**This matter is subject to an interim non-publication order, see paragraph [1].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

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

[2022] NZERA 103
3155546

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| BETWEEN | QDY<br>Applicant |
| AND | COUNTIES MANUKAU DISTRICT HEALTH BOARD<br>Respondent |

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| Member of Authority: | Rachel Larmer |
| Representatives: | Ashleigh Fechney, advocate for the Applicant<br>Rebecca Rendle and Meghan Bolwell, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions and Further Information Received: | 19 November 2021 from the Applicant<br>26 November 2021 from the Respondent<br>20 December 2021 from the Respondent<br>23 December 2021 from the Applicant |
| Date of Determination: | 21 March 2022 |

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**DETERMINATION OF THE AUTHORITY**

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## Non-publication order

[1] In a Minute dated 19 November 2021 the Authority made an interim non-publication order preventing publication of the applicant's name and any identifying particulars and directed that the applicant be referred to by the randomly selected letters "QDY".[1] That interim non-publication order is to continue until further order of the employment institutions.

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1 Member Robinson.

directed that the applicant be referred to by the randomly selected letters “QDY”.[1] That interim non-publication order is to continue until further order of the employment institutions.

**Employment relationship problem**

[2] This determination deals with QDY’s application to have her substantive claims removed to the Employment Court under 178(1) of the Employment Relations Act 2000 (the Act).

[3] The applicant’s statement of problem claimed she had been unjustifiably dismissed and unjustifiably disadvantaged and that the respondent had also breached its contractual and good faith obligations to her.

[4] The applicant sought to rely on all four grounds for removal set out in s 178(2) of the Act. In short, she argued that her substantive claims:

(a) Involved an important question of law relating to the legal classification of the termination of her employment. QDY claimed that the termination of her employment, because (due to her unvaccinated status) she was no longer able to fulfil her contracted role, was in fact a redundancy (s 178(2)(a));

(b) Were of such a nature and urgency that it was in the public interest for them to be removed to the Employment Court, because they involved vaccination related issues (s 178(2)(b));

(c) Were substantially similar to other proceedings currently before the Employment Court (s 178(2)(d));

(d) Should be removed by the Authority on its own discretion (s 178(2)(d)).

[5] The Counties Manukau District Health Board (CMDHB) opposed removal on the basis that none of the grounds for removal under s 178(2) of the Act had been met. Alternatively, CMDHB submitted that even if one of the s 178(2) grounds for removal had been met, the Authority should still exercise its discretion to decline removal of this matter to the Court, because this was a matter the Authority should be investigating and determining first.

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[1] Member Robinson.

## Authority's investigation

[6] By agreement with the parties, the applicant's removal application involved an 'on the papers' investigation. Both parties filed submissions.

## Issues

[7] The following issues are to be determined:

(a) Does this matter involve an important question of law that arises other than incidentally?

(b) Is the matter of such a nature and of such urgency that the public interest necessitates removal?

(c) Are there related proceedings before the Court between the same parties that involve the same, similar or related issues?

(d) Does the Authority believe the matter should be determined by the Court in the first instance?

(e) If one or more of the s 178(2) grounds for removal in the Act are established, should the Authority exercise its discretion not to remove this matter to the Court?

(f) What, if any, costs should the successful party be awarded?

## Background

*Applicant's role*

[8] QDY originally commenced employment as a Registered Nurse – Managed Isolation Facilities (MIF) with Geneva Healthcare Limited (Geneva) on 4 July 2020. Her employment was then essentially transferred to CMDHB, and on 12 October 2020 she commenced employment with CMDHB on similar terms and conditions as she had with Geneva.

*NZNO MECA*

[9] QDY was employed under the District Health Board's New Zealand Nurses Organisation Nursing and Midwifery Multi-employer Collective Agreement dated 4 June 2018 – 31 July 2020 (the NZNO MECA). She was employed on a fixed term agreement that expired on 30 June 2021.

*Health and safety assessment*

[10] In March 2021 the Ministry of Business Innovation and Employment (MBIE) advised CMDHB that to meet health and safety obligations from 1 May 2021 all MIQ work subject to a required testing order and assessed as having a high risk due to Covid-19 should be done only by workers who were vaccinated.

[11] CMDHB completed a health and safety risk assessment and determined that some roles that were assessed as medium risk due to Covid-19 should also be undertaken only by workers who were vaccinated. CMDHB then consulted with QDY on the risk assessment, the impact her vaccination status had on her ability to continue her role, and potential redeployment opportunities if she was not vaccinated.

*Vaccinations Order*

[12] On 29 April 2021 MBIE advised CMDHB that the Minister for Covid-19 response had issued the Covid-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order) effective from 11.59 pm on 30 April 202. The Vaccinations Order required roles in Managed Isolation Facilities (MIF) to be undertaken by vaccinated persons only.

[13] The Covid-19 Public Health Response (Vaccinations) Order 2021 was created under s 11(1)(a)(v) of the Covid-19 Public Health Response Act 2020. The applicant accepted she was an "affected person" under the Vaccinations Order. Clauses 7 and 87 of the Vaccinations Order provides that:

> […] an affected person must not carry out certain work unless they are vaccinated. A relevant PBCU [Person Conducting a Business or Undertaking] must not allow an affected person (other than an exempt person) to carry out certain work unless satisfied that the affected person is vaccinated.

[14] The Vaccination Order therefore imposes an obligation on the employer, to change the way in which "certain work" is completed, for the purpose of preventing, and limiting, the risk of the outbreak or spread of Covid-19.

*Consultation with QDY*

[15] CMDHB said it consulted QDY on the implications the Vaccinations Order had on her unvaccinated status and gave her extended special paid leave from 1 May until 30 June 2021. CMDHB also provided QDY with a non-exhaustive list of approximately 50 redeployment opportunities and encouraged QDY to view its website for additional opportunities.

[16] QDY declined an offered role of Registered Nurse, Module 7/7A, that she was suitably qualified to undertake, and advised she did not want to apply for any alternative redeployment opportunities. Unknown to CMDHB, while on special leave in June 2021 the applicant left New Zealand to travel to the United States of America.

*Termination of QDY's employment*

[17] CMDHB consulted QDY over a preliminary decision to terminate her employment, and QDY advised she had no feedback. CMDHB then terminated QDY's employment on 9 July 2021 on the grounds she was no longer able to fulfil her contracted role as a result of the Vaccinations Order and her status as an unvaccinated person. QDY said this termination was in fact a redundancy.

*Applicant's substantive claims*

[18] The applicant claimed CMDHB breached the terms of the NZNO MECA because it failed to comply with the "staff surplus" provisions, and in particular clause 24.3.7 of the NZNO MECA (that related to redeployment) and clause 24.3.11 of the NZNO MECA (that related to severance).

[19] QDY said she should have received a severance payment under the NZNO MECA because her termination was a redundancy. However, the applicant' position on that was apparently not supported by the NZNO because it declined to represent the applicant with this claim.

[20] The applicant claimed these alleged breaches of the NZNO MECA amounted to an unjustified dismissal or alternatively an unjustified disadvantage. QDY further claimed CMDHB breached its statutory duties of good faith and had failed to be active and constructive in maintaining the employment relationship.

[21] QDY claimed CMDHB breached an implied term of her employment relating to her accommodation, when it provided her with only 48 hours' notice to vacate the accommodation, she had been provided at Stamford Hotel as part of her role. QDY also said that breach had unjustifiably disadvantaged her.

*Respondent's position*

[22] CMDHB denied all of the applicant's claims. It said there was no "staff surplus" or redundancy situation because clause 24.3 of the NZNO MECA stated:

> When as a result of the **substantial restructuring of the whole, or any parts, of the employer's operations**; either due to the reorganisation, review of work method, change in plant (or like cause), the employer requires a reduction in the number of employees or, employees can no longer be employed in their current position, at their current grade or work location (i.e. the terms of appointment to their present position), then the options in sub-clause 24.3.4 below shall be invoked and decided on a case by case basis in accordance with this clause. (Emphasis added).

[23] CMDHB says it did not undertake a "*substantial restructuring of the whole, or any parts, of [*its*] operations*". It did not breach implied or express terms of the NZNO MECA and/or good faith obligations because it consulted with the applicant on the implications of the MBIE guidelines and its risk assessment in relation to her role, and the Vaccinations Order.

[24] CMDHB pointed out that QDY's role continued to exist with the same duties, responsibilities and location of work, so clauses 24.3.7 and/or 24.3.11 of the NZNO MECA did apply to the applicant's situation. The NZNO has apparently not disputed CMDHB's view about that.

**Relevant Law**

[25] Section 178 of the Act deals with removal of matters from the Authority to the Employment Court to hear and determine without the Authority first investigating. Section 178(2) of the Act sets out four possible grounds for removal, namely:

(a) An important question of law is likely to arise other than incidentally; [2] or

(b) The case is of such nature and of such urgency that it is in the public interest that it be removed immediately to the Court; [3] or

(c) The Court already has proceedings before it between the same parties which involve the same or similar or related issues;[4] or

(d) The Authority believes that in all the circumstances the Court should determine the matter.[5]

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2 Section 178(2)(a) of the Act.
3 Section 178(2)(b) of the Act.
4 Section 178(2(c) of the Act.
5 Section 178(2)(d) of the Act.

[26] The Court of Appeal in *A Labour Inspector v Gill Pizza Ltd & Others* recognised that removal under s 178(1) of the Act is "*contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority*".[6]

[27] The Employment Court in *Jackson v The Aorere College Board of Trustees* recognised that the Act "*generally requires proceedings to be filed in the Authority, and for matters to be dealt with in that forum with rights of challenge to the Court*".[7]

[28] However, the Act recognises there will be some limited circumstances where matters may be appropriately removed to the Court in the first instance. Those circumstances are identified in s 178(2) of the Act.

[29] At least one of the four possible grounds of removal must be met before the Authority may remove a matter to the Court. The Authority retains a residual discretion to decline removal, even if one or more of the s 178(2) grounds for removal have been met.

**Does this matter involve an important question of law other than incidentally?**

[30] The s 178(2)(a) ground for removal in the Act is that an important question of law is likely to arise other than incidentally.

*Case law*

[31] The Employment Court made the following observation about the 'important question of law' ground for removal in *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd:*[8]

> The statutory test is not whether there is an unsettled, controversial, or novel point of law. Rather, an important question of law must be shown to be likely to arise in the proceedings other than incidentally. A question of law will be an important question of law if it will be decisive of the case.

*Question of law identified by the applicant*

[32] The applicant's removal application dated 9 November 2021 identified the following question of law for removal under s 178(2)(a) of the Act:

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6 [2021] NZCA 192 at [48].
7 [2021] NZEmpC 109.
8 [2002] 1 ERNZ 74.

> Whether the process undertaken by the respondent, ought to have been considered a restructure process, giving rise to redundancy entitlements.

[33] The applicant in her submissions said that was an important question of law because it related "*to the classification of termination of the applicant's employment*". Although not raised in the removal application, Ms Fechney's subsequent submissions said the question posed was important because:

> (a) Does clause 8 of the [Vaccinations Order] impose a duty on the employer to change the terms and conditions of "certain work"?
>
> (b) If so, does this amount to a restructure process?
>
> (c) Does clause 8 of the [Vaccinations Order] impose a duty on the employer to establish a vaccination policy in relation to "certain work"?
>
> (d) If so, does a breach of that policy amount to serious misconduct?
>
> (e) What is the legal difference between the introduction of a policy, and a change to the terms and conditions of employment?

[34] The law is also well established regarding what constitutes a restructure or redundancy process, and that is exactly the type of clam the Authority is tasked with determining in the first instance.

[35] The Court of Appeal in *G v N Hale & Son Limited v Wellington Caretakers IUW* approved a definition of redundancy as involving a termination of employment "*attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer*", as per the definition in s 184(5) of the Labour Relations Act 1987.[9]

[36] The Court of Appeal in *Grace Team Accounting v Brake* confirmed that *Hale* remained good law and that redundancy involved an employee being "*superfluous to the needs of the business.*"[10]

[37] In this case the NZNO MECA set out when a redundancy situation would arise. Whether the applicant was redundant, as per the definition in the NZNO MECA, is mainly a question of fact. In so far as it involves a question of law, that will consist of simple contract interpretation and that in itself is not an important question of law.

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[9] [1991] 1 NZLR 151 (CA) at 852.

[10] [2014] NZCA 541 at [47].

[38] In so far as the question of law identified by the applicant related to a dispute about the application and operation of the NZNO MECA, that was not an important question of law because the principles of contract interpretation are well established by case law.[11] There was no need for the Employment Court to have to interpret the meaning of the "staff surplus" clauses in the NZNO MECA, because whether it applied would mainly be a question of fact.

[39] The Authority did not consider that the questions posed by the applicant would affect large numbers of employers or employees or would be of major significance to employment law generally. The outcome of these claims would likely be unique to QDY's personal situation.

[40] Although most claims involved mixed questions of law and fact, any questions of law in this matter are incidental to the factual findings that are required. The questions of law involved are settled and involve well understood legal principles, of the type that are regularly applied by the Authority.

[41] The express objects of the Act included s 143(f) that the purpose of the Act is to "*recognise that judicial intervention at the lowest level needs to be that of a specialist decision making body that is not inhibited by strict procedural requirements*".

[42] The Authority therefore did not agree that the questions posed by the applicant involved important questions of law that would arise other than incidentally.

[43] What QDY is asking the Authority to determine is whether the termination of her employment and everything associated with that (i.e. the process used and the accommodation issue) was justified, as well as whether CMDHB breached it contractual and/or good faith obligations to her.

[44] The Authority determines these sorts of claims on a daily basis. It is obviously well placed to consider whether the way CMDHB responded to the Vaccinations Order, and how its response affected the applicant's employment, was justified. The questions the applicant has posed will not be decisive of that.

[45] This matter involves the sort of factual inquiries the Authority has specifically been set up to undertake, consistent with s 143(fa) of the Act that states one of the objects of the Act is

[11] See *New Zealand Tramways and Public Passenger Transport Employees' Union v Cityline (NZ) Limited* [2018] NZEmpC 156 and *Bathurst Resources Limited v L & M Coal Holdings Limited* [2021] NZSC 85.

to "*ensure that investigations by the specialist decision making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations*".[12]

[46] Whether the applicant was in fact made redundant, despite CMDHB saying she was not, is a straightforward factual matter that the Employment Court should not be required to decide in the first instance.

[47] In terms of the obligations imposed by the Vaccinations Order, and CMDHB's actions in response to that, the purported questions of law about appear to be inconsistent with the claims the applicant has set out in her statement of problem. QDY's questions of whether the Vaccinations Order imposed a duty on employers to introduce policy, and the difference between a policy and a change to the terms of employment, are not at issue in these proceedings so will not need to be determined.

[48] While it is open to the applicant to file an amended statement of problem, the questions she has identified are not important questions that warrant immediate removal to the Court. The Authority should determine such questions first, consistent with its unique jurisdiction and investigatory powers. Such an approach will also preserve the parties' rights to challenge.

[49] The Authority finds that the s 178(2)(a) ground for removal has not been met.

**Is the matter of such a nature and of such urgency that the public interest necessitates removal?**

[50] Under s 178(2)(c) of the Act the Authority may remove a matter if it is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court. There are two elements to this ground – nature <u>and</u> urgency, so both must be met. Just establishing one element is therefore insufficient.

[51] The urgency criteria was not met. During the Case Management Conference (CMC) held on 12 November 2021 the Authority considered and declined urgency. That decision was recorded in the Minute dated 19 November 2019.[13] That decision stands.

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12 *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd & Others* [2021] NZCA 192 at [54] – [55]

13 Above n1.

[52] The applicant had not progressed her claims with urgency. Her employment was terminated on 9 July 2021 but her statement of problem was not filed until 9 November 2021. She is also only seeking monetary remedies, which the respondent is in a position to pay if required to.

[53] Nor was the Authority satisfied that the matter was of such a nature that it was in the public interest to remove it.

[54] The applicant's claims relate to specific matters involving these particular parties, including the consultation and redeployment process undertaken by CMDHB regarding the applicant and her employment and the application of the NZNO MECA. The case is therefore a narrow one, based on the particular context and facts involving these specific parties and the applicable contractual and statutory obligations/requirements.

[55] The public interest element of this removal ground was not met, because there is no overriding public interest need for this matter to be removed to the Court.

[56] Employees covered by the NZNO MECA retain the option to refuse to be vaccinated. They also retain their rights under the Act to challenge the termination of their employment on a case by case basis. Such cases would require an intensely factual investigation into what occurred, as would normally occur in any other unjustified dismissal case.

[57] The applicant was unable to establish any of the elements of this ground of removal. The nature of the claims did not require removal, there was no urgency that required removal and it was not in the public interest to remove this matter to the Court.

[58] Accordingly, the ground for removal in s 178(2)(c) of the Act has not been established.

**Are there related proceedings before the Court between the same parties that involve the same, similar or related issues?**

[59] Section 178(2)(c) of the Act requires the Court to already have proceedings before it between the same parties and which involve the same or similar or related issues.

[60] The applicant relied on *GF v New Zealand Customs Service* and *WXN v Auckland International Airport Limited* as being two matters that are currently before the Employment

Court that involved vaccination related issues.[14] However, that was not a relevant comparison. Neither of those two cases involved either of the parties in this matter, which was a requirement of this ground for removal.

[61] Because the Employment Court does not have any proceedings before it involving these same parties, the ground for removal under s 178(2)(c) of the Act was not met.

**Does the Authority believe that the matter should be determined by the Court in the first instance?**

[62] Section 178(2)(d) of the Act reserves the Authority a discretion to determine that the matter should be determined by the Employment Court in the first instance. The ground for removal in s 178(2)(d) of the Act has not been made out.

[63] This matter involves the application of well-established principles of law to factual matters that are likely not in dispute. It is clearly an appropriate matter for the Authority to investigate and determine in the first instance.

**Outcome**

[64] The applicant has been unable to establish that any of the grounds for removal in s 178(2) of the Act apply to this matter. Accordingly, QDY's removal application does not succeed.

**Costs**

[65] CMDHB as a successful party is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve costs by agreement.

[66] If that is not possible, then CMDHB has 14 days from the date of this determination to apply for costs and the applicant then has 14 days within which to file her costs response. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[67] The Authority is likely to adopt its usual notional daily tariff based approach to costs. This removal application will be treated as a half-day investigation meeting, for the purposes

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[14] *GF v New Zealand Customs Service* [2021] NZEmpC 162 and *WXN v Auckland Airport International Limited* [2021] NZEmpC 205.

of assessing costs. The parties are therefore invited to identify any factors they say should result in the notional starting tariff being adjusted.

**Rachel Larmer**
**Member of the Employment Relations Authority**