

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 156
3064293

BETWEEN

YVONNE THOMPSON
Applicant

AND

CRAIGHEAD DIOCEAN SCHOOL
BOARD OF PROPRIETORS
Respondent

Member of Authority: Andrew Dallas

Representatives: Linda Ryder, advocate for the Applicant
Richard Harrison, counsel for the Respondents

Investigation Meeting: On the papers

Date of Determination: 22 April 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by Yvonne Thompson for removal of Authority matter 3062493 to the court pursuant to s 178 of the Employment Relations act 2000 (the Act). Ms Thompson's grounds for removal are, in summary:

- (a) the Authority has issued a determination in this matter;¹
- (b) Craighead challenged that determination to the court;
- (c) the court issued an interlocutory judgment dismissing Ms Thompson's strike out application finding that Craighead was entitled to challenge the determination (even though the Authority has not concluded its investigation);²

¹ *Thompson v Craighead Diocesan School Board of Proprietors* [2021] NZERA 341

² *Craighead Diocesan School Board of Proprietors v Thompson* [2022] NZEmpC 62 (Judge Smith)

- (d) the matter is to be set down for substantive challenge before the court;
- (e) removal of the remaining matters before the Authority (fixing arrears of wages and costs) will allow the court to dispose of the entire matter and obviate the need for further investigation by the Authority.

[2] Ms Thompson’s application is, effectively, supported by Craighead who advised the Authority “... there is no opposition to this application as it is both appropriate and sensible”.

The statutory regime for removal

[3] There are several provisions of the Act which are relevant to the question of removal to the court. Section 3 sets out the object of the Act as:

3 Object of the Act

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
 -

[4] This object is further reinforced through the object of Part 10 of the Act which provides:

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

[5] 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 generally and specifically in relation to Ms Thompson’s claims for minimum wage arrears.³

³ Employment Relations Act, ss 160(g)

[6] The grounds for removal of matter before the Authority 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.

....

[7] It is only logical that s 178(1) of the Act is 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 what is described as the “residual discretion”. A number of relevant considerations have been found to pertain to the exercise of that discretion.⁴ There are several others, including now the court’s costs regime, which differs significantly from that of the Authority.⁵

The application for removal

[8] From the outset, agreeance by Craighhead with Ms Thompson’s application does not form part of the applicable test for removal to the court under the Act. And, as has been stated previously by the Authority, parties cannot contract out of the Act by simply agreeing a statutory test does not apply to them.⁶

⁴ 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

⁵ *Gill Pizza Limited v A Labour Inspector* [2021] NZSC 184 at [65]

⁶ Employment Relations Act, s 238.

[9] While the court can derivatively exercise the Authority’s jurisdiction, the Court of Appeal has made it clear that the legislature contemplated this in “relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority”.⁷ This is consistent with an earlier court position which recognised that where the primary forum is clothed with the jurisdiction to adjudicate, it should be exclusively exercised by it.⁸

[10] Notwithstanding the Authority’s exclusive jurisdiction, I have formed the opinion under s 178(2)(d) of the Act that based on the specific factual matrix of these proceedings, it is appropriate for the court to hear and determine all matters relating to this employment relationship problem and not just those currently, and now, properly, before it.

[11] 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.

[12] In my view, none of the previously recognised relevant considerations stand in the way of me removing this matter to the court. In terms of the possible impact of the court’s costs regime on the removed proceedings, as this application has been made by Ms Thompson, and in the absence of information to the contrary, she must be taken to have been appraised of the potential financial implications of moving beyond the Authority’s tariff regime. In any event, the matters now being removed are residual. And, in terms of fixing costs for the Authority’s proceedings hitherto, the court has, appropriately, taken the view that it “stands in the shoes” of the Authority for that purpose.

⁷ *A Labour Inspector v Gill Pizza Limited* [2021] NZCA 192 at [48].

⁸ *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756; 767.

Outcome

[13] Proceedings 3062493 are removed to the court without being further investigated by the Authority.

Costs

[14] There is no order as to costs.

Andrew Dallas
Chief of the Employment Relations Authority