

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2019] NZERA 132
3053172

BETWEEN KAREN CURRIE
 Applicant

AND BAY OF PLENTY SEXUAL
 ASSAULT SUPPORT SERVICES
 TRUST
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, Advocate for Applicant
 Jeremy Sparrow, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 5 & 21 February 2019 from Applicant
 14 February 2019 from Respondent

Determination: 7 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Karen Currie, claimed in a Statement of Problem that she had been constructively dismissed, unjustifiably disadvantaged as a result of bullying by the Respondent, Bay of Plenty Sexual Assault Support Services Trust (BOPSASS), and that there had been a breach of good faith by BOPSASS.

[2] In determination [2018] NZERA Auckland 388 it was determined that, whilst Ms Currie's constructive dismissal claim had been raised within the statutory 90 day time frame as set out in s 114(1) of the Employment Relations Act 2000 (the Act), her claim of unjustifiable disadvantage based upon bullying had not been raised within the 90 day statutory time limit.

[3] It was further determined that there were no exceptional circumstances which occasioned the delay and it would not be just to grant leave to raise any of the other issues out of time.¹

[4] A date has been scheduled for hearing the substantive issue of constructive dismissal and a timetable for witness statements and documentation agreed with the parties.

[5] Ms Currie now seeks an order for removal of the matter to the Employment Court.

[6] BOPSASS opposes removal on the grounds that the requirements of s178 (2) (a) –(d) of the Act, which set out the basis for removal of a matter to the Employment Court, have not been met in this case.

Issues

[7] The issue for determination is whether or not the Authority should remove this matter to the Employment Court.

Removal Applications

[8] 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) (c) and (d) of the Act are

- (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; or
- (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

Submissions of the Applicant

[9] Mr Halse, on behalf of the Applicant submits as grounds for removal that the Applicant's claims of workplace bullying fall within the Health and Safety at Work Act 2015 (HSWA) which has no provision requiring a personal grievance of bullying to be raised

¹ *Currie v Bay Of Plenty Sexual Assault Services Trust* [2018] NZERA Auckland 388

within 90 days. On that basis the Authority is the wrong jurisdiction to deal with workplace bullying.

[10] It is submitted that determination [2018] NZERA Auckland 388, by determining that the constructive dismissal claim was raised within the 90 day statutory period pursuant to s114(1) of the Act but not the claims of unjustifiable disadvantage based on bullying, allows workplace bullying to continue.

Submissions of the Respondent

[11] The Respondent, noting that determination [2018] NZERA Auckland 388 was not challenged and that the time for doing so has expired, opposes removal on the basis that none of the grounds required in respect of removal pursuant to s 178(2) of the Act have been made out. The Respondent accordingly sets out its basis for opposition as follows:

(a) s178(2)(a): An important question of law

[12] The Respondent submits that there is no important question of law. The claim before the Authority for resolution, being the constructive dismissal claim based on allegations of excessive workload and stress, is an issue on which the law is settled and clear.

[13] It is submitted that a question of law is held to be important if: “its resolution can affect large numbers of employers or employees or both, or if the consequences of the question are of major significance to employment law generally.”² However in this case these circumstances do not apply.

(b) s178(2)(b): Of such a nature and urgency

[14] It is submitted that the Applicant’s employment with the Respondent terminated in April 2017, nearly 2 years ago. Although the Applicant raised personal grievances by way of letter dated 18 July 2017 relating to alleged excessive workload and stress, the Statement of Problem was not filed until more than a year later, on 3 September 2018. It was at that time that the Statement of Problem attempted to raise new personal grievances related to allegations of bullying.

[15] Given the time frames involved, it is submitted that there is no urgency that supports it being in the public interest that the matter be removed immediately to the Employment Court.

² *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 at pg [8]

(c) *s178 (2)(c): Proceedings on a related matter already before the court*

[16] It is submitted that this ground does not apply.

(d) *s178(2)(d): The Authority is of the opinion the court should determine the matter*

[17] It is submitted that the grounds submitted by the Applicant for removal are as an alternative to a challenge to determination [2018] NZERA Auckland 388.

[18] On the basis that there is nothing special about the remaining claim of constructive dismissal it is submitted that there is no reason why the Authority should not determine it or that the Employment Court would be better placed to determine it.

[19] It is also submitted by the Respondent that an important factor against the Authority exercising its discretion to remove is the additional cost and time spent in taking a matter to the Employment Court rather than the Authority. The Respondent cites the observation in *Ohms v Vice Chancellor Auckland University of Technology* that:

... a further discretionary consideration may be the desirability of having an employment dispute resolved speedily through the informal procedures adopted by the Authority rather than through the more formal procedures that apply in the Court.³

[20] The Respondent submits in summary that the Applicant's basis for removal does not rest upon any of the required grounds under s 178 of the Act but rather appears to relate to a bullying claim which in its nature means that the Employment Court is better suited to deal with it, however the reason for this has not been clarified by the Applicant. Further that by virtue of determination [2018] NZERA Auckland 388 the Employment Court would have no discretion to consider bullying claims.

Removal Application and discussion

General Principles of Removal

[21] 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.

[22] 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

³ *Ohms v Vice Chancellor Auckland University of Technology*[2013] NZEmpC 191 at [37] – [39]

matter should be removed to the Employment Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Employment Court⁴.

[23] I note that determination [2018] NZERA Auckland 388, which determined that the unjustifiable disadvantage claims based on bullying had been raised outside the statutory time frame set out in s 114(1) of the Act, has not been challenged. As a consequence of that determination of the Authority the issue before the Authority is that of constructive dismissal based upon excessive workload and stress.

[24] With that in mind when considering the grounds for removal and having regard to the grounds of removal as set out in s 178(2) of the Act:

- a) I am not satisfied that there is an important question of law that is likely to arise in this case. The claim to be determined by the Authority is that of constructive dismissal. The law which applies to a claim of that nature is well settled and I do not find that a resolution of a claim of this nature will affect a larger number of employers or employees;
- b) I am not satisfied that the case is of such a nature and urgency that it is in the public interest that it be removed immediately to the Court, noting the submissions of the Respondent regarding the delay in the filing of the claim with the Authority. Although this timing has no impact upon the Authority's ability to hear the matter, it does mitigate against the case being so urgent that it be immediately removed to the Court.

I also do not find that there is anything in the nature of the claim of constructive dismissal based on excessive workload and stress that renders it of such a nature that it is in the public interest that it be immediately removed to the Court;

- c) I find no grounds supporting removal on that basis that the Court has before it proceedings which are between the same parties and which involve the same or similar or related matters because there are no existing proceedings; and
- d) I consider that the Authority has jurisdiction to hear the Applicant's claim of constructive dismissal. The Authority was established to: "deliver speedy, informal

⁴ *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]

and practical justice to the parties” and I observe that there is a date scheduled for an investigation meeting for the substantive hearing within a reasonable timeframe.⁵

[25] I am not satisfied that one of the grounds for removing a matter to the Employment Court pursuant to s 178(2) of the Act has been met.

[26] In these circumstances I decline to order the removal of this matter to the Employment Court.

[27] Whilst removal has been declined, it is open to either the Applicant or the Respondent to challenge this determination declining removal to the Employment Court.

Costs

[28] I am minded to reserve the issue of costs until resolution of the substantive matter. However if the parties wish to seek costs on this interlocutory matter, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[29] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

⁵ Employment Relations Authority Regulations 2000 reg 4 (1)(c)