

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 586

3151842

BETWEEN SHAUN CAMERON HENDY
 Applicant

AND THE VICE-CHANCELLOR OF
 THE UNIVERSITY OF
 AUCKLAND
 Respondent

3151848

BETWEEN SIOUXSIE WILES
 Applicant

AND THE VICE-CHANCELLOR OF
 THE UNIVERSITY OF
 AUCKLAND
 Respondent

Member of Authority: Rachel Larmer

Representatives: Catherine Stewart and Daniel Church, counsel for the
 Applicants
 Philippa Muir, Rachael Judge and Ronnie Cabraal,
 counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further 4 November 2021 from Applicant
Information Received: 19 November 2021 from Respondent
 26 November 2021 from Applicant
 30 November 2021 from Respondent
 3 December 2021 from Applicant
 10 December 2021 from Applicant and Respondent
 20 December 2021 from Applicant and Respondent

Date of Determination: 24 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination involves two separate applicants who have each filed claims against the respondent, the Vice-Chancellor of the University of Auckland. The applicants have similar, but not identical claims.

[2] The parties agreed on a timetable for filing their evidence and submissions on these removal applications, which have been dealt with together. On 20 December 2021 the Authority affirmed the affidavit evidence of each of the witnesses, who had all filed unsworn affidavits due to the lockdown restrictions making the swearing of affidavits more difficult than it would normally have been.

[3] The respondent seeks non-publication orders regarding certain documents. The non-publication order application is mostly opposed by the applicants, subject to limited exceptions regarding particular parts of the documents in question, which the applicants agree should be subject to a non-publication order.

[4] The applicants seek removal of their claims to the Employment Court under s178(1) of the Employment Relations Act 2000 (the Act) on the same grounds, although their evidence is slightly different. Both applicants rely on the following grounds for removal in the Act:

- (a) S 178(2)(a) – matters involve important question(s) of law that arise other than incidentally;
- (b) S 178(2)(b) – case is of such a nature and urgency that it is in the public interest that it be immediately removed to the Court; and
- (c) S 178(2)(d) – the Authority is of the opinion that the Court should determine the matter.

[5] The respondent opposes removal. It says the applicants have not established any of the grounds in s 178(2) of the Act. The respondent says the applicants' claims are not examples of the "*very few*" cases that meet the threshold for removal, because they involve the application

of well-established principles of law to factual matters, which it is appropriate for the Authority to resolve in the first instance.¹

Applicants' substantive claims

[6] The applicants' substantive claims involve alleged:

- (a) Ongoing unjustified disadvantages, arising from failure by the respondent to appropriately address their safety concerns;
- (b) Breaches of the Academic Staff Collective Agreement (the CA), specifically clauses 2, 12, 22 and clause 3 of Schedule 2;
- (c) Breaches of the s 4(1A)(a) and (b) statutory good faith requirements, namely failure by the respondent to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

Applicants' concerns

[7] Shaun Hendy is a Professor of Physics at the University of Auckland respondent organisation and is a researcher for Te Pūnaha Matatini (TPM). Siouxsie Wiles is an Associate Professor of Medical Science at the University of Auckland and is a researcher for TPM, TEC-funded Centre of Research Excellence, hosted by the respondent.

[8] The applicants say they are expected to provide public commentary as part of their employment by the respondent, and that this has become particularly relevant during the COVID-19 pandemic, because their experience is relevant to serious matters of public health and safety.

[9] The public commentary the applicants have provided since early 2020 has resulted in them gaining significantly higher public profiles as expert commentators in relation to the COVID-19 pandemic. The applicants say that providing such commentary in the course of their employment is:

- (a) Consistent with the principle of academic freedom;

¹ *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2018] 1 ERNZ 249 at [43].

- (b) Enables the respondent to fulfil its statutory obligations in relation to academic freedom and acting as the “*critic and conscience of society*”, in accordance with s 268(2)(d)(i)(E) of the Education and Training Act 2020 (the ETA); and
- (c) Pertinent to the respondent’s statutory obligation in s 268(2)(d)(ii)(A) of the ETA to “*promote community learning*”.

[10] From April 2020 the applicants have raised concern, provided information and/or requested assistance from the respondent to protect them from being targeted for serious harassment by certain sectors of the public who dislike or disapprove of their commentary around COVID-19. They claim the respondent has either responded inadequately or not at all to their health and safety concerns and that it has failed to put in place robust protective measures to address the applicants’ safety concerns.

[11] The applicants have endured harassment that has included (but is not limited to) targeting via email, on social media and video sharing platforms, in person confrontations and threats of physical confrontations. Associate Professor Wiles has been the subject of doxing with an associated threat to physically confront her at her home. Professor Hendy has been physically confronted in his office on the University campus by an individual who threatened to ‘see him soon’.

[12] The applicants have suffered vitriolic, unpleasant, and deeply personalised threats and harassment that has had a detrimental impact on them in terms of their physical safety and from a psychological, mental health and wellbeing perspective. The level of harassment they are facing is continuing and has been getting worse and “*more extreme*” in nature.

[13] The applicants claim the respondent has failed to take proactive action to protect them from this abuse and harassment and that it has failed to take all reasonable steps to provide a safe working environment, as required by express and implied terms of the applicable CA and under the Health and Safety At Work Act 2015 (the HSWA).

[14] The parties have been communicating about safety issues since early 2020 when concerns were first raised with the respondent, the Proctor, the Service Management Specialist and others employed by the University regarding the threats and harassment the applicants had been receiving. Although some steps have been taken, the applicants say these are insufficient.

[15] The applicants say the respondent’s:

- (a) Response to date to their concerns is inconsistent with its contractual and statutory obligations to them;
- (b) Failure to take any meaningful or proactive steps to protect their safety is causing them to suffer ongoing unjustified disadvantage; and
- (c) Actions to date in the face of the threats and harassment the applicants have been experiencing has been “*purely reactionary and inadequate*”.

[16] On 12 July 2021 the applicants separately raised personal grievance claims of unjustified action causing disadvantage with the respondent. While the personal grievance letters were not identical, they are similar in substance.

[17] The applicants referred the Authority to the respondent’s letter to them dated 9 August 2021 that urged them (and another colleague) to keep their public commentary to a minimum and suggested they take paid leave to enable them “*to minimise any social media comments at present*”. This advice was apparently given to them after the respondent received recommendations from its legal advisors to amend its policies so as to “*not require*” its employees to provide public commentary, in order to limit its potential liability for online harassment.

[18] The applicants say they have taken “*reasonably practicable*” steps to protect their own health and safety. However they do not believe that it is reasonably practicable for them to limit their public commentary on COVID-19. They say such communications are a key element of their academic roles. The applicants note that they have previously been asked by the respondent and the Prime Minister’s Office to provide such commentary, in their roles as employees of the respondent.

[19] Quantum Security Services Limited (Quantum) undertook an external security review to determine whether the respondent’s security systems and safety processes, involving both digital and physical security, were sufficiently robust. That resulted in a report dated 12 October 2021 (the Quantum Report) that identified “*opportunities for improvement*” and a draft Implementation Plan by the respondent.

[20] The applicants say that the respondent has not:²

² As at filing their reply affidavits dated 26 November 2021.

- (a) Met with them to discuss the Quantum Report; or
- (b) Put interim arrangements in place pending the implementation of the Quantum Report (to the extent that the identified improvements will be implemented).

[21] Professor Hendy pointed out that the respondent's intended timeframe for the implementation of the Quantum Report recommendations was staggered throughout 2022. The applicants are concerned that in a 'best case scenario' they appear to be expected to wait another year until the safety improvements identified in the Quantum Report can be fully implemented.

[22] The applicants say they:

- (a) Were not informed of the decisions the respondent has taken regarding security issues, until they saw the affidavit Ms Boyer filed with the Authority on 19 November 2021;
- (b) Have not been kept informed of the "*ongoing risk assessment process*" Ms Boyer referred to in her affidavit, particularly in terms of what that entailed or how those processes were translating (if at all) into actions that actually protected them from external harassment; and
- (c) Were not advised about the actions Ms Boyer refers to in her affidavit and only received information on such matters after they filed their original affidavits on 4 November 2021 in support of this removal applications.

[23] The applicants say the University has never dealt with the main issue that is of primary concern to them, namely:

- (a) Are the persons making threats against them likely to follow through on such threats?; and
- (b) If so, what protective systems will the respondent put in place to prevent the applicants from being harmed as a result of their public COVID-19 communications?

[24] The applicants do not accept that they are not "*expected*" to provide public commentary on COVID-19 matters as part of their roles with the respondent. Associate Professor Wiles points out that 40% of her role is devoted to supporting science communication within the University's Faculty of Science, pursuant to a buy-out agreement first signed in 2014, which has rolled over ever since then.

[25] The applicants also claim that the University is statutorily required to accept a role as “*critic and conscience of society*” and to promote community learning, science, communication and research for COVID-19 because that is directly funded by the New Zealand Government under specific contracts it has with the University.

[26] The applicants therefore consider that COVID-19 related public communications are a requirement of their respective roles, so they say it is unreasonable of the respondent to expect them to stop or limit their public communications about that.

[27] The applicants reject the respondent’s suggestion that the harassment and personalised targeted abuse they are experiencing arises from “*outside activities*”. They say it is evident from the content and views expressed in the abuse and harassment they are receiving that it arises solely out of their work on COVID-19. The harassment started at the beginning of the pandemic in March 2020 and has accelerated, and is continuing to accelerate, since then.

[28] Neither applicant experienced harassment like what they have received since they began publicly communicating about the COVID-19 pandemic. They point out that the harassment they are receiving has worsened since the anti-lockdown and anti-vaccination protests have ramped up, and note that these activists have become more emboldened over time.

[29] The applicants say the respondent’s position - that they should constrain or avoid COVID-19 related public communications to protect their safety if such communications are likely to result in public harassment of them - is not an adequate answer to their safety concerns. That response inappropriately restricts their academic freedom, and is contrary to the respondent’s statutory role under s 268(2)(d)(i)(E) of the ETA as “*the critic and conscience of society*” and to the obligation it has under s 268(2)(d)(i)(A) of the ETA to “*promote community learning*”.

[30] The applicants want the Court to resolve the parties’ divergent views about how their respective obligations under the ETA and the HSAW affect the way the safety risks associated with the applicants’ public communications on COVID-19 matters should be addressed, so there is certainty about that as soon as possible.

[31] The applicants say that a decision by the Court reconciling the parties’ ETA and HSWA obligations is wider than just themselves. They believe the issues at the heart of their claims

are an issue for all academics – namely, what is the scope of academics’ ability to comment publicly on matters within their expertise for which they might receive harassment, and how do the parties’ obligations under the HSWA affect that?

Respondent’s position

[32] The respondent denies unjustifiably disadvantaging the applicants and/or breaching the CA or its statutory obligations. It says it has acted in good faith towards the applicants at all times and it is opposed to removal and any of the remedies sought.

[33] The respondent says that the applicants are not “*expected*” or required to provide public commentary on COVID-19 as part of their employment or roles with the respondent, but it acknowledges they are entitled to do so.

[34] The respondent’s expectations for academic employees, including the applicants, are set out in the CA and its academic standards. The respondent also referred the Authority to sections 267(2), 267(4)(a) and 268(2)(d) of the ETA regarding the proper use of resources by institutions in exercising their academic freedom, the definition of academic freedom and the characteristics of a university’s role in society.

[35] The respondent notes the manner in which universities must achieve the characteristics set out in the ETA is not specified in the ETA. Nor does the ETA set any particular requirements in relation to public commentary by university employees on matters of public interest.

[36] The respondent says it has appropriately responded to the applicants’ concerns and it has acted in accordance with its contractual and statutory obligations, including considering “*reasonably practicable*” steps to ensure the applicants’ health and safety at work. However, the respondent claims that much of the applicants’ public commentary has been undertaken in their private capacity, in breach of its Outside Activities Policy.

[37] The respondent denies instructing the applicants to keep their public commentary on COVID-19 related matters to a minimum. It says it merely advised the applicants that doing so is an option they may want to consider, in the interests of taking personal steps under the HSWA towards minimising risks to their own health and safety.

[38] The respondent therefore maintains that it was reasonable for it to have identified - consistent with the applicants' own duty to take reasonable care of their health and safety - that a way of minimising potential safety risks to them would be for them to limit the extent and/or form of their public commentary on COVID-19 related matters.

Issues

[39] The following issues are to be determined by the Authority:

- (a) Should a non-publication order be issued?
- (b) Do the substantive claims involve an important question of law that is likely to arise other than incidentally?
- (c) Are the substantive claims of such a nature and urgency that it is in the public interest that they be immediately removed to the Court?
- (d) Is the Authority of the opinion that in all the circumstances the Court should determine the matter in the first instance?
- (e) If one or more of the grounds of removal are met, should the Authority exercise its discretion against removing the matter to the Court?
- (f) What if any costs should be awarded?

Should a non-publication order be issued?

[40] The respondent seeks a non-publication order regarding the Government contracts that are annexed to Professor Fraser's affidavit dated 19 November 2021 as Exhibits "A" and "C" (the contracts) on the grounds that the contracts:

- (a) Are peripheral to the applicants' case;
- (b) Are commercially sensitive;
- (c) Except for some limited information (such as the existence and total value of the contracts) the contents are not in the public domain;
- (d) Contain private information about third parties; and
- (e) There is no legitimate public interest in publishing the content of commercially sensitive contracts with third parties.

[41] The respondent also seeks non-publication of the Quantum Report and/or the Implementation Plan, which are confidential and commercially sensitive. It says publicly disclosing such information could alert those who pose a potential threat to its staff of the specific security measures in place, potentially undermining such measures.

[42] The respondent says the contracts contain confidential and private information that is not currently in the public domain. Disclosure would be detrimental to the respondent and/or other contracting parties (and to the individuals named in the contracts) and there is no countervailing public interest in the information that would outweigh the prejudicial consequences of that.

[43] The applicants oppose non-publication of the government contracts on the grounds that prevents transparency. They say the contracts permit and/or oblige them to communicate their work to the public, so the contents of the contracts will be material in determining their claims. They do however agree to non-publication of the specific findings and recommendations of the Quantum Report and/or specific actions to be taken according to the respondents' draft Implementation Plan, to the extent that these may jeopardise possible safety measures to be taken.

[44] However, the applicants say the timeframe for initiation of the Quantum review and the timing of the Quantum Report, and the respondent's intended timeline to implement any recommendations (according to the draft Implementation Plan) are material facts in the case, that ought not to be suppressed. Apart from these limited exceptions, the applicants oppose the respondent's non-publication application.

[45] The Authority's discretion to grant non-publication orders is contained in clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). That states:

The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[46] This discretion must be exercised on a principled basis. The employment institutions have recognised that the position regarding non-publication orders prior to the resolution of substantive claims may be different than after those claims have been publicly determined.

[47] The non-publication order application involves an assessment of the interests of justice in light of the claims by the applicants that have not yet been substantively investigated or determined. There is a stronger case at this early stage to prohibit publication of the material identified by the respondent until the evidence in these documents has been tested during a substantive investigation meeting.

[48] The Employment Court in *Crimson Consulting Limited v Berry* reviewed and summarised the authorities regarding non-publication in the employment jurisdiction.³ The Court recognised that the general principle that justice should be administered openly was a strong one. However, it recognised that each case requires a careful weighing of competing factors.

[49] The Authority is concerned that failing to issue an interim non-publication order regarding the contents of the contracts (other than information that is already in the public domain) and of the Quantum Report and draft Implementation Plan could adversely affect third parties who are not involved in these proceedings. Protecting their privacy currently outweighs the public interest in publication. Doing so does not impair the applicants' ability to present their claims, as the employment institutions can be exempted from the interim non-publication order.

[50] The Authority is satisfied that it is in the public interest, and in the overall interests of justice, for an interim non-publication order to be made, pending further order(s) of the Authority and/or Employment Court preventing publication of:

- (a) The contents of the contracts appended to Professor Fraser's affidavit, to the extent that such information is not already in the public domain;
- (b) The content of the Quantum Report;
- (c) The draft Implementation Plan the respondent has provided.

[51] These non-publication orders are made subject to the condition that they do not apply to the employment institutions. The parties may apply for this interim non-publication order to be reviewed at the conclusion of the evidence in the substantive matter, or earlier if there are good reasons for doing so.

³ [2017] NZEmpC 94.

Do the substantive claims involve an important question of law that is likely to arise other than incidentally?

[52] The Authority may remove a matter to the Court under s 178(2)(a) of the Act if “*an important question of law is likely to arise in the matter other than incidentally*”.

[53] The applicants say the important question of law is:

The meaning of “*academic freedom*” and the extent of the respondent’s employment obligations in protecting the applicants from disadvantage and/or harassment in the course of providing public commentary in relation to Covid-19.

[54] The applicants say that this question relates to their public COVID-19 commentary and how that fits with the respondent’s role as the “*critic and conscience of society*” under s 268 of the ETA, because universities have characteristics of accepting “*a role as critic and conscience of society*” and “*promot[ing] community learning*.”⁴

[55] The applicants claim that the question of law is not only relevant to them, and to the COVID-19 issues the country is currently experiencing, but also to other academics more generally, when those academics comment on unpopular or controversial issues that may attract the opprobrium of the public.

[56] The respondent says the key issue for determination is whether it has met its health and safety obligations towards the applicants. The respondent also says that it does not dispute that the applicants may engage in public commentary as part of their roles with the respondent. The respondent therefore says there is no important question of law that should be removed to the Court.

Analysis of the proposed question of law in this case

[57] The particular context of these matters is highly relevant to whether this ground for removal is met. The question of law does not need to be complex, tricky or novel to be important.⁵

⁴ Sections 268(2)(d)(i)(E) and 268(2)(d)(ii)(A) of the ETA.

⁵ *Johnson v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

[58] A question of law 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.⁶ The importance of a question of law can also be gauged by how many others will be affected by the outcome, other than just the parties, or by the effect it will have on employment law more generally.⁷

[59] The question of how the ETA impacts health and safety duties and obligations under the HSAW is a question of law that potentially impacts more than just these parties. The consequences to employment law more generally are also potentially significant, as is the public interest in academic experts sharing their knowledge during a pandemic.

[60] The Court's answer to this question of law will also provide additional guidance for those in employment relationships on the respective health and safety rights and obligations that arise where the nature of the work undertaken by employees places them at risk of harassment, abuse and potential harm.

[61] Urgent judicial guidance on these obligations is important because the pandemic has brought abuse and harassment of employees who are communicating public health messages to the fore. Examples of this can be seen in the adverse response some people have demonstrated to the lockdowns and traffic light restrictions the COVID-19 Protection Framework has introduced, and to requirements associated with vaccine mandates, the use of vaccination passes, the wearing of masks and the like.

[62] It is clear that the parties hold differing views on the scope of academic freedom in the context of health and safety concerns where public communications on issues of widespread public importance are in the overall public interest. The Authority accepts there is an urgent need for the Court to determine the scope (if any) of the respondent's duty to protect the applicants from their harassers in such circumstances.

[63] Professor Hendy says that the outcome of that decision will have "*an important and profound effect not only on myself, [Associate Professor Wiles], and other academics who provide public commentary in the context of the COVID-19 pandemic, but also other*

⁶ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at [7].

⁷ *Supra*.

academics who provide public commentary on unpopular or controversial topics, and therefore may also be the subject of targeted harassment.”

[64] Associate Professor Wiles says she has been specifically asked to pull back on her media communications as a response to her safety concerns. That advice affects not just these applicants but also other academics who may face similar safety concerns arising from their public communications about contentious matters within their area of expertise.

[65] The attempted silencing of experts who are speaking out on matters of national importance by targeting them with harassment, threats and escalating abuse affects the public generally, not just those in employment relationships, so the outcome of these matters will be of wider application than just applying to these applicants or other academics.

[66] For example, the applicants are aware of the targeting by harassment and abuse of Maori academic researchers who comment on racism and race issues, sexism directed at academics who comment on the gender pay gap, and harassment directed at academic experts who comment on genetic modification and pest control.

[67] The Authority is satisfied that the applicants’ matters involve an important question of law from an overall public interest perspective, from the perspective of these applicants and other academics, and for others in employment relationships where their work related public communications (such as journalists and the media) attract harassment and abuse at a level that creates a potential risk of harm to those employees.

[68] The outcome of the question of law is also likely to be strongly influential in resolving the material dispute about whether or not it is reasonably practicable for the applicants to be expected to cease or limit their public communications on COVID-19 related matters, given their particular roles and expertise, during the current pandemic in response to their safety concerns.

[69] The Authority is satisfied that the ground for removal in s 178(2)(a) of the Act has been established, namely that these matters involve an important question of law that arises other than incidentally.

Are the substantive claims of such a nature and urgency that it is in the public interest that they be immediately removed to the Court?

[70] The s 178(2)(b) ground for removal in the Act is that “*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.*”

[71] There are two elements to this ground of removal, both of which must be satisfied:

- (a) Nature and urgency; and
- (b) Public interest.

[72] The applicants say there is an urgent need to obtain clarity regarding the respondent’s health and safety obligations. They also say there is an obvious public interest in having them (and other experts) continue to provide public commentary in the context of the ongoing COVID-19 pandemic, and even more broadly.

[73] The Authority is satisfied that the applicants have laid a solid evidential foundation regarding the following material facts:

- (a) They have been subjected to extensive documented threats, harassment and abuse, some of which appear on the face of it to be ‘unhinged’;
- (b) They have been subjected to threats online, in person on the University premises and at their homes;
- (c) They have a genuine and legitimate concern about the potential risk of harm to them from people who disagree with their COVID-19 related public communications;
- (d) They believe it is contrary to the principles of academic freedom for them to effectively be silenced by outside threats, harassment and abuse;
- (e) The harassment and abuse they have experienced, and therefore potential risk of harm, has been escalating over time and that escalation is likely to continue;
- (f) The harassment and abuse appears, on the face of it, to be directly related to their COVID-19 public communications, as opposed to ‘other activities’;
- (g) Their roles and the respondent’s contracts permit the applicants to engage in public communications regarding COVID-19 related matters that fall within their area of expertise;

- (h) There is significant public interest in experts, such as the applicants, being able to publicly communicate about issues of public importance that arise from and/or are associated with the current pandemic;
- (i) Constraining or stopping their public communications on COVID-19 related matters, as recommended by the respondent, will deprive the public of the benefit of their expertise during the current pandemic;
- (j) They have been attempting to address and resolve their safety concerns since April 2020, so further delay is undesirable in the face of the apparently escalating safety risks.

[74] The applicants say that all COVID-19 communications are undertaken in the course of their work because they are part of their contractual and statutory obligations. The respondent does not accept that, which is why the issues that arise under the ETA, in so far as how it relates to the HSWA obligations, are at the heart of this matter.

[75] The respondent's claim that the applicants have not been complying with its Outside Activities Policy and the suggestion that has caused their health and safety concerns indicates how the parties have wildly divergent views on key matters.

[76] The parties have a fundamental dispute regarding whether or not the respondent has in fact done everything, or is doing everything, that it is legally obliged to do regarding the health and safety concerns that the applicants have identified. While part of that conflict will be resolved by factual findings, it will also be necessary for the parties' rights and obligations under the CA, the ETA, the HSAW, the Act and applicable contracts to be determined in order for factual findings about compliance or otherwise with such obligations to be made.

[77] If the respondent's position regarding academic freedom is upheld then that would likely curtail the applicants' public communications on COVID-19 matters, thereby depriving the country of the benefit of their insights and expertise during the current COVID-19 pandemic. If the applicants' position regarding academic freedom is upheld then that will have a serious impact on how the respondent applies its limited resources, in circumstances where the pandemic has already created a fiscal deficit for the respondent.

[78] The Authority considers there is a wider public interest in the Court providing guidance as soon as possible about how the parties' should be required to balance academic freedom and

freedom of expression considerations with safety concerns arising from public communications by experts that are associated with an increased risk of potential harm to them.

[79] The Quantum Report anticipates a timeline that runs through 2022, thereby indicating that the applicants' concerns are unlikely to be addressed to their satisfaction in the immediate future. There is a pressing need for the parties' competing views to be judicially determined as expeditiously as possible.

[80] While these matters did not start out as inherently urgent, the Authority considers that this is a situation in which the urgency has built up over time. The ongoing COVID-19 pandemic is a serious public health issue in respect of which there is an obvious public benefit to having experts continue to provide public commentary. Meanwhile the risk of potential harm to the applicants has also been increasing as a result of their public communications.

[81] The Authority is therefore satisfied that the ground for removal in s 178(2)(b) of the Act, namely that the case is of such a nature and urgency that it is in the public interest that it be removed immediately to the Court, has been established.

Is the Authority of the opinion that the Court should decide the matter?

[82] The s 178(2)(d) ground for removal is that "*the Authority is of the opinion that in all the circumstances the Court should determine the matter*".

[83] This ground for removal enables cases that do not meet the grounds for removal in s 178(2)(a)-(c) of the Act to still be removed to the Court at the Authority's discretion.

[84] There is no presumption in favour or against removal. However generally personal grievances and employment relationship problems should first be investigated by the Authority, consistent with its unique investigatory powers and ability to resolve employment problems in a speedy and non-technical manner.⁸

[85] The objects in ss 143(f) and (af) of the Act recognise the importance of low-level intervention by the Authority in most employment disputes, while s 143(g) of the Act recognises that difficult issues of law will be determined by the Court. That indicates that

⁸ *Visagie v Worksafe New Zealand* [2020] NZEmpC 8 at [11].

removal to the Court should not be done lightly but will be appropriate if there are sound reasons for that to occur.

[86] When assessing whether or not it is of the opinion that in all the circumstances the Court should determine these matters, the Authority needs to keep in mind that it has been designed as a low-level cost effective forum.⁹ Removal therefore needs to be assessed within the context that the vast majority of cases will benefit from the Authority's semi-inquisitorial process, that provides a unique and well trusted first instance method for determining employment disputes.¹⁰

[87] The Court of Appeal in *Labour Inspector (Ministry of Business, Innovation and Employment v Gill Pizza)* confirmed that:¹¹

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.

[88] The Supreme Court's recent decision in *Gill Pizza Ltd and Ors v Labour Inspector (Ministry of Innovation, Business and Employment)* did not contradict the Court of Appeal's view about that.¹²

[89] The Employment Court in *Jackson v The Aorere College Board of Trustees* referred to the Court of Appeal's comment in *Gill Pizza* and interpreted it as saying that the catch all ground for removal in s 178(2)(d) of the Act had to be read in light of Parliament's decision to specify a limited range of circumstances in which removal may be considered appropriate.¹³

[90] The issues in these two matters for which removal has been sought are very capable of being investigated and determined by the Authority in the first instance. Ordinarily they would be.

[91] Although these matters, as almost all matters do, will necessarily involve mixed questions of law and fact, the outcome is likely to turn on an assessment of disputed statutory and contractual obligations as opposed to disputed facts. There is little factual dispute in this case because it is common ground the applicants have provided, and continue to provide, public

⁹ Above n8 at [11].

¹⁰ *Hall v Westpac New Zealand Ltd* [2013] NZEmpC 66 at [25].

¹¹ [2021] ERNZ 237, [2021] NZCA 192 at [48].

¹² [2021] NZSC 184.

¹³ [2021] NZEmpC 109 at [6].

commentary in relation to the COVID-19 pandemic and that they have been subject to targeted harassment from a small but venomous sector of the public.

[92] At the heart of these matters are the parties' differing interpretations of the meaning of "academic freedom", whether providing public commentary constitutes "work" for the purposes of the applicants' employment by the respondent, and the extent to which the respondent as the applicants' employer is required to protect their health and safety when a risk of harm arises from the applicants' public commentary on COVID-19 matters.

[93] There is currently no direct authority from the Court on the matters at the heart of the applicants' claims. The Authority is satisfied there is considerable benefit to the parties in having the Court resolve their widely divergent views regarding the scope of "academic freedom", as it arises in these particular proceedings, and how the tension between that and "the critic and conscience" role the respondent has in society interfaces with the parties' respective obligations under the ETA and the HSWA.

[94] The applicants have a strong desire to achieve certainty regarding their employer's obligations regarding the harassment they are receiving, that has been ongoing for more than 19 months, with no definitive end in sight. Removal will achieve certainty for the parties at the earliest possible opportunity.

[95] The Employment Court in *Transpacific Industries Group (NZ) Limited v Harris and Smart Environmental Ltd* acknowledged that it was more economic for a fully reasoned decision by the Court to be obtained in one hearing of the matter removed to the Court, rather than an investigation meeting by the Authority followed by a *de novo* challenge.¹⁴

[96] In *Johnston v Fletcher Construction Company Limited* the Employment Court held that there was force in the observations made in *Transpacific* that there was benefit in some cases having a fully reasoned substantive decision by the Court in the first instance.¹⁵ The Court in *Johnston* also acknowledged that:¹⁶

Litigation tends to be expensive. Employment litigation is no exception, particularly where an investigation meeting runs for days or weeks, and calls for numerous procedural steps [...] which will inevitably be reciprocated if the matter proceeds to an adversarial hearing in the Court. Litigants have an

¹⁴ [2012] NZEmpC 17 at [23].

¹⁵ Above n5 at [36].

¹⁶ Supra.

interest in where their (generally limited) financial resources are applied. This factor seems to me to have particular relevance in the context of a statutory scheme which provides for de novo challenges, conferring on dissatisfied parties the right to start from scratch again in the court. I perceive that to be the point that Judge Couch was making in *Transpacific*, in considering the cost factor in the exercise of the Court's discretion in that case.

[97] The Authority considers that the unsuccessful party/parties in an Authority investigation of these matters is/are almost inevitably likely to file a challenge given the importance of the issues to the parties, the impact the decision will have on others and the overall competing public interests that are at stake. It will therefore be more efficient and less costly for these matters to be dealt with by the Court in the first instance in order to achieve certainty of outcome.

[98] The Authority is concerned about the cost and delays associated with obtaining certainty of outcome if the parties are required to participate in an Authority investigation and then a challenge to the Court. That could take up to another year for the applicants' safety concerns to be resolved while the threats, abuse and harassment against them continues to escalate. The parties are in an ongoing employment relationship, so the need for early intervention is a pressing one.

[99] While a challenge is not inevitable, the fact that the interface of obligations under the ETA and HSWA has not been subject of findings by the employment institutions means that the unsuccessful party is likely to want to obtain certainty about that from the Court.

[100] The applicants are likely to want to challenge because of the risk of harm they believe they are facing while the respondent is likely to want to challenge because the very serious operational, financial and practical implications it would have on the way they are required to support academics who attract harassment as a result of their public commentary, if the applicants' claims succeed.

[101] Normally parties could expect to have their matter heard more quickly by the Authority than the Court. However, backlogs in the Authority arising from COVID-19 lockdowns mean that is not currently the case. The Court has demonstrated that it has been able to decide

COVID-19 related matters quickly.¹⁷ The Court in “*Employees*” v *Attorney General* expressly recorded that it “*was able to deal with matters urgently where that is appropriate [...]*.”¹⁸

[102] The Authority therefore considers that the parties are likely to get an earlier substantive decision from the Court than they would currently be likely to get from the Authority. That is important considering the potential the outcome of these matters has to impact more broadly on others, particularly those providing expert commentary on ‘unpopular’ topics.

[103] The length of time that has elapsed since the applicants first raised concerns with the respondent and the time that it is likely to take to address the recommendations identified in the Quantum Report (another 12 months), along with the delays inherent in getting this matter set down for an investigation meeting and determined by the Authority plus the likelihood of a challenge creates a unique situation where it is in the public interest for the applicants’ health and safety concerns to be addressed by the Court in the first instance, so the parties have a definitive ruling on their rights and obligations sooner rather than later.

[104] The Employment Court in *Jackson v The Aorere College Board of Trustees*:¹⁹

The point [about a pressing need for a decision to be made] is likely to be particularly acute in cases involving ongoing employment relationships and have particular relevance in light of what appears to be the ongoing impact of COVID-19 in the Authority. As the Act makes clear, there is a strong statutory imperative dealing with problems at an early stage, supporting successful employment relationships where possible. The further along the time continuum an employment problem or dispute is permitted to travel, the less likely the statutory objective will be met.

It will be apparent that I do not see s 178(2)(b) as necessarily limited to matters which are urgent from the outset. Rather, urgency can build over time, requiring intervention at some point along the continuum. [...]

[105] Removal allows the parties to save time and costs. Although removal will result in a loss of the parties’ challenge rights, they can appeal a question of law to the Court of Appeal. The Authority considers that the nature and urgency of these matters, and the public interest in

¹⁷ “*Employees*” v *Attorney-General* [2021] NZEmpC 141; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153; *Fechney v Employment Relations Authority* [2021] NZEmpC 173; *UXK v Talent Propeller Limited* [2021] NZEmpC 167; *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 123.

¹⁸ [2021] NZEmpC 141 at [15].

¹⁹ Above n13 at [12] – [14].

having the Court provide a reasoned substantive decision as soon as possible, is of greater weight than the loss of the right to challenge a substantive determination of the Authority.

[106] The Authority is concerned about the uncontested evidence that the harassment is escalating and is expected to continue to do so. The issues associated with the vaccination of children aged 5-11 years of age is already a topic that has stirred up increased vitriol towards the applicants.

[107] There is a high public interest in the applicants' COVID-19 related public communications. At the same time the applicants believe they face an increasing risk of harm that their employer is not taking all reasonably practicable steps to address. The parties appear entrenched in their divergent views about their statutory and contractual rights, responsibilities and obligations and a challenge to an Authority determination is almost inevitable.

[108] For these reasons, the Authority is of the opinion that these matters should be determined by the Court in the first instance, so the ground in s 178(2)(d) of the Act has been established.

Should the Authority exercise its discretion against removal?

[109] Removal is discretionary. Having concluded that the applicants have established that three of the four grounds for removal identified in s 178(2) of the Act have been established, the Authority still has a residual discretion to determine that removal of these matters is undesirable and therefore should not occur. Whether removal should be declined depends on the circumstances of these particular cases.

[110] The Court in *Auckland District Health Board v X (No 2)* described the residual discretion in the following way:²⁰

The legislative scheme makes paramount, satisfaction of one or more of the express statutory tests for removal. The discretion then remaining is residual and should not be employed to re-litigate, avoid or defeat the statutory test or tests established. Rather, it should be applied to determine whether there may be a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests.

²⁰ [2005] ERNZ 551 at [561]-[562].

[111] Factors relevant to the exercise of the Authority's residual discretion not to remove a matter have included:²¹

- (a) Would any useful purpose be served by removal?
- (b) Does the matter turn on disputed facts that are more properly dealt with by the Authority in the first instance?
- (c) Does urgency favour one jurisdiction over another?
- (d) Is a challenge inevitable?
- (e) Does cost and proportionality favour one jurisdiction over the other?
- (f) Is the matter best suited to resolution by the Authority's investigative processes or by the Court's more formal adversarial processes?
- (g) Length of hearing time required?

[112] Whether removal should be declined will depend on the circumstances of each case. Applying the above factors, the Authority finds that:

- (a) Removal is in the public interest;
- (b) The matter does not turn on disputed facts;
- (c) Urgency favours removal, the Court is likely to be able to provide a more expeditious outcome for the parties;
- (d) A challenge is almost inevitable;
- (e) The economic reality of the costs involved in the parties obtaining certainty of outcome favours removal;
- (f) This matter is not best suited to one jurisdiction's approach over the other;
- (g) The length of hearing time is considered to be a neutral factor in this matter, as it is likely to involve a similar amount of time in each jurisdiction.

²¹ Above n5; above n14 and *Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] NZEmpC 74.

[113] The respondent says removal will effectively deprive the parties of the one general “*right of appeal*”. However, that is not a decisive factor against removal in this case because that was an intended consequence of removal under s 178(1) of the Act.²²

[114] The Employment Court in *Bowen v Bank of New Zealand* held that the fact that removing the proceedings deprives the parties of the right of challenge to an Authority determination was “*not a strong argument*” because s 178 envisaged in some cases that would be appropriate. The Court has recognised that the removal of the right of challenge is “*one that must have been regarded as an acceptable consequence by the legislature*”.²³

[115] The Authority is not persuaded that it should exercise its residual discretion to decline removal.

Outcome

[116] Pursuant to s 178(1) of the Act, the Authority orders that the substantive matters 3151842 and 3151848 are to be removed to the Employment Court in the first instance on the grounds identified in s 178(2) (a), (b) and (d) of the Act.

What if any costs should be awarded?

[117] The applicants as the successful parties are entitled to a contribution towards their legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible, then the applicants have 28 days within which to file their cost submissions, with the respondent having 14 days within which to file its cost submissions.

[118] For the purposes of assessing costs, the Authority will approach this matter as if it involved a one day investigation meeting, so the notional starting tariff for assessing costs will be \$4,500. That will then be adjusted to reflect the particular circumstances of this case, so the parties should identify any factors they say should result in adjustments being made to the notional starting tariff.

Rachel Larmer
Member of the Employment Relations Authority

²² Above n4 at [24] and *Flight Attendants & Related Services (NZ) Assoc Inc* [2013] NZEmpC 125 at [50].
²³ [2021] NZEmpC at [31].