

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 478  
3066973 & 3066953

BETWEEN	A LABOUR INSPECTOR Applicant
AND	SOK HOIRNG CHHOIR IN PARTNERSHIP WITH RATTANAK HENG T/A THE BAKEHOUSE CAFE First Respondent
AND	RATTANAK HENG IN PARTNERSHIP WITH SOK HOIRNG CHHOIR T/A THE BAKEHOUSE CAFE Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Marija Urlich, counsel for the Applicant Matt Robson, counsel for the Respondents
Investigation Meeting:	On the papers
Determination:	15 August 2019

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**DETERMINATION OF THE AUTHORITY**

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**A. This matter is removed to the Employment Court to hear and determine.**

**Employment Relationship Problem**

[1] Labour Inspector David Li sought removal of this matter to the Employment Court because he has also filed claims in the Court seeking declarations that the respondents committed serious breaches of the statutory minimum entitlements for employees and should be ordered to pay pecuniary penalties. Only the Court has jurisdiction, under Part 9A of the Employment Relations Act 2000 (the ERA), to make those declarations and orders.

[2] His application to the Authority, that he wanted removed to the Court, sought orders requiring the respondents to pay penalties for failing to keep wage and time records required under the ERA and holiday and leave records required under the Holidays Act 2003 (the HA). His claim in the Court alleges the respondents committed serious breaches of the Minimum Wage Act 1983 (the MWA) for wages not paid when due and of the HA for annual holidays and public holidays not paid.

[3] As the facts of the cases in the Authority and the Court concern breaches of employment standards for two workers employed by the respondents, there is a substantial overlap in the evidence and issues to be considered.

[4] The respondents' statement in reply to the Inspector's substantive application to the Authority accepted they breached the ERA and the HA provisions about record keeping but say they have remedied underpayments to the two workers and put in place required record keeping. They have not, in that reply, expressly accepted any liability to the penalties sought by the Inspector. In reply to the Inspector's application for removal to the Court, the respondents agreed this matter should be heard there because of the Court's exclusive jurisdiction regarding pecuniary penalties and "to save time and cost to all parties".

### **Grounds for removal**

[5] This application for removal has been determined on the papers. Section 178 of the ERA allows the Authority to order removal of a matter to the Court where, among other reasons, "the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues". The Authority may also remove a matter where it "is of the opinion that in all the circumstances the court should determine the matter". If either or both of those criteria are satisfied in a removal application the Authority must then also, as a check in exercising its discretionary power to order removal, consider whether there is any reason not to remove the matter.<sup>1</sup>

[6] As explained in the Inspector's application for removal, the Court would first need to exercise its jurisdiction to consider whether any breaches that occurred after Part 9A of the ERA came into effect on 1 April 2016 were "serious". If the Court did

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<sup>1</sup> *Auckland District Health Board v X (No. 2)* [2005] ERNZ 551 at [30].

make that finding, the Court could then consider making the orders that flow from it. However if the threshold of seriousness was not established, the Court could nevertheless, at that stage, exercise the Authority's jurisdiction to order penalties for what the Inspector described as the "simple breaches" regarding record keeping and also order the payment of any arrears due as minimum wages and holiday pay. By following that approach both parties would be spared the time and expense of preparing for and participating in both an Authority investigation and a Court hearing with both institutions having to make findings and determine appropriate remedies.

[7] The circumstances and that explanation clearly met the s 178(2)(c) criterion for removal of proceedings between the same parties and involving the same issues. I have concluded the discretion to order removal on that ground should be exercised to enable a more efficient use of the resources of the Authority, the Court and the parties while also ensuring the justice of the entire circumstances will be thoroughly considered and determined. The s 178(2)(d) criterion regarding the Authority's opinion in all the circumstances was therefore also satisfied.

[8] There were no factors apparent or identified that, as a cross check, suggested removal should nevertheless be declined.

[9] Accordingly, the removal application has been granted. Under s 178(1) of the ERA, the Authority orders removal of the matter to the Court.

Robin Arthur  
Member of the Employment Relations Authority