Note: An order prohibiting publication of some names and identifying information applies to these matters – see paragraph [10]

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 160
3051312 and 3051372

	BETWEEN	ANGELA NEIL Applicant in 3051312
	AND	NEW ZEALAND NURSES ORGANISATION Respondent
	BETWEEN	TINA WEST Applicant in 3051372
	AND	NEW ZEALAND NURSES ORGANISATION Respondent

Member of Authority:	Robin Arthur
Representatives:	Allan Halse, advocate for the applicants Susan Hornsby-Geluk, counsel for the respondent
Investigation:	On the papers
Determination:	20 March 2019

DETERMINATION OF THE AUTHORITY

A. The application for removal of these two matters to the Employment Court to hear and determine is declined.

B. Costs are reserved.

[1] Angela Neil and Tina West asked for their applications in the Authority to be removed to the Employment Court to hear and determine. Their applications related to disadvantage grievances raised with their employer, the New Zealand Nurses Organisation (NZNO). NZNO opposed removal of these two matters to the Court.

The employment relationship problem

[2] Broadly summarised, the applications of Ms West and Ms Neil said that they were each subjected to bullying behaviour by other employees and that their NZNO managers had not properly investigated their concerns. They also said NZNO had acted unfairly towards them in two further ways. Firstly, NZNO had not agreed to a request for Ms West and Ms Neil to be given special paid leave. They were taking leave due to concerns about their personal wellbeing arising out of what they said had become unsafe working conditions. Secondly, NZNO had not agreed to arrangements they wanted in order to return to work.

[3] In late December 2018 NZNO had begun an inquiry into the prospects of Ms West and Ms Neil returning to work. It asked for their feedback on what they considered could be done to ensure a safe and healthy working environment. NZNO also told Ms West and Ms Neil their employment relationships with NZNO might be at risk of termination due to incompatibility or medical incapacity. Through their advocate Ms West and Ms Neil had then sought to return to work on 14 January 2019. NZNO declined that request saying it was not satisfied it would be safe for them to return to the working environment they had complained about. It said broader issues about the relationships of Ms West and Ms Neil with their colleagues, and their perceptions of those relationships, had to be addressed before their return.

[4] NZNO had asked that any feedback on what actions it could take to restore the workplace to one Ms West and Ms Neil considered safe and healthy be provided by 14 January 2019. Ms West and Ms Neil did not provide any feedback. Instead they lodged applications to the Authority on that date.

[5] In late January 2019 NZNO managers asked Ms West and Ms Neil, by letter, to attend meetings about the future of their employment. They advised there appeared to be an irreconcilable breakdown of the employment relationship and termination of the employment was a possible outcome. Neither woman attended the requested meetings. Their advocate said this was for health reasons.

[6] On 11 February the NZNO managers advised, by letter, that they had reached a preliminary decision to dismiss them. They said the breakdown in the relationship had become so fundamental it was incompatible with ongoing employment. Soon after NZNO dismissed Ms West and Ms Neil.

[7] At a case management conference held by telephone with the parties' representatives on 13 February 2019 arrangements were made for an Authority investigation to be held on 19, 20 and 21 June 2019. The advocate acting for Ms West and Ms Neil declined earlier investigation meeting dates available in March and April.

[8] Timetable directions were also set to allow the Applicants to lodge an amended statement of problem. This was, in part, to allow correction of some claims based on inapplicable provisions of the Employment Relations Act 2000 (the Act). It was to allow Ms West and Ms Neil to apply for an investigation of personal grievances for unjustified dismissal, as the termination of their employment had occurred after their original statements of problem were lodged on 14 January. The date set for lodging amended statements of problem was 25 March, with provision for amended statements in reply to then be lodged by 8 April.

[9] This provision for amended statements of problem raised the prospect that the matters for removal could have included the issue of whether the dismissals were justified or not. As things stand at the date of consideration of the removal application, only the original applications (relating to unjustified disadvantage during the employment) are before the Authority. Even if these present matters are removed and later applications are made regarding the dismissal, those later claims would have to be investigated in the Authority, at first instance, unless a separate removal application was made and granted.

Order prohibiting publication of some information

[10] An order made under clause 10(1) of Schedule 2 of the Act on 13 February 2019 prohibited publication of the names, positions and work location of the three NZNO other employees who were the subject of allegations made by Ms West and Ms Neil. The advocate for Ms West and Ms Neil, Allan Halse, subsequently and deliberately breached that order in posts he made on the Facebook page of his business.

[11] Orders for compliance with those non-publication orders were made in an Authority determination issued on 25 February 2019.[1] Despite ongoing breaches of those orders by Mr Halse, they remain in place and enforceable by compliance action in the Authority and the Court.

The removal application

[12] Under s 178 of the Act the Authority may order removal of these two matters to the Court if:

(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.

[13] If the Authority declines removal, the party applying for removal may seek the special leave of the Court for an order for removal.[2]

[14] The removal application has been determined on the papers. An opportunity was provided, but not used, for the representatives to make further oral submissions. In response to an opportunity for written submissions a brief email was submitted on behalf of Ms West and Ms Neil summarising their application, with no additional or different reasons or arguments given for removal.

[15] The application lodged on behalf of Ms West and Ms Neil did not directly or clearly address any of the statutory criteria for removal. After setting out a view of the facts, there appeared to be three specific reasons advanced for removing these matters to the Court where the application said the applicants were "more likely to receive a fair hearing".

[16] The first reason given was that the Authority member had not asked NZNO to "desist" from its inquiries and eventual decision to dismiss Ms West and Ms Neil.

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[1] *Neil & West v New Zealand Nurses Organisation* [2019] NZERA 98.
[2] Employment Relations Act 2000, s 178(3).

[17] The second reason was an allegation that the Authority member presently investigating these matters was "unduly influenced" by another Authority member who had previously worked for NZNO and the present member had become "caught up in [a] campaign" against Mr Halse and his business, CultureSafe NZ Limited.

[18] The third reason advanced referred to a Facebook post by a trade union official and former Member of Parliament who was said to be "a close friend of many within NZNO". The post quoted referred to "forums" in which unions had contact with the Labour Party, the government, government officials and the Employment Relations Authority. The application said the post implied that the former MP had the ability to influence the Government, unions and the Authority and this was "an extremely serious concern if true".

[19] Those three reasons are addressed later in this determination in considering whether they could warrant removal under the fourth statutory criterion.

Who determines a removal application?

[20] It is well-established Authority procedure that the investigating Member determines applications for removal. The same procedure applies to applications for recusal of a Member or for re-opening of an investigation. The courts have, over time, developed principles to apply in dealing with similar applications that they receive. Authority investigations are judicial proceedings so the principles developed by the courts also guide Authority members carrying out their quasi-judicial role of investigating employment relationship problems.[3]

[21] Although not raised in the removal application itself, a subsequent email from Mr Halse said the investigating Member should not determine whether to remove the case to the Court because "his bias has already been demonstrated". If that observation were sufficient to amount to an informal application for recusal of the present Member, it would be declined for the following reasons.

[22] A recusal application is usually considered by the decision maker who a party seeks to have removed from considering the case.[4]

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[3] Employment Relations Act 2000, s 176(2).
[4] See, for example, *Bracewell v Richmond Services Limited* [2015] NZEmpC 45 at [12]-[16].

[23] An Authority Member is generally obliged to complete the investigation of any particular case she or he is assigned. A High Court of Australia decision has explained the principle in this way:[5]

> Although it is important justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

[24] The principles applicable in considering a recusal application, as confirmed by the Supreme Court, are often referred to as the *Saxmere* test.[6] This takes account of the oath or affirmation taken by a decision maker, which in the case of the Authority is to faithfully and impartially perform her or his duties.[7] Where bias is alleged, the *Saxmere* test considers whether a fair-minded and sensible member of the public, with appropriate knowledge of all the relevant circumstances including the general workings of the legal system, might reasonably apprehend that a decision-maker might not bring an impartial mind to resolving a question to be decided. Previous unfavourable rulings by a decision-maker against a party seeking the recusal, without more, do not trigger that test.[8] Comments or concerns expressed by a decision-maker during the proceedings do not necessarily indicate pre-judgment.[9] Such concerns or comments are also probably more likely to be expressed in the Authority's exercise of its investigative role, where the Member is expressly mandated by the Act to be more involved in questioning and checking evidence than a judge would typically be in the more formal adversarial procedures of a court.

[25] Observations made by the District Court Chief Judge Jan-Marie Doogue about the reasons why some representatives seek a change of decision-maker are as apt for the Authority as for the courts:[10]

> It seems that this is often occurring in situations where the Judge may have expressed an opinion in an earlier case and that is not necessarily a ground for recusal. The mere fact that a Judge earlier in the same case, or in a previous case, has commented adversely on a party or a witness or found the

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[5] *Re JRL, ex parte CJL*, (1986) 161 CLR 342 (HCA) at 352, per Justice Mason.
[6] *Saxmere Company Ltd v New Zealand Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.
[7] Employment Relations Act 2000, s 168.
[8] *Stiassny v Siemer* [2013] NZHC 154, at [12].
[9] *Bracewell*, above n 4, at [10].
[10] "Reminder from Chief Judge on judicial recusal" Law Talk 911 (October 2017) 46.

> evidence of a party or a witness to be unreliable would not without more be found to be a sustainable objection to that Judge presiding …

[26] Against that background, in the course of these proceedings to date, I have expressed concern about instances of Mr Halse behaving inappropriately and some inadequacies in the pleadings he lodged on behalf of Ms West and Ms Neil. The concern about inappropriate behaviour in large part related to postings he made on his CultureSafe Facebook page and some of what he said in correspondence to the Authority about the NZNO employees who are the subject of the non-publication orders presently in place (and one of them in particular), about the other party's representative and about the Authority Member. In a Minute to the representatives I described his conduct as exhibiting a persistent pattern of "playing the ref" and not "the ball", the ball meant as a metaphor for paying attention to progressing the proceedings in a fair and measured way. The Minute included this extract from an email I sent to the representatives earlier in the proceeding:

> … Mr Halse has referred in his correspondence to Judge Perkins of the Employment Court. Mr Halse knows the judge has previously expressed concern about the modus adopted by Mr Halse in making disparaging comments about Authority Members where there is any development in proceedings which Mr Halse perceives to be disadvantageous to him. The judge has described one instance of such comments by Mr Halse about Authority Members as "despicable and reprehensible". In that light I ask Mr Halse to reflect on material posted regarding this particular proceeding and remove or amend it accordingly.

[27] Rather than modifying his behaviour Mr Halse proceeded to breach the orders made prohibiting publication of names and identifying details of three employees. In a determination issued later to order compliance with the earlier orders, I noted Mr Halse's belief he was entitled to make such postings was based on his idiosyncratic and incorrect view of the law, of the interrelationship of various statutes and of the procedures long developed in the common law for the fair treatment of parties and witnesses in proceedings, in the Courts and in tribunals like the Authority. I noted he incorrectly described the Authority's orders as "illegally raised".[11] He has relied on his personal interpretations of the Health and Safety at Work Act 2015, the New Zealand Bill of Rights Act 1990 and the Protected Disclosures Act 2000 as somehow giving him licence to say whatever he likes rather than wait for the proper process conducted under the Employment Relations Act to fairly examine and determine

[11] *Neil & West v New Zealand Nurses Organisation*, above n 1, at [16] and [17].

allegations made. The compliance determination described that conduct as a disturbing and dangerous disregard for the rule of law, amounting to vigilante-like behaviour.[12] The latter reference related to his breach of the present non-publication orders to name and otherwise identify one of the NZNO employees who is the subject of allegations made by Ms West and Ms Neil.

[28] While unusual, it has sadly proved necessary, to make strong findings about some aspects of Mr Halse's conduct so far in this proceeding and its corrosive effect on the Authority's endeavours to conduct an investigation where the claims of Ms West and Ms Neil, and the responses of their former employer, can be fairly examined and determined. A fair-minded and sensible member of the public, with appropriate knowledge of all the relevant circumstances including the general workings of the legal system, would understand those findings sought to protect the integrity of the process rather than indicating the decision-maker might not bring an impartial mind to resolving the questions for decision.

[29] Further, a litigant or advocate cannot subject a decision-maker to abusive comments or unfounded allegations and then, having done so, fairly say that decision-maker should be removed from a case involving that litigant or advocate. Such activity is not a ground for recusal. If it were otherwise, making such comments or allegations would become a device or tactic whereby a party or advocate could manipulate and remove decision-makers. It would licence what the courts have called 'judge shopping' and said should not be allowed. Rather, in those circumstances, what has been called the 'duty to sit' prevails. It is that latter obligation that applies to considering the removal application made in the present case.

Does the removal application meet any of the statutory criteria?

No important question of law

[30] An Authority Minute of 14 February set out the issues for determination in this case, based on the present statements of problem of Ms Neil and Ms West:

(i) Did NZNO act in good faith and take reasonable steps to investigate Ms Neil's and Ms West's complaints of bullying by co-workers?

(ii) Should NZNO be ordered to pay Ms Neil and Ms West special leave for any period?

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[12] *Neil & West v New Zealand Nurses Organisation*, above n 1, at [18].

(iii) Should any order be made requiring action by NZNO to comply with its obligations to Ms Neil and Ms West (with the applicants seeking an order requiring NZNO to engage an external investigator to investigate the concerns they raised)?

(iv) If NZNO's actions are found to have unjustifiably disadvantaged Ms Neil and/or Ms West, should either or both be awarded compensation under s 123(1)(c)(i) of the Act?

(v) If any compensation is granted, should it be reduced (under s 124 of the Act) due to blameworthy actions of Ms Neil or Ms West that contributed to the situation giving rise to her grievance?

(vi) If NZNO is found to have breached its good faith obligations, should NZNO be ordered to pay a penalty?

(vii) Should either party contribute to the costs of representation of the other party?

[31] Those questions touched on the application of the statutory provisions for good faith behaviour, the justification test of whether what an employer did was what a fair and reasonable employer could have done in all the circumstances at the time, the remedies for a grievance and costs.[13] The case law on each aspect is well settled.

[32] There was no apparent important question of law arising from those issues. The removal application did not expressly identify any such question. It had a passing reference to Mr Halse's view that the Authority is "unable" to rule on matters involving alleged workplace bullying by using what he called the "correct" legislation, referring to the Health and Safety at Work Act 2015. The HSWA may be an alternative means in another forum for a worker to seek resolution of, or remedies for, the action or inaction of an employer that has harmed the worker's mental health. However there was no important question of law over whether the issues raised by the applications of Ms West and Ms Neil, as grievances over employment relationship problems, was within the jurisdiction of the Employment Relations Act.

No urgency and public interest factors

[33] Neither party has identified that Ms West and Ms Neil's case is of such a nature and of such urgency that there is a public interest in its immediate removal to

[13] Employment Relations Act 2000, s 4, s 103A, s123 and Schedule 2 clause 15.

the Court. One indication of that was their advocate declining early investigation meeting dates offered in March and April. He said those earlier dates were too soon and would be harmful to their health. As submitted by NZNO, while the case was important to the parties, it involved standard personal grievance claims and should be heard by the Authority in the normal manner.

No related proceedings already before the Court

[34] There are no proceedings already before the Court involving the same parties and the same, similar or related issues.

No other circumstances favouring removal

[35] The last statutory criterion allows the Authority a wide discretion to order removal to the Court of matters that either do not fit the other criteria or are for reasons in addition to them. It is the one criterion where the three reasons for removal put by the applicants, as referred to in paragraphs [15] to [19] above, could be considered. Each failed for the following reasons.

[36] On the first reason, concerning whether the Authority should have intervened in NZNO's employment inquiry, the statements of problem lodged for Ms West and Ms Neil on 14 January had not sought an injunction or urgency. In an email sent to an Authority officer on 4 February Mr Halse had referred to wanting "immediate intervention". In a further email sent on 5 February, Mr Halse wrote that he would "put this matter into the public arena" if the Authority did not "direct" NZNO to withdraw its letters of 29 January.

[37] While those email communications fell well short of an adequate application for an injunction or for an urgent investigation by the Authority, a message was sent to the parties' representatives drawing their attention to the case law about the likely difficulties if such applications were formally made. In *Ports of Auckland v Findlay* the Employment Court had observed that:[14]

> [23] … [O]rders restraining an employer from proceeding with an investigative/ disciplinary process into concerns about employee conduct will be rare. … The reasons for this are clear. The first point is that such an approach runs the risk of putting the cart before the horse, and pre-judging the end-point that an employer might (but might not) get to. It also runs the

[14] [2017] NZEmpC 45 at [23].

> risk of cutting across an employer's obligation to investigate concerns, including health and safety concerns impacting on other employees. Also relevant is the interest, both to the individuals concerned and more generally, in allowing such processes to run their course without undue interruption and delay. A stop-start approach to an investigative and disciplinary process which invites intervention along the way from the Authority; the Employment Court on a challenge; and potentially the Court of Appeal and Supreme Court by way of further appeal; is plainly undesirable for public policy reasons.

[38] Even if properly applied for, the prospects for successfully getting such orders would have been quite low.

[39] On the second reason, there was no factual foundation or evidence of any kind advanced for Mr Halse's allegation that the present Authority member was "unduly influenced by the fact" that another Authority member had previously worked as a lawyer for NZNO. All Authority members have previously worked in some professional capacity for workers, employers, workers' unions, employers' organisations, government departments or law firms providing legal services to workers or employers. Such experience, and knowledge of the law relating to employment matters, is the very basis of their appointment. Previous connections are managed by conflict processes well-known and well-understood in legal practice, the courts, government and business. Mere proximity with another Authority member who has some prior connection with a party is no ground for removal.

[40] Similarly the allegation of the present member being involved in a "campaign" against Mr Halse and his business had been addressed in the earlier section of this determination that considered who should determine the removal application. NZNO's submissions correctly identified that the removal application essentially relied on the fact that the applicants, or rather their advocate, had not liked some decisions made by the Authority in its handling of this case so far. The view of a party or an advocate on such decisions is not a sufficient reason for removal. As the NZNO submissions noted lack of success on some procedural points had not been one-sided. The Authority had declined NZNO's request for an order prohibiting the publication of names of the parties and, twice, the names of some NZNO witnesses.

[41] The third reason advanced was a similarly unfounded and tentative concern. It was raised on that basis that it was "an extremely serious concern if true". The post of concern to Mr Halse was made by a trade unionist and former MP on a Facebook

page for people involved in trade union activities. The unionist and former MP had also made previous posts on Culturesafe's public Facebook page. Those previous posts had criticised Mr Halse's behaviour and negative comments he made about trade unions. Mr Halse subsequently blocked her from making further posts on his CultureSafe page. He did reprint a post from her, made on a unionists' Facebook page, which criticised him for "incompetence", doing damage to the issue of bullying at work, and "exploitation … of vulnerable people". It was a further and (it seems) later post on the same unionist Facebook page that he said was of such concern that the present matter should be removed to the Court. The copy Mr Halse provided of that post was undated. The poster had referred to enduring "vitriolic and personal attacks" and wanting some safe place to share concerns with other unionists. She then referred to forums through "the CTU … Labour Party … regular contact with the government and their officials and even through the ERA and union lawyers". While it was clear Mr Halse and that poster had engaged in strongly-worded social media debate, there was simply nothing to establish on any reasonable measure that she had any prospective influence on the progress or outcome of the present Authority investigation. She had not been identified as a person who is likely to be a witness or in any other way involved in the present case.

Outcome

[42] The removal application is declined. Timetable directions are in place for the next steps in preparation for the Authority's investigation of these matters.

Costs

[43] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority