

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 93
3078872

BETWEEN SUSAN MARGARET
 KENNEDY
 Applicant

AND THE CHIEF EXECUTIVE OF
 ORANGA TAMARIKI -
 MINISTRY FOR CHILDREN
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Allan Halse, advocate for the Applicant
 Hamish Kynaston & Louise Grey, counsel for the
 Respondent

Investigation Meeting: On the papers

Submissions Received: None from the Applicant
 27 November 2019 from the Respondent

Date of Determination: 27 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Susan Kennedy has made a number of claims against Oranga Tamariki, by whom she was employed for almost eight years.¹ These include claims to have been constructively dismissed, unjustifiably disadvantaged, bullied in the workplace, and sexually harassed. Also included are claims a supervisor and a manager treated her differently from other staff; that

¹ Ms Kennedy resigned by letter dated 11 January 2018.

her employer failed to provide a safe and healthy work environment; and failed to put safety measures in place for her in relation to individuals she identified as bullies. She says her employer failed to investigate the concerns she raised or to try to resolve her employment relationship problems.

[2] Oranga Tamarika denies all of Ms Kennedy's claims.

[3] On 18 October 2019 Ms Kennedy lodged an application under s 178 of the Employment Relations Act 2000 (the Act) for removal of the substantive matter to the Employment Court.

[4] Oranga Tamariki opposes the application.

Relevant law

[5] Section 178(2) of the Employment Relations Act 2000 (the Act), gives the Authority the discretion to remove a matter, or any part of a matter, to the Employment Court provided at least one of the following criteria is satisfied:

- (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 of the circumstances the Court should determine the matter.

Grounds for removal

[6] The grounds Ms Kennedy has cited for removal are s 178(2)(c) and (b) and she also refers to s 178(2)(a). With regard to s 178(2)(c) she says she:

“... has appealed two interlocutory orders related to the substantive proceedings before the Authority...”

and that those challenges:

“...effectively place matters to do with this case before the Court.”

[7] The two interlocutory orders were Minutes of the Authority, one dated 28 August 2019 and the other dated 29 August 2019. They relate respectively to a non-publication order and to Ms Kennedy's attendance at an investigation meeting to hear her claims against Oranga Tamariki.

[8] The Authority held a telephone conference with the representatives of the parties on 30 October 2019, in the course of which a timetable for submissions on the Removal application was put in place. An Authority Officer confirmed the timetable in writing with the parties that day.

[9] On 14 November 2019, the day after Ms Kennedy's submissions were due, her representative notified the Authority that:

“We will not be submitting anymore evidence or documentation in relation to Ms Kennedy's application for leave. We believe the Authority have all the evidence they need to make this decision and we will not be asking for even more from our client who has already spent months supplying information.”

[10] Oranga Tamariki filed submissions in accordance with the Authority's timetable. After the date for reply submissions from Ms Kennedy had passed, an Authority Officer emailed her representative to ask if he intended filing a reply. When the Authority Officer had received no response by the following late afternoon, she again emailed the representative. She noted that, as the Authority had not had a response, it was going to take it that he (the representative) did not intend to file a final submission in relation to the application.

[11] In a response the representative asked the Authority Officer not to make that assumption and said:

“Oranga Tamariki have 3 external layers working on this case, plus an unknown number of internal lawyers and staff.

Susan has CultureSafe NZ Ltd who work for free. We can confirm that for reasons of disparity of power alone, we are dependent upon the “court of public opinion” and WILL NOT be complying with any non-publication orders.

That is my submission.”

[12] In the absence of submissions from Ms Kennedy, I will cite parts of her application that provide reasons for her seeking removal of her claims to the Court. In her view, she has been proactive in seeking resolution of her application to the Authority but says the Authority processes have continually disadvantaged her. Ms Kennedy says she has been waiting over nine months for WorkSafe NZ (WorkSafe) to investigate her notification of harm and she provides an account of her dealings with WorkSafe. This is of no relevance to the Authority. WorkSafe and the Authority are separate and independent institutions and the Authority has no control or influence over any proceedings WorkSafe may instigate or prosecute.

[13] Ms Kennedy's application refers to Oranga Tamariki displaying an ongoing disregard for her health throughout the process. The application includes the following:

“16. Oranga Tamariki have displayed a complete and callous disregard for Susan's health throughout this process and this continues. Both Oranga Tamariki and Member McKinnon (sic) have failed to explain why they believe it is necessary for Susan to attend the investigation meeting in poor health and attend in a state that will compromise her ability to present her case. In the absence of an explanation, I can only presume it is the latter; that Susan's ability to present her case will be compromised making the process unfair and frankly, unethical. This is grounds enough to remove the matter to Court.

17. We appeal to have the substantive proceedings removed to the Employment Court under s 178(2)(c); the challenges submitted on the 18 September 2019 effectively place matters to do with this case before the Court.

18. We also appeal to the Authority under s 178(2)(b). Oranga Tamariki are a Government-funded organisation charged with the welfare of young people in New Zealand. The toxic and dysfunctional culture that exists within Oranga Tamariki has been well-documented and can only serve to impair the object and aims of the organisation. This effectively means that the care and welfare that Oranga Tamariki strive to provide is compromised and that the lives they are influencing are at risk therefore.”

[14] Ms Kennedy also refers to an important question of law in relation to one of the Authority Minutes she has challenged. She questions the jurisdiction of the Authority to issue a non-publication order and suggests:

“...the Authority does not have a publicly available policy for the general suppression of identifying and case-related information and does not have the authority to issue such orders.”

[15] In Oranga Tamariki's submission, none of the grounds under s 178 is met, and removal is not warranted in all the circumstances. It submits the Authority should hear and determine the matter in the usual way, accommodating any health issues of Ms Kennedy, just as those issues might be accommodated in the Employment Court.

[16] It submits Ms Kennedy has not identified any questions of law in respect of her substantive proceedings. While she has raised an issue over freedom of expression in her challenge to an interim non-publication order made by the Authority, that matter is already before the Court and does not form grounds for removal of the substantive matter.

[17] I accept that submission. Ms Kennedy has identified no important questions of law arising from the personal grievance claims she has made. Whilst important to her, the claims are of a type heard and determined frequently by the Authority and around which there is a considerable body of case law.

[18] With regard to the public interest ground advanced by Ms Kennedy, Oranga Tamariki submits her case is not of such a nature or urgency that it is in the public interest for it to be removed immediately to a Court. It observes there is no ongoing employment relationship between the parties and the proceedings had been in train for some 22 months before Ms Kennedy applied for removal of the matter to court. In its submission, the events in issue are specific to Ms Kennedy. It disputes her claim that the matter needs to be heard urgently to prevent other people from being harmed and says there is no evidence to support such a claim.

[19] In any event, Oranga Tamariki observes, the Court is unlikely to hear the substantive matter with greater urgency: the matter is already before the Authority, and the pleadings and evidence have been filed. It makes the point that both the Authority and Court require claims to be heard in accordance with the principles of natural justice, which entails witnesses giving evidence and being available for cross-examination.

[20] I agree with the respondent that there are no grounds for removal to the court under s 178(2)(b). Ms Kennedy lodged her statement of problem in the Authority for the substantive matter in February 2018 seeking mediation in the first instance. Following receipt of the statement in reply from the respondent, the Authority directed the matter to mediation in March 2018. Mediation took place in June 2018.

[21] Ms Kennedy lodged an amended statement of problem and further mediation was scheduled at her request. This was to have taken place on 22 November 2018. An investigation meeting had also been scheduled to take place in November 2018. Ms Kennedy's representative informed the Authority on 26 November 2018 that mediation had not taken place because the Mediator had decided the risk to Ms Kennedy's health made it too unsafe to proceed. The representative stated the matter would now be "*escalated at a political level in order to find an appropriate jurisdiction where (Ms Kennedy's) case can be safely resolved and that may be the Employment Court.*"

[22] The Authority had notified the parties on 26 November 2018 of its intention to stay the matter until Ms Kennedy's health improved. It required a medical certificate to be provided when Ms Kennedy was sufficiently well to proceed. An email was received from Ms Kennedy's representative within a week stating the belief that the Authority could not provide a safe environment for Ms Kennedy and advising that WorkSafe would be asked to investigate.

[23] The Authority Member dealing with the matter at the time issued a Notice of Direction on 4 December 2018 which, amongst other matters, set out the offer the Authority had previously made to construct a hearing that met Ms Kennedy's medical needs, and would prevent the traumatic effect she and her medical advisors anticipated. The Notice of Direction concluded that the application could not progress in the current circumstances.

[24] Despite Ms Kennedy's stated belief on 2 December 2018 that the Authority could not safely hear her claims, she did not apply for removal of the matter to the Employment Court until October 2019, ten and a half months later. Authority records suggest she made no further contact with the Authority until June 2019 when she asked for urgency to be accorded to her case for reasons relating to her health.

[25] In July 2019 the Authority scheduled an investigation meeting to take place from 11 to 15 November 2019 to determine Ms Kennedy's grievances. Ms Kennedy did not file her application for removal of the matter to the Employment Court until three months after the scheduling of the Authority's investigation meeting.

[26] Oranga Tamariki submits the matters on which Ms Kennedy relies for urgency had been within her knowledge for a considerable period, having been raised by her in her

statement of problem, and throughout the proceedings. Its view is that, viewed in context, Ms Kennedy's actions do not support a claim of urgency.

[27] I accept that submission. Ms Kennedy's delay in applying for removal of the matter to the Employment Court is at odds with her claim that the case is of such urgency that removal should be immediate. Further I am not persuaded the nature of the case merits removal. While personal grievances of the type raised by Ms Kennedy are serious matters, they are matters frequently dealt with by the Authority. I accept Oranga Tamariki's submission that they do not have wider application to its other employees or to employment relationships outside of that Oranga Tamariki such that removal to the Court is warranted in the public interest.

[28] With regard to s 178(2)(c) – proceedings already before the Court – Oranga Tamariki submits the two challenges to the Authority's interlocutory determinations are discrete issues and do not warrant the removal of the substantive matter to the Court. The orders issued by the Authority in the two Minutes under challenge may go to the Authority's process but, in its submission, their determination by way of a challenge would not determine the substantive issues raised by Ms Kennedy.

[29] Oranga Tamariki further submits that the non-publication order, which was the subject of one of the Minutes, was interim only and the Authority would consider whether and to what extent it should make permanent orders in due course. With regard to the subject matter of the second Minute under challenge, in Oranga Tamariki's submission the Court does not have the jurisdiction to consider the order made in the Minute as it was procedural in matter and not subject to challenge by virtue of s 179(5) of the Act.

[30] I accept Oranga Tamariki's submissions in relation to the matters currently before the Court and find no grounds for removal under s 178(2)(c).

Conclusion

[31] I find there are no valid grounds for removal of this matter to the Employment Court. The Authority is well-placed to determine Ms Kennedy's claims and has demonstrated its willingness to put in place practical measures to minimise stress for her during the process. The Authority has invited the parties to consider certain measures it proposed and to put

forward any other measures they consider would lessen any adverse health effects on Ms Kennedy.

[32] I dismiss Ms Kennedy's application.

[33] An Authority Officer will contact the parties shortly with a view to setting the matter down for an investigation meeting.

Costs

[34] Costs are reserved pending determination of the substantive matter.

Trish MacKinnon
Member of the Employment Relations Authority