

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 73
3046232
3046252

BETWEEN REPETA MAKEA-RUAWHARE
Applicant

AND TURUKI HEALTH CARE
CHARITABLE TRUST
Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael O'Brien, Counsel for the Applicant
Anthony Drake and Dylan Pine, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 13 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Makea-Ruawhare, claims that the Respondent, Turuki Healthcare Charitable Trust (Turuki) has breached a settlement agreement between the parties, and is seeking penalties in respect of those breaches.

[2] Ms Makea-Ruawhare seeks an order for removal of the matter to the Employment Court pursuant to s 178(2)(c) of the Employment Relations Act 2000 (the Act) on the basis that there are already proceedings before the Employment Court relating to breaches of the settlement agreement which will necessarily involve evidence of the same matters outlined in her Statement of Problem.

[3] Turuki claims that the matter is *res judicata* in that the Authority has already determined the matter, and should be dismissed.

[4] Turuki opposes the application by Ms Makea-Ruawhare for removal.

Brief Background

[5] Ms Makea-Ruawhare was employed by Turuki as a Family Start worker. An employment relationship issue arose as a result of which the parties attended a mediation provided by the Ministry of Business, Innovation and Employment. Ms Makea-Ruawhare was represented during that process by advocates Allan Halse and Tracey Simpson of Culturesafe NZ Limited, (Culturesafe) an organisation which offers employment advocacy services.

[6] During mediation the parties entered into a confidential Record of Settlement (the ROS). Terms of the ROS included that:

- it was confidential (clause 1);
- Turuki would make financial payments to Ms Makea-Ruawhare and certain healthcare providers (clauses 3, and clauses 6-10); and
- the parties would not make derogatory remarks or disparaging comments about the other (clause 11).

[7] Turuki subsequently filed a Statement of Problem with the Authority claiming that there had been a breach of the confidentiality provisions of the ROS by the Respondent, Ms Makea-Ruawhare and her employment advocates. This claim was determined by the Authority on an *ex parte* basis (the First Determination).¹

[8] A process was thereafter commenced by the Authority as a result of which Ms Makea-Ruawhare as First Respondent, together with the other named respondents Allan Halse, Tracey Simpson and Culturesafe, was advised that a statement in reply was required to be filed with the Authority setting out the Respondent's position. Ms Makea-Ruawhare did not file a statement in reply, and did not engage in the Authority's process.

[9] The result of that process was a determination which awarded penalties and general damages against Culturesafe, Mr Halse and Ms Simpson (the Second Determination).²

[10] Member Crichton stated in the Second Determination that: "I am not persuaded there is evidence that the first respondent has any involvement in the breaches".³

¹ *Turuki Healthcare Services v Makea-Ruawhare & Ors* [2018] NZERA Auckland 95

² *Turuki Healthcare Services v Makea-Ruawhare & Ors* [2018] NZERA Auckland 136 at [39]

²

³ Above n. 2 at [39]

[11] That determination has been challenged but although Turuki applied to the Court to have Ms Makea-Ruawhare joined as a party to that *de novo* challenge, Ms Makea-Ruawhare opposed that order and no judgment has been issued.

[12] Ms Makea-Ruawhare has made an application to the Authority for it to determine a claim that Turuki breached the ROS. The breaches of the ROS by Turuki claimed by Ms Makea-Ruawhare are:

- Non-payment of psychologist's invoice (clause 7, express term);
- Non-payment of general practitioner's invoice (clause 9, express term); and
- Failure to transfer medical records (implied term)

[13] Ms Makea-Ruawhare has applied for the matter to be removed to the Employment Court.

Issue

[14] This determination addresses the issue of whether or not the Authority should remove this matter to the Employment Court.

Principles of Removal

[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
- 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

[16] Ms Makea-Ruawhare applies to have the matter removed to the Court in reliance on s 178(2)(c) and s 178(2)(d) of the Act. Mr O'Brien, on behalf of Ms Makea-Ruawhare, submits that the proceedings presently before the Court relate to alleged breaches by the Respondent of the ROS and it would be an efficient use of resources for the Court to hear both matters contemporaneously.

Submissions of the Respondent

[17] Mr Drake, on behalf of Turuki, submits that the application for removal by Ms Makea-Ruawhare is misconceived on the basis that the Authority has already determined the matter, and the law of issue estoppel or *res judicata* arises.

[18] Mr Drake notes that Ms Makea-Ruawhare was served with Turuki's proceedings in the earlier Authority process and given the opportunity to address the Authority on the issues but chose not to do so. Having been provided with a full opportunity to participate in the Authority's process and having chosen not to do so, it is submitted that the present application by her is an attempt to get 'a second bite at the cherry' and against the principles of equity.

[19] Mr Drake submits that the principle of *res judicata* applies. Mr Drake cites the comments of Sir James Wigram VC in *Henderson v Henderson*, in which His Honour explained:⁴

In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[20] The facts relied upon by Ms Makea-Ruawhare in respect of this application have been determined by the Authority and, in light of the fact that she was given a full opportunity to participate in the Authority's proceedings at that time, it is contrary to public policy that she be permitted now to raise the extant causes of action against Turuki.

[21] Mr Drake further submits that Ms Makea-Ruawhare is basing her application for removal on s 178(2)(c) and s 178(2)(d) of the Act. In regard to s 178(2)(c) it is submitted

⁴ *Henderson v Henderson* (1983) 3 Hare 100, [1843 – 1860] All ER Rep 378 at 381

that on a plain reading of s 178(2)(c) the Employment Court must have before it the same parties, however Ms Makea-Ruawhare is not a party to the proceedings before the Court. She is not named as a party to the proceedings and when an application for joinder was made, the Court was informed that it was opposed, and no judgment has been issued.

[22] In regard to s 178(2)(d) Mr Drake submits that the Authority must first consider the merits of the application and whether or not it has jurisdiction to deal with the application. It follows that because of the legal principle of *res judicata* the Authority does not have the jurisdiction to deal with the application and removal on this ground cannot be granted.

[23] It is submitted for Turuki that the facts of the case have already been heard, considered and determined by the Authority and it would be unreasonable to allow the Authority's processes to be used in the manner sought by Ms Makea-Ruawhare. If the Authority allowed its processes to be thus used, it is submitted that it would risk setting a dangerous precedent and may undermine the rule of law.

Applicant's submissions in reply

[24] Mr O'Brien, on behalf of Ms Makea-Ruawhare, further submits that there is no issue estoppel or *res judicata* operative. The previous determinations by the Authority related to claims by Turuki against Ms Makea-Ruawhare and her representatives; however Ms Makea-Ruawhare's claims relate to Turuki's alleged breach of terms of the ROS in respect of which there was no substantive judgment by the Authority.

[25] Mr O'Brien submits that the proceedings before the Employment Court relate to breaches of the ROS by Mr Halse, Ms Simpson and Culturesafe which were in response to alleged breaches of the ROS by Turuki. This will necessarily involve evidence of the same matters outlined in Ms Makea-Ruawhare's statement of problem.

[26] Mr O'Brien submits that Ms Makea-Ruawhare has been named as an intended plaintiff in an application to the Employment Court. Proceeding has a wide meaning and includes applications. As such Ms Makea-Ruawhare is a party to proceedings in the Employment Court.

[27] It is submitted by Mr O'Brien that on the basis that the Court is due to hear matters related in fact, it would be a proper exercise of the Authority's discretion to remove the matter to the Court.

Should the application for removal be granted?

(i) *On the basis of s 178(2)(c) of the Act?*

[28] Previous determinations by the Authority have addressed the claims brought by Turuki of a breach of the terms of the ROS by Ms Makea-Ruawhare and her representatives.⁵

[29] In the second Determination the Authority determined that breaches of the ROS had occurred by Ms Makea-Ruawhare's representatives and remedies were awarded against them.⁶

[30] Although the alleged breach of one of the terms of the ROS by Turuki was referred to in that Determination in the context of giving rise to the breach on the part of Ms Makea-Ruawhare and her representatives, there was no substantive determination of that issue. Further the additional breaches of the ROS by Turuki as claimed by Ms Makea-Ruawhare have not been determined by the Authority.

[31] I do not find issue estoppel or the principle of *res judicata* to apply in this case.

[32] Pursuant to s 178(2)(c) of the Act the Authority may remove the matter if: "the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues".

[33] The Employment Court proceedings are between the Plaintiffs CultureSafe, Allan Halse and Tracey Simpson, and the Defendant Turuki. Ms Makea-Ruawhare is not named as a party to those proceedings.

[34] I accept that the proceedings in the Employment Court may involve Ms Makea-Ruawhare's representatives, and may tangentially touch upon related issues, however Ms Makea-Ruawhare opposed being joined to those proceedings and is not named as a party in them. Furthermore I am not convinced that the Employment Court proceedings will focus in any detail on the claims now brought before the Authority by Ms Makea-Ruawhare.

[35] I do not find that removal should be granted pursuant to s 178(2)(c).

(ii) *On the basis of s 178(2)(d) of the Act?*

[36] Pursuant to s 178(2)(d) of the Act I have discretion whether or not to remove the matter to the Employment Court. Such discretion should be used in a principled manner.

⁵ See above n 1 and n2

⁶ See above n 2

[37] The proceedings before the Employment Court are a challenge in respect of the Authority's second determination which awarded penalties and damages against Ms Makea-Ruawhare's representatives, but not against her.

[38] Whilst I am not persuaded that the proceedings before the Court will necessarily involve a full examination and determination of the claims now brought before the Authority by Ms Makea-Ruawhare, I do find that the claims are capable of being fully investigated by the Authority.

[39] Claims involving breaches of a ROS are not unusual in the Authority and I find to fall fully within the jurisdiction of the Authority.

[40] After carefully considering this matter I determine pursuant to s 178(2)(d) that this is not a case in which to exercise my discretion by removing the matter to the Employment Court.

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

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

Next Steps

[43] The Authority will contact the parties to arrange a case management call to progress Ms Makea-Ruawhare's application.

Costs

[44] 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.

[45] 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