications; the law applying to injunction applications is well established; and is considered and applied by the Authority in numerous cases. Assessing whether there are grounds to grant the injunctions sought in this case will be determined on the specific facts of the matter. It is not an important question of law.

Public interest or urgency s 178(2)(b)

[39] Pursuant to s 178(2)(b) it is submitted that there is no public interest or urgency necessitating the immediate removal of this matter to the Court. In respect of the Applicant's claim that it is in the public interest it be removed because the case includes: "sensitive allegations of a sexual nature" it is submitted that:

a. The Authority regularly deals with cases involving sensitive allegations of a sexual nature;

b. It is not uncommon for an Applicant to allege in the Authority that the employer's process is adversely impacting their health;

c. it is premature to consider these matters (either in the Authority or the Court) because the VUA's process is still underway and the Application is simply an attempt to stop an employer from undertaking and completing a legitimate investigation. This would usurp managerial prerogative.

[40] It is further submitted that s 178(2)(b) of the Act requires a combination of both the particular nature of the case and urgency, which makes it in the public interest for it to be removed. [11] VUA does not accept there is any urgency in resolving the matter, in particular:

a. The Applicant's application for urgency has already been considered by the Authority and declined;

b. The Applicant is currently on paid sick leave. VUA has written to the Applicant proposing that its investigation process will be placed on hold until the Applicant is well enough to provide it with any further information. It has offered to provide the Applicant with unpaid extended leave after her entitlement to paid sick leave expires on 25 October 2019 pending medical confirmation that she is fit for work.

[41] It is submitted that the requirements of s 178(2)(b) are not satisfied, and it is not appropriate to remove this matter to the Court on grounds of public interest.

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[11] Above n 10 at [37]

The Authority's General Discretion to remove s178(2)(d)

[42] The Respondent submits that there are no unique circumstances in this case which would merit removal to the Court. In *McAlister* the Court confirmed the discretionary element of the decision to remove stating:

> Even if an important question is likely to arise, the removal of a matter to the court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts, which can be more properly dealt with in the Authority … and whether this is case which will inevitably come to the Court by way of challenge in any event.[12]

[43] The Respondent submits as relevant the statement by the Court in *Hall v Dionex Pty Ltd* that factors which could be considered in exercising the residual discretion included: "the parliamentary intent that the Authority is well-placed to deal with factual disputes and that the grant of leave would effectively rob one party of its statutory rights of challenge*"*[13]

[44] In *Vice-Chancellor of Lincoln University v Stewart (No 2)* the Court also noted that: "*Personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the criteria set out in a s178(2) are established*".[14] The Respondent submits that the present case is not one of the "very few" that meet the threshold for removal.

[45] The Respondent submits that even if there is an important question of law that arises in this case, which is denied, the Authority should decline to exercise its discretion to grant the Applicant's application for removal to the Court in these proceedings in the circumstances of this case for the following reasons:

a. No useful purpose would be served by ordering the removal of the proceedings to the Court as the matter involves a number of questions of disputed fact which are more appropriately determined by the Authority at first instance;

b. The Applicant will have a right to challenge the Authority's substantive determination in the Court if she is dissatisfied with it;

c. Granting of the application would effectively result in the loss of the parties' appeal rights as leave is needed on a question of law to proceed with an appeal the Court of

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[12] Above n 10 at [10]
[13] *Hall v Dionex Pty Ltd* [2013] NZEmpC 27 at [29]
[14] *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] 1 ERNZ 249 at [43]

Appeal,[15] Given the disputed facts in this case it is submitted that it is in the interests of justice to preserve a right of challenge on factual matters; and

d. Removal to the Court for a hearing at first instance would result in increased costs for both parties and would also likely result in a later hearing date.

[46] It is submitted that should the matter be removed to the Court, the jurisdictional issue may well require a full Court hearing and this would mean a significant delay in the matter being heard. In any event, it is submitted that the Authority processes would mean a faster hearing date.

[47] In respect of costs, it is accepted by the Respondent that costs in this case are spiralling, but it is submitted hat there was no need for the Applicant to file an application for removal which has unnecessarily added to the costs being incurred by the parties.

[48] The Respondent submits that the Applicant has not made out the grounds for removal pursuant to s 178(2) of the Act and the Authority should exercise its residual discretion to decline remove to the Court.

Removal

(a) Important question of law

[49] The case law supporting the contention that the Authority has the jurisdiction to order interim and permanent injunctions, and the Authority not infrequently issues interim injunctions.

[50] As observed by Corkill J in *Savage v Wai Shing Limited,* a case in which there was an application to halt an employer's disciplinary process in circumstances in which the Authority had issued an interim reinstatement pending a substantive hearing of the applicant's unjustifiable dismissal claim*:*

> Orders restraining an employer from proceeding with an investigative/disciplinary process into concerns about employee conduct would be rare, a conclusion reached in reliance of dicta of this Court in *Ports of Auckland Ltd v Findlay*. The application for the interim injunction was therefore dismissed.[16]

[51] I do not find that there is uncertainty about the Authority's jurisdiction to halt an employer's disciplinary process such that it constitutes an important question of law, since the case law in this area is well established the circumstances in which the Authority may make such an order would be rare.

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[15] *Owen v Chief Executive, Department of Corrections* [2014] NZEmpC 215 at [15]
[16] *Savage v Wai shing Limited* [2019] NZEmpC 141 at [6]

[52] In considering whether or not the health of the Applicant which the Applicant submits is a key consideration in this case raises this case to the 'rare' case status I have taken into account the fact that it is not uncommon for a disciplinary process to have some adverse effect on the health and well-being of an employee.

[53] Whilst I accept, based on the untested affidavit and medical evidence, that the Applicant is currently experiencing some severe health issues, I do not find after due consideration that this elevates this case into the 'rare' category of cases in which an employer is restrained from proceeding with an investigative/disciplinary process.

[54] In reaching this view I have also taken into consideration the fact that VUA has offered to delay the investigative steps until the Applicant is fit for work.

[55] As already observed, the Authority is experienced in determining injunctive applications and in considering the factual and legal considerations and well placed to do so in this case.

[56] I do not find an important question of law pursuant to s 178(2)(a) of the Act and decline removal of the matter to the Court on that basis.

Public interest and urgency

[57] The health of the Applicant has been submitted as a ground for removal on the basis of urgency. I have already declined urgency in this case in light of the Respondent's offer to delay the process pending the Applicant being fit for work.

[58] The case does involve some allegations of sexual harassment, however the Authority regularly deals with such matters and is experienced in so doing. I do not find that the public interest considerations merit removal in the circumstances of this case.

[59] The impact on the future career prospects of the Applicant given the nature of the allegations in a small industry sector as submitted by the Applicant will be addressed by the non-publication order (addressed below) and I do not find therefore that this ground for consideration necessitates removal.

[60] I do not find that there is a public interest and urgency in this matter law pursuant to s 178(2)(b) of the Act and decline removal of the matter to the Court on that basis.

Residual Discretion to remove

[61] It is accepted that at present there is a delay to the Authority's usual timeframe for investigation meetings, however this situation will be alleviated early in 2020. I anticipate therefore that I would be able to allocate a date for an investigation meeting on the substantive matter within a reasonable time period, especially when there will be some delay as indicated in the disciplinary matter proceeding due to the Applicant's current health condition.

[62] In this situation I do not find that the Court process may be speedier than that of the Authority such as to exercise the Authority's discretion to remove pursuant to s 178(2)9d) of the Act.

[63] The Authority is, as Parliament intended, well placed to deal with factual disputes in the nature of this case.

[64] In respect of the right of appeal, it is not unusual for a party, dissatisfied with the finding in a determination of the Authority, to exercise its right to appeal that determination. That right includes the right to appeal on a *de novo* basis which traverses both challenges based on the facts and the law.

[65] I find that it is in the interests of justice that that right is preserved for factual as well as legal questions.

[66] The submissions that a dismissal for the Applicant would be career-ending appears to be premature given that the disciplinary investigation has not concluded and no decision of that nature has been reached. In addition a non-publication order will address any concerns for the Applicant on this basis.

[67] I do not find that there are grounds pursuant to s 178(2)(d) of the Act and decline removal of the matter to the Court on that basis.

[68] In conclusion I do not find that the grounds for removing the matter to the Employment Court pursuant to s 178(2)(a), (b) and (d) of the Act have been satisfied.

Non-Publication Order

[69] The Applicant submits that there is not a particularly high hurdle to overcome to obtain a non-publication order noting the comments of the full Court in *H v A Ltd.*[17]*:*

[17] *H v A* [2014] NZEmpC 92 at [78] – [80]

[70] On the basis that non-publication of the medical evidence of the Applicant is uncontroversial due to its sensitive nature and it appears to be agreed by the parties that appropriate orders should be made.

[71] In terms of whether her name should be published the Applicant submits that it should not be published. The Applicant complained to the perpetrator that she had been sexually harassed by him, as a result of which she is now subject to an investigation and a disciplinary process. It is submitted that if her name is published, it could have a chilling effect on employees who wish to bring sexual harassment to the perpetrator's attention and discourage them from doing so. In *Z v* A the Court stated:

> In the majority of cases, the interests of justice will require that the name of a grievant in a complaint of sexual harassment should be protected. The public interest is advanced by saying so because this amount of protection is likely to encourage the oppressed to come forward and bring their oppressors to justice without fearing the added punishment of the public exposure of their exploitation.[18]

[72] It is further submitted that the Applicant's health will be adversely affected by the publication of her name, both in respect of the applicant and the impact on her family, and the added potential for damage to her career prospects.

[73] It is submitted that should the Authority not be minded to grant a non-publication order in respect of the Applicant's name and identifying particulars, then it should put an interim non-publication order in place to allow the Applicant to challenge the determination, as otherwise the "cat will be out of the bag" and her rights to challenge rendered nugatory. The Applicant cites *XUG v DJV* in which the Authority did so, stating:

> XUG has indicated a wish to challenge this determination so the lifting of the current interim non-publication order will be time delayed to allow that to occur, so that a successful challenge is not rendered nugatory.[19]

[74] The Respondent's position is that it opposes non-publication orders on the basis that it is only in rare circumstances that the Authority will decide that investigation meetings should not be open to the public noting the principle of open justice referenced in *Peters v Birnie*[20].

[75] The Respondent submits that the starting point is the principle that justice should be administered in the open, and subject to public scrutiny:

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[18] *Z v A*[1993] 2 ERNZ 49 at 495
[19] *XUG v DJV* [2019] NZERA 124
[20] *Peters v Birnie* HC Auckalnd CIV-2009-404-8119, 19 March 2010 at [25]

a) The affairs of the respondent, are, rightly, subject to more scrutiny than many other organisations because it is a public institution that plays an important role in the tertiary education sector and the community;

b) as it is a public institution, it is in the public interest for there to be open justice in relation to this matter.

[76] The Respondent submits that it has carefully considered the medical evidence contained in the affidavit submitted with the medical certificates provided in support of the Applicant's application for non-publication orders. Although it's position opposing the permanent non-publication order remains as set out above, the Respondent does not oppose the Authority granting an interim non-publication order on the following terms:

a) The Applicant would be granted an interim non publication order in relation to her name and any identifying particulars, with the Respondent reserving its position to revisit the continuation of this order at a later stage in this process, as matters progress; and

b) A non-publication order would not apply to the Respondent.

[77] The Respondent does not oppose the application for a permanent non-publication order in relation to all medical information relating to the Applicant.

[78] I have considered the submissions of the Applicant and the submissions and supplementary submissions of the Respondent and the fact that the Respondent does not oppose the application for a permanent non-publication orders in relation to all medical matters relating to the Applicant, I accept that a permanent non-publication order for all medical matters relating to the Applicant is both necessary and appropriate in this case, and that it is in the interests of justice to make such an order.

[79] I also have considered the submissions in regard to interim orders and consider it appropriate to make orders in relation to an interim non publication order in relation to the Applicants name and any identifying particulars.

Order

[80] **Accordingly, pursuant to clause 10(1) of Schedule 2 of the Act, I order that all medical information relating to the Applicant is subject to a permanent non-publication order.**

[81] **Pursuant to Schedule 2 clause 10(1) of the Act I order that the name of the Applicant and any identifying particulars will be subject to an interim non-publication order.**

[82] **In this determination the name of the Applicant will be referred to as BEO, three randomly selected letters.**

[83] **The orders of the Authority has made are to take effect immediately and will remain in force until further notice.**

Costs

[84] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority