IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 292
3053372

	BETWEEN	MATTHEW FECHNEY Applicant
	AND	SPARK NEW ZEALAND TRADING LIMITED Respondent
Member of Authority:	Helen Doyle	
Representatives:	Ashleigh Fechney, Advocate for Applicant Emma Butcher, Counsel for Respondent	
Investigation Meeting:	On the papers	
Submissions received:	15 March 2019 from Applicant 29 March 2019 from Respondent	
Determination:	20 May 2019	

APPLICATION FOR REMOVAL OF A MATTER TO THE EMPLOYMENT COURT

A The application for removal of file number 3050012 to the Employment Court is declined.

B Ms Fechney and Ms Butcher should now proceed to agree a timetable for an exchange of statements of evidence and a bundle of documents for the investigation meeting on 31 July 2019.

C Costs are reserved until after the substantive determination.

Employment Relationship Problem

[1] The applicant seeks removal of a matter lodged with the Authority under file number 3050012 to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act).

[2] The application is made on the basis that the grounds for removal under s 178(2)(a) and (b) are made out. They are that there is an important question of law likely to arise in the matter other than incidentally and 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.

[3] The respondent opposes removal of the proceedings to the Employment Court and says that there is no question of law arising in the proceeding other than incidentally to the questions of fact. Further that the claims are not urgent and are not of a nature that there is a public interest in them being removed to the Employment Court.

[4] It was agreed that the removal application be dealt with on the papers.

[5] In determining the application for removal, the Authority has considered the statement of problem and statement in reply lodged in file number 3050012, the application for removal, the opposition to removal and submissions in support of and in opposition to the application for removal.

The proceedings before the Authority

[6] The applicant is in an ongoing relationship with the respondent.

[7] He says that his employment and conditions of employment have been affected to his disadvantage by unjustifiable actions by the respondent.

[8] The applicant claims the respondent implemented changes to the terms and conditions of employment for all of its employees which disadvantage its employees for their use of sick leave and annual leave – the "Accreditation framework."

[9] He says that the respondent put him on a performance management plan due to high levels of sick leave without regarding the genuineness or reasonableness of that sick leave and without following a fair and reasonable process consistent with the medical incapacity process.

[10] The applicant says he was not considered for a pay rise otherwise due to him under Spark New Zealand Trading Limited's policy because of his alleged high sick leave and was placed on a performance management plan for failing to meet his sales targets in circumstances where he says that was not fair or reasonable.

[11] The applicant further says that the respondent placed him on a performance management plan which did not meet the criteria of a performance plan that may have justifiably resulted in disciplinary action and he was not considered for a pay rise because of the implementation of the unjustified performance plan.

[12] The relevant policies/procedures for consideration in respect of the above together with the Accreditation framework include the absence management plan and the performance management plan.

[13] The respondent in its statement in reply does not accept there has been action taken that unjustifiably disadvantages the applicant. The respondent says there have been no changes made to the applicant's terms and conditions of employment and that he was not put on a performance management plan due to high levels of sick leave. Further, it says that the applicant was not due a pay rise under the respondent's policy rather than there being an issue with sick leave. The respondent says its performance support plan process is fair and reasonable and has been fairly and reasonably applied to the applicant in good faith.

[14] In the event that the matter is not removed the Authority has provided the parties with a date for an investigation meeting on 31 July 2019.

Important question of law likely to arise other than incidentally – 178(2)(a)

[15] Ms Fechney submits that an important question of law is likely to arise in the matter other than incidentally.

[16] She refers to the principles to be applied as set out in *Hanlon v International Educational Foundation (NZ) Inc*[1] as summarised in *McAlister v Air New Zealand Limited.*[2] *Hanlon* provides guidance as to what constitutes an important question of law that is likely to arise other than incidentally in the matter.

[17] Ms Fechney submits the anticipated questions of law are:

(a) Whether it is fair and reasonable to require an employee to meet various KPI's and sales targets where they fail to take into consideration authorised individual's sick leave and annual leave;

(b) Whether an employer can fairly implement a plan to manage employees sickness, and if so, whether this is inherently discriminatory;

(c) Whether an employer can implement a medical and capacity process for sick leave that is sporadic, rather than continuous.

[18] Ms Fechney submits that the questions of law are determinative of the entire proceeding and important to employment law generally as there is little to no case law regarding the question. In her submissions she refers to cases with similar patterns and obiter statements. Three of these are Employment Relations Authority determinations.[3] Ms Fechney also refers to obiter statements in two Employment Court cases about the purpose of sick leave and responses to an employee taking an entitlement to more sick leave than the statutory minimum.[4] Ms Fechney submits there are no reported cases determining the relationship between sick leave, annual leave and KPI and sales targets. She submits that those questions of law are likely to arise other than incidentally in the problem before the Employment Relations Authority.

[19] Ms Butcher in her submission considers the questions of law that arise from the facts are broader than those set out by Ms Fechney. She submits that the question for determination by the Authority is whether the respondent's absence management plan and the

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1 *Hanlon v International Foundation (NZ) Inc* [1995] 1 ERNZ 1

2 *McAlister v Air New Zealand Limited* 4AC 22-5, 11 May 2005 at [9].

3 *Bentley v Land Transport New Zealand* NZERA Wellington WA10/08 25 January, *Cooper v Mars New Zealand Limited* trading as *Mars Pet Care* NZERA Wellington WA163/07 6 December 2007 and *Retire v Southern Paprika Limited* [2012] NZERA Auckland at [70].

4 *Taiapa v Te Runanga O Turanganui A Kiwa Trust (trading as Turanga Ararau Private Training Establishment)* (2013) 10 NZELR 378 at [30] and *Electrical Union 2001 Incorporated v Mighty River Power Limited* [2013] NZEmpC 197 at [100].

performance support plan were applied fairly and meet the test for justification under s 103A of the Act. She submits that the questions are unique to the circumstances of the applicant taking into account his experience, sick and annual leave, KPI's set for him and the general discretion of the respondent in the particular circumstances. She submits that the questions of law that arise from the facts are:

(a) Whether the respondent's application of its performance support processes in respect to the applicant amounted to unlawful discrimination;

(b) Whether the application of the respondent's accreditation framework to the applicant involved a unilateral change to his terms and conditions of employment; and

(c) Whether the steps taken by the respondent towards the applicant amounted to unjustified actions that caused him disadvantage.

[20] Ms Butcher submits that the law that needs to be applied to answer those questions is well established and it will be the facts of the case that determine the outcome. She accepts the facts are relatively complicated and to determine what occurred there will be evidence required but submits that is best achieved by the Authority's investigative process rather than the Court's adversarial one. Ms Butcher refers the Authority to an Employment Court judgment in *New Zealand King Salmon Co Limited v Cerny*[5] to support the suitability of the Authority process for analysing facts.

[21] Ms Butcher submits that the questions of law identified by the applicant in submissions are in fact combinations of law and fact. Further that the submissions frame the questions of law so narrowly and so related to the specific facts, some of which are disputed, that they appear to be issues that have not previously been considered. Ms Butcher submits the questions framed by the applicant in fact fall more broadly within the questions identified in her submissions and more broadly still with the overarching question being whether the respondent fairly applied policies and procedures to the applicant in his particular circumstances.

[22] She submits that the absence of cases with similar facts point to the specific facts of the case rather than the need for determination by the Court.

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5 *New Zealand King Salmon Co Limited v Cerny* [2012] NZEmpC 195 at [18].

Conclusion on questions of law and their importance

[23] In *Hanlon*[6] the then Chief Judge Goddard held that the importance of a question of law is a relative matter and has to be measured in relation to the case in which it arises.

[24] I prefer Ms Butcher's broader assessment of the questions that arise from the statement of problem and statement of reply. The main issue for the Authority is whether there were unjustified actions on the part of the respondent that disadvantaged the applicant. There are many cases that provide guidance in applying the test of justification in s103A of the Act.

[25] The Authority will need to determine the facts in order to assess the circumstances, the respondent's policies and processes and the fairness and reasonableness of their application to the applicant including whether there are any issues of unlawful discrimination under the Act. The Authority is well placed to undertake this.

[26] I accept Ms Fechney's submission that the Employment Court may not have determined cases with similar fact patterns about sick and annual leave and performance measures. I also accept Ms Butcher's submission that in all likelihood this is because of the fact specific nature of this matter rather than an important question of law. There are potentially many actions about which the Employment Court may not have determined justifiability or whether they are disadvantageous. That of itself generally does not give rise to an important issue of law.

[27] I am not satisfied that an important question of law arises in this matter other than incidentally.

[28] The ground in s 178(2)(a) of the Act is not made out.

Is the case of such a nature and urgency that it is in the public interest that it be removed? – s 178(2)(b) of the Act

Urgency of the case

[29] Ms Fechney refers to delay in setting the investigation meeting date. I agree that this matter was given a date further out than may have been given in other circumstances

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6 Above n 1 at 7

particularly with an ongoing relationship because of unexpected events resulting in an increase in the caseload in Christchurch.

[30] I am not persuaded however that there is particular urgency. Ms Butcher submits that the applicant remains in employment and is not under a disciplinary process. It is not a situation therefore where employment is under threat.

Nature of the case

[31] Ms Fechney submits that the respondent employs approximately 5,000 part-time and full-time employees and while the grievances are recognised as those of the applicant the respondent's other employees are employed in almost identical terms to the applicant.

[32] She submits that resolution of the applicant's grievances may result in the respondent amending its accreditation framework and/or its KPI and sales target structure which would affect many of the respondent's employees. Ms Fechney submits it is highly unlikely that the applicant is the only employee who had been impacted by the respondent's action for sick and annual leave.

[33] She submits that resolution of the applicant's grievances would affect those employees' currently on management plans for performance and absence and would be of importance for all the respondent's employees extending past the respondent and its employees to sales targets and plans in the sales industry.

[34] Ms Fechney submits in a broader sense there is interest by both employers and employees on the justifiability of the approach to managing sick leave. She refers to a recent article published by Radio New Zealand[7] one of which criticised the New Zealand Police's call centre for implementing a similar approach for sick leave to demonstrate public interest regarding management plans for absences.

[35] Although referred to by Ms Fechney in support of removal I am not satisfied that this case is on all fours with the Authority determination in *New Zealand Post Primary Teachers*

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[7] Charlie Drever *"emergency call handlers fear being penalised for sick days"* 16 August 2018 Radio New Zealand in <https://www.radionz.co.nz/news/national/364195/emergency-call-handlers-fear-being-penalised-for-sick-days>.

Association v Secretary for Education.[8] In that case the Authority removed the matter of its own volition. There was a dispute about a variation to a collective agreement that impacted on pay scales. The collective agreement covered the work of over 20,000 full time equivalent secondary teachers and the dispute involved a potential liability of several million dollars. There was urgency because of claims having been tabled for bargaining. The public interest aspect was found to have been satisfied by the significant number of individuals engaged in the education sector that may either directly or indirectly be impacted by a resolution of the matter or any delay of the matter.

[36] In the present case I agree with Ms Butcher's submission that the applicant will be impacted by any determination because the Authority is assessing the fairness and reasonableness and justification of the absence management and performance plans as they apply to him. To the extent that there may be interest to other employees of the respondent I cannot be satisfied it would be significant in all the circumstances and/or require other than similar individual assessment of each employee's situation who may be supported by plans at the time.

[37] Ms Butcher said that the plans only apply to employees in the Contact Centres and Retail, and not to all its employees. She acknowledges in her submission that many employees are covered by the accreditation framework but only a small proportion are supported by plans.

[38] I am not satisfied in this matter that its nature is such that there would be public interest in the specific factual aspects of the matter before the Authority and/or that the matter is so urgent that there should be removal to the Employment Court.

Discretionary Considerations –s 178(2)(d) of the Act

[39] I have not found that an important question of law is likely to arise in this matter other than incidentally. I have not found 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 Employment Court.

[40] At this point I need to assess whether in the exercise of my discretion the matter should otherwise be removed to the Employment Court.

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8 *New Zealand Post Primary Teachers Association v Secretary for Education* [2012] NZERA Wellington 130 at [20], [23] and [24].

[41] Ms Fechney submits that the applicant has limited resources and it is important that those resources be utilised effectively and efficiently. Ms Butcher submits that the Court process is time intensive and more costly and because it is adversarial it is likely to create more tension in the parties' on-going employment relationship.

[42] I am not satisfied that a challenge is inevitable. Ms Butcher in her submission noted that the respondent "welcomes the Authority's assessment of its plans and accreditation framework and the application of these to the applicant in his particular circumstances".

[43] This is the sort of case that Parliament intended the Authority to investigate and determine. It is a personal grievance and there is an on-going employment relationship.

[44] I am not otherwise minded in the exercise of my discretion to remove the matter to the Employment Court.

[45] The application for removal to the Employment Court is declined.

Next steps

[46] Ms Fechney and Ms Butcher should agree a timetable for an exchange of evidence and preparation of a bundle of documents for the investigation meeting on 31 July 2019.

Costs

[47] I reserve the issue of costs for determination after the substantive investigation.

Helen Doyle
Member of the Employment Relations Authority