IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 366
3115073 & 3136102

BETWEEN	E TŪ INCORPORATED First Applicant
AND	JENNY MOONEY, NICHOLAS GODFREY AND VINCENT KASK Second, Third and Fourth Applicants
AND	CARTER HOLT HARVEY LVL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Peter Cranney, counsel for the Applicant Liz Coats, counsel for the Respondent
Investigation:	On the papers
Determination:	17 August 2021

DETERMINATION OF THE AUTHORITY

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

Employment Relationship Problem

[1] E tū asked the Authority to remove a dispute over the application and operation of provisions of the Holidays Act 2003 (HA) to the Employment Court to hear and determine. The dispute arose from Carter Holt Harvey LVL Ltd (CHH LVL) requiring union members employed at its Marsden Point manufacturing plant to use leave entitlements during part of a Covid-19 emergency lockdown last year. CHH LVL agreed with E tū's view that there were grounds for this matter to be removed to the court.

The dispute

[2] On 23 March 2020 the government announced the country would move from 25 March to an Alert Level 4 lockdown under its Covid-19 pandemic emergency response system. A state of national emergency was also declared on 25 March 2020 which eventually ran, with extensions, until 15 May 2020.

[3] At the time of the announcement the government advised the lockdown was expected to be in place for four weeks.

[4] CHH LVL's plant was not deemed to be an essential service so, under the Covid-19 emergency orders, it could not operate and its employees were not permitted to leave their homes to come to work.

[5] On the day of the government's announcement CHH LVL's chief executive advised all employees by email of arrangements for paying them during the expected duration of the lockdown.

[6] For the first two weeks CHH LVL said it would pay those employees "in accordance with your employment agreement". In effect this meant the employees would get their normal wages for those two weeks.

[7] For the third and fourth weeks the chief executive's notice said the employees would "need to take 8 days leave". The leave was to be paid if the employees used entitlements, in the following order, to annual leave, accrued annual leave, long service leave or alternate days. For those without enough leave entitlements, the leave was to be unpaid.

[8] The two Easter public holidays fell during that third week and fourth week so taking eight days annual leave was enough to get the equivalent of two weeks' paid leave.

[9] CHH LVL said E tū and some union members raised some administrative questions about those arrangements in the following weeks but the company received no objection during that time from the union or individual members about the requirement to use leave entitlements.

[10] On 20 April 2020 the Alert Level 4 lockdown was extended for a further, fifth week. CHH LVL paid its employees their normal wages for that week, that is as it had done for the first and second week.

[11] On 2 July 2020 an E tū organiser wrote to CHH LVL raising personal grievances on behalf of 48 members on the ground that their leave entitlements had been debited without prior consultation or agreement under the arrangement CHH LVL put in place at the start of the Level 4 lockdown. The letter said those members were disadvantaged by being forced to use leave at a time that was not of their choosing and provided no opportunity for rest and recreation. It said CHH LVL had provided no opportunity to reach agreement with union members on when, and how much, leave would be taken. As a remedy the letter sought reinstatement to those members of all annual leave taken without their agreement during the lockdown.

[12] By letter of reply, dated 22 July 2020, CHH LVL denied the union members had valid grievances. It said the company acted in good faith and in accordance with its employment law obligations in its treatment of those members before and during the lockdown. It said the company acted with urgency to communicate with employees and to give them certainty about pay and leave arrangements before the lockdown began. It said individual consultation was impractical in the particular extreme circumstances. It said none of the claimant members had objected to the framework CHH LVL put in place during the 14 days in which they were paid ordinary wages and before the requirement to use paid leave came into effect. The letter also noted E tū had formally raised the issue more than 90 days after the 23 March announcement and the company did not consent to the union seeking to raise those grievances outside that statutory period.

[13] The application before the Authority at the time removal was sought was made by E tū and three named union members.[1] A schedule attached to the application identified a further 45 union members as also affected by the issues raised.

[14] The application did not seek to pursue those issues as personal grievances. Rather it sought resolution of a dispute over whether it was lawful for CHH LVL to make deductions from those members' annual holiday balances as a result of requiring them to take annual holidays during two weeks of the lockdown. E tū sought two

[1] Amended Statement of problem (12 April 2021).

remedies. Firstly, if CHH LVL's requirement for those members to take the leave was found to be unlawful, the union asked the Authority to make a determination that the leave balance of each affected member was understated by the equivalent of two weeks. Secondly, the union asked the Authority to issue a compliance order requiring compliance with each members annual holiday entitlement under the HA.

[15] CHH LVL's statement in reply, as it was at the time removal was sought, raised four objections to E tū's application:[2]

(a) the union had no standing to enforce its members' entitlements under the HA through proceedings brought under its own name (the standing issue);

(b) the basis on which three individual members had been added as applicants, in the amended statement of problem, as being representative of the circumstances of all the affected union members was not clearly identified (the intended applicants issue);

(c) the HA did not provide for the remedy of reinstatement of annual leave duly taken by an employee and paid for by an employer (the remedy jurisdiction issue); and

(d) the Authority had no jurisdiction to issue a compliance order for any alleged non-compliance with the relevant provisions of the HA (the compliance jurisdiction issue).

[16] Alternatively, CHH LVL said a compliance order, if within the Authority's jurisdiction to make, would not be consistent with equity and good conscience in the particular circumstances of the case.

[17] In addition to its procedural, technical or jurisdictional objections, CHH LVL also said its actions regarding annual leave taken by union members during the Level 4 lockdown had complied with its obligations under the HA (the substantive issue).

The legal context

[18] At the relevant time the union members were employed by CHH LVL under the terms of a collective agreement (the CA) between CHH LVL and E tū. The CA said any new employee who joined the union would become an additional party to the

[2] Amended Statement in reply (23 April 2021).

agreement and would then "be entitled to all the benefits and subject to all obligations under this [CA]".

[19] Under the heading "Leave provisions" the CA included these clauses:

> **7.1 Public Holidays**
>
> Public Holidays shall be in accordance with the Holidays Act 2003.
> …
>
> **7.2 Annual Leave**
>
> Annual Leave shall be allowed in accordance with the Holidays Act 2003
> …

[20] In relation to this particular matter the relevant sections of the HA are s 18 and s 19, and specifically sub-sections s 18(3) and 19(1)(a) and (2) (underlined emphasis added):

> **18 Taking of annual holidays**
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> (1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.
>
> (2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.
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> (3) <u>When annual holidays are to be taken by the employee is to be agreed between the employer and employee.</u>
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> (4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.
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> **19 When employee may be required to take annual holidays**
>
> (1) **An employer may require an employee to take annual holidays if—**
>
> (a) <u>the employer and employee are unable to reach agreement under section 18(3)</u> as to when the employee will take his or her annual holidays; or
>
> (b) section 32 (which relates to closedown periods) applies.
>
> (2) <u>If subsection (1) applies, an employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays.</u>

[21] Section 32, referred to in s 19(1)(b), was not relevant here as it related only to customary closedowns such as seasonal or regular plant maintenance closures.

[22] In light of one of CHH LVL's objections to E tū's application, the following provisions of the Employment Relations Act 2000 (the ER Act) were also relevant:

> **137 Power of Authority to order compliance:**
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> (1) This section applies where any person has not observed or complied with—
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> (a) any provision of—
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> (i) any employment agreement; or
>
> …
>
> (b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.
>
> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.
>
> (3) …
>
> (4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
>
> (a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1).
>
> …

The criteria for considering removal

[23] The issues for resolution in this matter are within the jurisdiction of the Authority to determine, including the question of the existence or extent of the Authority's jurisdiction to order the remedies sought by E tū and the other applicants. For reasons noted later in this determination, the matter is within the Authority's jurisdiction to make determinations about employment relationship problems, including disputes about the application of an employment agreement, such as the CA here.[3] The Authority may also, in performing its role, deal with any question related to an

[3] Employment Relations Act 2000, s 161(1)(a).

employment relationship, including any question connected with the construction of the HA, where the question arises in the course of any investigation.[4]

[24] Section 178 of the ER Act provides a discretion for the Authority to remove matters to the court on certain grounds. However as recently emphasised by the Court of Appeal:[5]

> …removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.

[25] In the event one or more of the grounds permitted in s 178 are satisfied in respect of proposed removal of any particular case, the Authority has a residual discretion to determine whether or not the matter should be removed to the court. In exercise of that discretion relevant factors against removal must be considered.[6]

Grounds for removal

[26] E tū proposed, and CHH LVL agreed, removal of this matter could be considered on two grounds provided for in s 178 of ER Act. Those grounds were:

(a) An important question of law was likely to arise in the matter other than incidentally; and
(b) The Authority is of the opinion that in all the circumstances the court should determine the matter.

[27] By agreement of the parties this removal application has been determined on the papers. Those papers comprised the removal application, the original and amended statements of problem and in reply lodged by the parties, the email and letters already referred to, and the CA.

Was an important question of law likely to arise other than incidentally?

[28] The test for an important question of law remains essentially as described by in *Hanlon v International Educational Foundation (NZ) Inc* in respect of the predecessor provision to s 178 of the ER Act:[7]

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[4] Employment Relations Act 2000, Schedule 2 clause 1.
[5] *A Labour Inspector v Gill Pizza Ltd* [2020] NZCA 192 at [48].
[6] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[31].
[7] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

> It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s [178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[29] Questions of law do not need to be complex, tricky or novel to be important.[8] The importance test is met if the outcome turns on the answer.[9]

[30] The parties' pleadings and the removal application canvassed five issues as potentially giving rise, in the particular circumstances of this case, to questions of law of sufficient relative importance to warrant removal to the court:

(a) the standing issue;

(b) the intended applicants issue;

(c) the substantive issue of whether the requirement to take annual leave was unlawful under s 19(1) and s 18(3) of the HA;

(d) the compliance jurisdiction issue; and

(e) the remedy jurisdiction issue.

[31] For the following reasons, issues (a), (b) and (d) did not meet the criteria for raising decisive or strongly influential questions of law, other than incidentally. However, issues (c) and (e) do.

The standing issue and intended applicants issue

[32] The standing issue and the intended applicants issue were incidental or technical issues of insufficient relative importance. This conclusion requires some attention to

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[8] *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].
[9] *Tourism Holdings Ltd v A Labour Inspector* [2018] NZEmpC 95 at [22].

the content of the CA and the question of its incorporation of provisions of the HA as terms of employment for union members covered by it.

[33] E tū and the three named applicants are, by its terms, parties to the CA. As noted above, the CA included a term expressly referring to annual leave being “allowed in accordance with the Holidays Act 2003”. The CA thereby incorporated HA provisions on annual leave as terms of the CA.

[34] As parties to the CA, or as persons bound by the agreement, the union or its members had standing to pursue a dispute about the company’s application or operation of provisions of the HA incorporated as part of the terms of their CA.[10]

[35] However, if there was any real issue about whether the union could be a party to proceedings in respect of individual rights of members to such incorporated and statutory entitlements, that procedural point was answered by the addition of three named union members as applicants in the amended statement of problem. CHH LVL queried whether the amended statement had adequately identified how ‘representative’ the circumstances of each of those three union members might be of the total of the 48 identified in the case.

[36] Having legal issues determined through the example of one or a small selection of workers is a common, practical and sufficient approach for some cases in the employment jurisdiction. This particular case, with the facts turning on an email issued by the company’s chief executive and relatively focussed legal questions regarding interpretation of employment agreements and statutes, is one where the issues can be adequately addressed by having some but not all of the union members as applicants. Doing so does not raise any important question of law.

The substantive issue

[37] The pleadings show the parties more or less agree about the facts of what happened. What is in contest is what s 18 and s 19 of the HA mean when those sections say an employer may “require” an employee to take annual holiday only if they “are unable to reach agreement” as to when the employee will take annual holidays. Those points of contention about meaning are clearly questions of law. They are important questions because answers to them will be strongly influential in deciding whether CHH

[10] Employment Relations Act 2000, s 129.

LVL acted lawfully or unlawfully in telling its employees they "will need to take 8 days leave" on identified dates. Those questions are, therefore, central rather than incidental to the matter.

[38] In terms of other potential indicators of importance, as identified in *Hanlon*, the answer in respect of the lawfulness or otherwise of CHH LVL's actions as they applied to the three applicant union members could affect the 45 other identified members and, more widely, other employees and employers in other workplaces where similar approaches to requiring leave during that period may have been taken. This supported a conclusion that the question of law raised was an important one.

The compliance jurisdiction issue

[39] CHH LVL takes the view that the Authority has no jurisdiction to issue a compliance order for any alleged non-compliance with relevant provisions of the HA. The court would, in turn, be in the same position if that view on jurisdiction were correct. However, as already noted, the application of HA provisions was incorporated as a term of the CA. Section 137 of the ER Act allows the Authority to order compliance where any person has not observed or complied with any provision of any employment agreement. If other elements of E tū's case were established, s 137 therefore allows for the prospect of a compliance order. Consequently no decisive or strongly influential question of law arose other than incidentally on that issue.

The remedy jurisdiction issue

[40] If successful in its argument about an unlawful requirement to take annual leave, E tū and the three applicant union members want CHH LVL to be ordered to adjust the leave balances of the union members so that the days they were required to take are restored as annual holiday entitlements for future use. CHH LVL says such a remedy is not expressly provided for in the HA, so is not available. Alternatively, if such a remedy were found to be available, CHH LVL says the Authority (or the court) should exercise its jurisdiction in equity and good conscience not to make such an order.[11]

[41] If it were found that HA entitlements had been unlawfully reduced, determining what remedy was available and appropriate would be a question of law decisive to a material part of this case.

[11] Employment Relations Act 2000, s 157(3) and s 189.

[42] A mere finding of unlawfulness would not, of itself, necessarily be enough to fix that situation. If there is a right, there should be a remedy.[12]

[43] Whether considerations of equity and good conscience might fetter the nature or extent of any such remedy ordered in the particular circumstances of this case is, as CHH LVL submitted, simply an aspect of that question of law about the availability of a remedy.

[44] What the Authority, or the court, may order in such situations, and possible limits to it, does not appear to have been directly addressed or resolved in earlier cases in the Authority or the court.

[45] While novelty or complexity are not necessary elements in the assessment of importance, the apparent absence of earlier answers on this point make determination of the question more important in this case.

The Authority's opinion in all the circumstances

[46] Having concluded two of five identified issues gave rise to important and other than incidental questions, so that removal could be ordered on that ground, it was not necessary to consider whether other circumstances of the case also favoured removal.

[47] The three issues not accepted as of sufficient relative importance would also not have satisfied this "in all the circumstances" ground for the reasons already given about each of those issues.

The residual discretion

[48] Having concluded the s 178(2) test for important questions of law had been met for two identified issues in this matter, I have considered whether there were any other relevant factors *against* removal.[13] None were argued by the parties and I identified none that would warrant exercise of the residual discretion not to remove this particular matter.

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[12] Ubi jus, ibi remedium.

[13] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at [38].

Removal granted

[49] For the reasons set out in this determination, the application for removal is granted.

Costs

[50] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority