

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 557
3147902
3147869

BETWEEN	A LABOUR INSPECTOR Applicant
AND	NIKHIL HIMALAYA POINT CHEV LIMITED t/a Merchants Liquor First Respondent
AND	THE FURTHER RESPONDENTS listed in Schedule 1

Member of Authority: Andrew Dallas

Representatives: Tim Gray, counsel for the Applicant
Myriam Mitchell, counsel for the Respondents

Investigation Meeting: On the papers

Date of Determination: 14 December 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by the Labour Inspector for removal of Authority matters 3147902 and 3147869 to the court pursuant to s 178 of the Employment Relations act 2000 (the Act).

[2] The Labour Inspector's grounds for removal are, in summary:

- (a) there are proceedings in the court between the parties, which overlap with those in the Authority, including claims for pecuniary penalties under Part 9A of the Act for serious breaches of minimum employment standards and compensation orders seeking to recover minimum employment entitlements;

- (b) the proceedings before the court also include claims for “banning” orders pursuant to s 142M of the Act; and
- (c) if the breaches are found by the court to be “simple” rather than “serious” breaches, removal will allow the court to deal with the entire matter before it and vitiate the need for the proceedings in the Authority.

[3] The Labour Inspector’s application is supported by the Respondents who advised the Authority “[w]e confirm our client consents to the removal of proceedings to the [c]ourt against the following defendants under file number 3147869 to the [c]ourt”.

The statutory regime for removal

[4] Several provisions of the Act are relevant to the question of removal.

[5] Section 3 of the Act sets out its object. Relevantly:

3 The object of this Act is—

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
 -
 - (vi) by reducing the need for judicial intervention
 - ...

[6] This object is reinforced in the objects of Part 10 of the Act (Institutions) which relevantly provide:

143 Object of this Part

The object of this Part is to establish procedures and institutions that—

- ...
- (m) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations....

[7] The Authority’s jurisdiction referenced in s 143 is extensively set out in s 160 of the Act. Section 160(1) confers exclusive jurisdiction to make determinations about employment relationship problems generally¹ and specifically in relation to the Labour Inspector’s arrears and penalty claims currently before it.²

[8] The grounds for removal to court are set out in s 178 of the Act:

178 Removal to court

- (1) The Authority may, on its own motion or on the application of a party to a matter, 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—
 - (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.

....

[9] Based on any sensible and orthodox approach to statutory interpretation s 178(1) must be read in conjunction with s 178(2). Even if one (or more) of the grounds set out in 178(2) is found to exist, the Authority retains the residual discretion to decline removal based on the use of the word “may” in s 178(1) and the relevant considerations previously recognised as falling out of that.³ There are several others but these are not applicable in the circumstances here.

¹ Employment Relations Act, s 160(1). The concept of an “employment relationship problem” within the context of the Authority’s exclusive jurisdiction is very broad: *FMY v TZV* [2021] SC 145.

² Employment Relations Act, ss 160(g) and (m).

³ See, *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74, 83 and *Auckland District Health Board v X (No.2)* [2005] ERNZ, 561-562.

The application for removal

[10] Turning to Labour Inspector's application for removal, it is necessary to address one matter at the outset. With respect the parties, agreement between them does not form part of the applicable test for removal to the court under the Act. For the sake of completeness, it would not matter whether "experienced and senior" or, for that matter, "inexperienced and junior" representatives jointly arrived at such a position. Parties cannot contract out of the Act by agreeing a statutory test does not apply to them.⁴

[11] Where Authority is clothed with the jurisdiction to adjudicate it should be exclusively exercised by it.⁵ While the court can derivatively exercise the Authority's jurisdiction, it is clear that Parliament intended this is occur on a limited basis. Indeed, this is the very clear guidance given to the Authority by the Court of Appeal. In *Labour Inspector v Gill Pizza Limited* it stated "... 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".⁶

[12] Notwithstanding, on a case specific basis, I have decided that the contentions advanced in paragraph [2] above provide a foundation for an opinion to be formed by the Authority that removal to the court is appropriate under s 178(d) of the Act.

[13] Having satisfied myself that one of the grounds set out s 178(2) of the Act has been met, I must now consider whether the residual discretion not to remove this matter should be exercised. The principles for the Authority's exercise of this residual discretion are usefully summarised by Member Urlich in *Auckland District Health Board v New Zealand Public Service Association*.⁷

⁴ Employment Relations Act, s 238.

⁵ *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756; 767.

⁶ [2021] NZCA 192 at [48].

⁷ [2021] NZERA 359

Outcome

[14] Taking those principles in account, and while finely balanced, a majority of the proceedings between the parties lie in another forum and it is, therefore, appropriate, despite the Authority's exclusive jurisdiction, that the court hear all such matters. Proceedings 3147902 and 3147869 are removed to the court without first being investigated by the Authority.

Costs

[15] There is no order as to costs.

Andrew Dallas
Chief of the Employment Relations Authority

SCHEDULE 1

NIKHIL HIMALAYA LIQUOR LIMITED T/A THE BOTTLE-O MANLY
Second Respondent

NIKHIL HIMALAYA HOLDINGS LIMITED T/A THE BOTTLE-O POINT CHEVALIER
Third Respondent

NIKHIL HIMALAYA TAIHAPE LIMITED T/A THE BOTTLE-O TAIHAPE
Fourth Respondent

N H REMUERA LIMITED T/A THE BOTTLE-O REMUERA
Fifth Respondent

RAVINDER KUMAR ARORA
Sixth Respondent

ANURADHA ARORA
Seventh Respondent