

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 101  
3048692

	BETWEEN	BAY OF PLENTY DISTRICT HEALTH BOARD Applicant
	AND	CULTURESAFE NEW ZEALAND LIMITED First Respondent
	AND	ALLAN HALSE Second Respondent
	AND	ANA SHAW Third Respondent
Member of Authority:	Tania Tetitaha	
Representatives:	Christie Goodspeed, counsel for the Applicant Allan Halse, advocate for the Respondents	
Investigation Meeting:	On the papers	
Submissions Received:	8 February 2019 from the Applicant 31 January and 6 February 2019 from the Respondents	
Date of Determination:	25 February 2019	

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**DETERMINATION OF THE AUTHORITY**

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**A. The application is removed in its entirety to the Employment Court for determination.**

**B. Each party is to meet its own costs.**

**Employment Relationship Problem**

[1] This current application arises out of a determination dated 7 December 2018 dismissing Ana Shaw's personal grievance of unjustified dismissal. Ms Shaw's dismissal by

the Bay of Plenty District Health Board was held to be justified.<sup>1</sup> The First Respondent, Culturesafe New Zealand Limited, has advised Ms Shaw challenged the determination on 8 January 2019.

### **Application for penalty, take down and contempt**

[2] The applicant had filed an ex parte application for penalty, contempt and take down orders on 30 November 2018. The (then) presiding Authority Member directed on 3 December 2018 that the applicant was to file a statement of problem and the respondents a statement in reply. A statement of problem was filed on 10 December 2018 and a statement in reply was filed on 3 January 2019. Both parties objected to mediation and no direction was made. Due to workload the file was transferred to the current Authority member for determination.

[3] The applicant seeks penalties against the respondents for the following:

- (a) Conduct of Mr Halse and CultureSafe prior to the determination of the matter in breach of directions of the Authority. This included breaching a direction that Mr Halse not make direct contact with the applicant (as opposed to through the applicant's representative);
- (b) Conduct of the respondents in breach of the rule of sub judice prior to determination of the substantive proceeding. This included breaching directions that Mr Halse not make public comment regarding the applicant and its staff while the Authority's investigation was occurring; and
- (c) Conduct of each of the respondents subsequent to determination of the substantive proceedings. This includes Facebook postings by some or all of the respondents some of which allege bias by the Authority Member.

### **Application to remove**

[4] This matter was transferred to the current Authority Member on or about 24 January 2019. Attempts to set down this matter for a telephone conference for a hearing in March 2019, were stymied by Mr Halse's refusal to engage with the Authority. This was because of Mr Halse's view that the applicant ought to withdraw this application. The applicant has declined to do so.

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<sup>1</sup> *Ana Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390.

[5] I enquired whether the determinations had been challenged or appealed. The applicant confirmed it had been and provided a copy of the statement of claim on 25 January 2019. I sought submissions from the parties regarding removing this application in its entirety to the Court. The application was to be determined upon the papers.

[6] The applicant filed submissions objecting to the removal of the application. Mr Halse filed emails alleging his preference the applicant withdraw its claims.

### **Application to Remove**

[7] There is power to remove this matter to Court in s 178(2)(c) and (d) of the Employment Relations Act 2000:

#### Section 178 Removal to Court

- (1) The Authority may, on its own motion ... order the removal of the matter, or any part of it, to the Court to hear and determine the matter without the Authority investigating it.
- (2) The Authority may order the removal of the matter, or any part of it, to the Court if –  
...
- (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.

### ***Same parties/similar issues before the Court***

[8] The Court has a de novo challenge that seeks, amongst other things, the Court investigate the (previous) Authority member's role and the refusal of the Chief to remove her from this matter (see paragraph 2.122). It is highly likely the respondent's behaviour towards the Authority member and consequentially compliance with her directions shall form part of the evidence before the Court upon challenge.

[9] There seems little point in investigating the same or similar issues by way of the application before the Authority. It would be more timely and cost effective for the Court to consider these matters in the first instance. Further the outcome of the challenge may affect any decision I may make about the respondents' behaviour.

***In all the circumstances the Court should determine the matter***

[10] The power to make orders for contempt is not settled.<sup>2</sup> The alleged actions giving rise to the contempt occurred during the determination that is now the subject of the challenge. The Authority's powers to detain a party for the alleged contempt in the statement of problem ended when the previous determination was issued. Section 196(2)(a) Employment Relations Act 2000 only allows the Authority to detain a person in custody "until the rising of the Authority". This may have occurred when the previous hearing ended.

[11] Powers such as the ability to imprison for up to three months and impose fines of \$5,000 for each offence post determination appear to be within the exclusive jurisdiction of the Court.<sup>3</sup> Therefore there may be no remedy I am capable of awarding in respect of the actions giving rise to contempt set out in the statement of problem.

[12] The applicant also seeks a "take down order" relating to various Facebook posts made by the First and Second Respondents. No specific section has been cited that allows the Authority to make such an order.

[13] There is power to order compliance pursuant to s137(1)(b) with any direction of the Authority. Whether this power extends to require social media hosts such as Facebook to take down the respondents posts is unclear. This matter would benefit from judicial consideration especially given the growing number of alleged breaches arising from parties social media postings in the Authority.

[14] The grounds for removal under s178 of the Act have been made out. The application is removed in its entirety to the Employment Court for determination.

[15] Given neither party were successful, each party is to meet its own costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>2</sup> *Hynds Pipe Systems Ltd v Forsyth* [2017] NZEmpC 89 at [18].

<sup>3</sup> Section 196(2) Employment Relations Act 2000.