IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 2
3144161

BETWEEN	NATALIA SZABLEWSKA Applicant
AND	THE VICE-CHANCELLOR OF AUCKLAND UNIVERSITY OF TECHNOLOGY Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael O'Brien, counsel for the Applicant Tim Oldfield, counsel for the Respondent
Submissions:	14 December 2021 from the Applicant 17 December 2021 from the Respondent
Investigation Meeting:	On the papers
Determination:	12 January 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Dr Natalia Szablewska, seeks an order for removal to the Employment Court pursuant to s 178(2) of the Employment Relations Act 2000 (the Act), on the grounds that:

> a. an important question of law is likely to arise in the matter other than incidentally;
>
> 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;
>
> c. …
>
> d. the Authority is of the opinion that in all the circumstances the court should determine the matter.

[2] The Respondent, the Vice-Chancellor of Auckland University of Technology, opposes removal on the basis that none of the grounds pursuant to s 178 (2) are met.

Brief Background Facts

[3] Dr Szablewska commenced employment in the capacity of a Senior Lecturer with Auckland University of Technology (AUT) on 1 November 2019.

[4] Dr Szablewska alleges that during discussions prior to her accepting the role of Senior Lecturer, it was represented to her that she could expect to progress to the role of Associate Professor in a timely manner, although the Respondent refutes this.

[5] During the 2020 appointment round at AUT Dr Szablewska applied for promotion to the position of Associate Professor. She was advised on 15 October 2020 that her application had not been successful.

[6] Dr Szablewska sought further information in a meeting with Professors Kearins and Ricketts on 23 October 2020 and claims that she raised personal grievances during that meeting.

[7] On 5 November 2020 Dr Szablewska said she met with the Deputy Vice-Chancellor, and reiterated her personal grievances and discussed issues which concerned her.

[8] The Respondent denies that a personal grievance was raised by Dr Szablewska on either 23 October or 5 November 2020, but accepts that Dr Szablewska did lodge a written appeal of the decision not to promote her in accordance with a clause in the AUT Professional Appointments Handbook.

[9] The University Appeals Committee considered Dr Szablewska's appeal and made a recommendation to the Vice-Chancellor. On 16 December 2020 Dr Szablewska was notified in writing that the appeal was not successful.

[10] On 14 May 2021 counsel for Dr Szablewska wrote in connection with personal grievances of unjustifiable disadvantage and unjustifiable discrimination based on sex, and requesting a meeting with the Vice-Chancellor, who was the only person in AUT with the authority to overturn the refusal to promote.

[11] Counsel for the Respondent replied on 19 May 2021 stating its view that the personal grievances were raised outside of the statutory time frame, and it did not consent to the late raising of them. However it offered to meet Dr Szablewska in the context of an academic appeal and an ongoing employment relationship.

[12] On 25 May 2021 counsel for Dr Szablewska wrote to the Respondent outlining the occasions when she had outlined her complaints with the Respondent, and reiterated her request for a meeting with the Vice-Chancellor.

[13] AUT replied on 28 May 2021 and again offered to meet with Dr Szablewska in the context of an academic appeal. A follow-up email was sent on 1 June 2021 asking Dr Szablewska for dates to meet.

[14] Dr Szablewska did not accept the invitation to meet and on 22 June 2021 proceedings were subsequently filed on her behalf in the Authority.

Submissions by the Applicant

[15] In support of its application to have this matter removed to the Employment Court, counsel for the Applicant relies on the following grounds pursuant to s 178(2)(a) (b) and (d) of the Act as follows:

Section 178(a) Important Questions of Law

[16] Counsel for the Applicant submits that there are a number of important questions of law which meet the grounds for removal. These are submitted to be:

1. Whether the Applicant was unlawfully discriminated on the basis of sex;
2. Whether the Applicant was unlawfully discriminated against on the basis of age; and
3. Reconsideration of the Court of Appeal's judgment in *Victory University of Wellington v Haddon* [1996] 1 ERNZ 139, specifically the Court's findings that non-promotion is unlikely to amount to a personal grievance because an employee suffers no disadvantage simply from a lack of progression upwards[1]; and
4. The interrelationship between s 104(1)(a) of the Act and the remedies provided under s 123(1)(c)(ii) of the Act.

[17] The Applicant submits that case law establishes that a question: "will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about the decision of that case or a material part of it"[2]. It is submitted that the test is not

[1] *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139.
[2] *McAlister v. Air New Zealand Ltd* AC22/05, 11 May 2005.

whether the question of law is novel, but rather that if there is an important issue of law that is Parliament's intent that it should be removed to the Employment Court.

Question 1: Unlawful discrimination on the basis of sex

[18] In relation to Question 1: unlawful discrimination on the basis of sex, it is submitted that it is not merely a factual question, but involves an important legal question including the legal concept of comparators as evidenced by the full Court hearing which considered the legal question of discrimination based on sex in *NZPPTA v Secretary of State for Education*.[3]

Question 2: Unlawful discrimination based on age

[19] In relation to Question 2: unlawful discrimination on the basis of age, it is submitted that similar to the summation on the issue of sex, this involves a legal question, and that it is an important one. It is submitted again that the test is not whether the legal issue is novel.

Question 3: Reconsideration of the Court of Appeal's judgment in VUW v Haddon

[20] In relation to Question 3: a reconsideration of the Court of Appeal's judgment in *Haddon,* it is submitted that the principle espoused by the Court of Appeal is antiquated.[4] Particularly with regard to discrimination, it is appropriate that the legislation takes into account an employee missing out on opportunities for advancement to a new role because of discrimination.

[21] It is submitted that *Haddon* was a 1996 judgment under a different piece of legislation and the principles can be distinguished under the Act, specifically the expressed intent under s 4 of the Act that the parties be: "active and constructive in establishing and maintaining a productive employment relationship". It is submitted that what should be read into those obligations is reasonable opportunity for an employee growing in their employment and advancing to higher roles rather than remaining stagnant in an existing role.

Question 4: The interrelationship between s 104(1)(a) of the Act and the remedies provided under s 123(1)(c)(ii) of the Act

[22] It is submitted by the Applicant that this issue of law goes to the proper compensation for non-promotion based on discrimination. It is submitted that the Court has routinely found that the issue of remedies can give rise to an important issue of law, citing the observation by the Court in *Kazeni v Rightway Limited* that*:*

---

[3] *NZPPTA v Secretary for Education* [2021] NZEmpC 87.
[4] *Haddon* above n 1.

> I accept the respondents' submissions that determination of each of the questions posed by the applicant will involve, to a greater or lesser degree, consideration of the relevant factual context. Plainly they do not comprise standalone questions or pure law. That is not, however, the yardstick under s 178(2)(a). …. While the facts are likely to be determinative in establishing whether or not there has been a breach of good faith, the law will be determinative in deciding the jurisdictional issue of whether general damages can be awarded. A mixed question of law and fact will then arise as to the appropriate level of damages.[5] .

[23] It is submitted the fact that a question of law will arise in remedies does not mean that the question will arise incidentally and accordingly fall outside the scope of s 178(2)(a) of the Act.

Section 178(2)(b) The case is of such a nature and such urgency that it is in the public interest to be removed immediately to the Court

[24] Counsel for the Applicant submits that there is public interest in having judgments that deal with issues of equality in the workplace, and various publically available studies about the under-representation of females in senior roles support this. It is a significant issue for society to address.

Section 178(2)(d): The Authority is of the opinion that in all the circumstances the court should determine the issue

[25] It is submitted by counsel for the Applicant that it would be a proper exercise of its discretion for the Authority to remove this issue.

[26] It is submitted that there would be no loss of appeal rights if a matter is removed to the Employment Court as both parties would retain the right to apply for leave to appeal to the Court of Appeal and the Supreme Court.

[27] Further given the likelihood either party may challenge the Authority's findings, a hearing in the Court will most likely provide a quicker result. It is submitted that the cost of litigation also strengthens the Applicant's position.

[28] Finally it is submitted that the issues in the case will give rise to significant issues around discovery and cross-examination of numerous witnesses and the Court has a better arsenal than the Authority to deal with the myriad of issues at play.

Submissions by the Respondent

[29] Counsel for the Respondent submits that none of the grounds are made out.

---

[5] *Kazeni v Rightway Limited* [2018] NZEmpC 3 at [15].

Section 178(a) Important Questions of Law

Questions 1 and 2: Unlawful discrimination on the basis of sex and age

[30] In relation to the first two alleged questions of law, being unlawful discrimination on the basis of sex or on basis of age, counsel for the Respondent submits that the Applicant has not properly identified any questions of law. Whilst the Applicant has referred to comparators for the first time in submissions, she has not identified any, nor explained why this gives rise to an important question of law.

[31] It is submitted that the issues raised are actually questions of fact. The Respondent submits that the Authority's role, if it finds the grievances were raised in time, will be to determine whether the Applicant was discriminated against by reason of age or sex within the meaning of s 104(1) of the Act. The legal principles relevant to that exercise are set out in *Air New Zealand Ltd v McAlister.*[6] In that judgment the Supreme Court said that:

> The correct question raised by the phrase 'by reason of' is whether the prohibited ground was a material ingredient in the making of the decision to treat the complaint in the way he or she was treated .

[32] This is a factual inquiry as accepted by the Supreme Court at paragraph [4] of that judgment, and no questions of law arise.

[33] In respect of a comparator, it is submitted by the Respondent that the Applicant has not suggested any, nor suggested why an important question of law might arise in selecting a comparator, nor is any question of law articulated about this in the application for removal. The comparator, if the grievance is deemed to have been raised in time, will be as identified in s 104(1)(a) of the Act and it is submitted, the Supreme Court dealt with the legal test for such comparators under s 104(1)(a) in *McAlister* at [32] – [38].[7]

Question 3: Reconsideration of the Court of Appeal's judgment in VUW v Haddon

[34] Counsel for the Respondent submits that in respect to the third question of law raised by the Applicant in submissions, being the applicant's submission that a reconsideration of the Court of Appeal's judgment in *Haddon* is necessary under the Act, particularly in light of the Act's focus in s 4, the Applicant's reference to *Haddon* is not complete. [8]

[35] It is submitted that in *Haddon* the Court of Appeal made it clear that an unjustifiable disadvantage may arise where opportunities for promotion are an element in a particular

---

[6] *Air New Zealand Ltd v McAlister* [2009] NZSC 78.
[7] *McAlister a*bove n 1.
[8] *Haddon* above n 3.

employment situation.[9] In this case it appears that the Applicant is alleging a breach of the Respondent's Good Employer Policy and Professional Appointments Policy, and that these policies are binding on the Respondent as set out in the statement of problem.

[36] It is submitted accordingly that the alleged question of law does not arise in this case, nor does *Haddon* exclude all failures to promote from the ambit of an unjustifiable disadvantage. Moreover the principle in *Haddon* allowing for unjustifiable disadvantage grievances to proceed where promotion is contemplated has been reaffirmed by the Employment Court following the passing of the Act in *Ramkissoon v Commissioner of Police* and therefore the good faith overlay does not contribute to the analysis.[10]

Question 4: The interrelationship between s 104(1)(a) of the Act and the remedies provided under s 123(1)(c)(ii) of the Act

[37] It is submitted by counsel for the Respondent that no question of law is formulated by the Applicant. However, if there is question of law, it is submitted that it is truly incidental, because the Applicant has always been paid more than the top rate for Associate Professors in the collective agreement. Any other differences in entitlements are minor and incidental and the Applicant has not suffered any quantifiable loss arising out of the failure to promote her.

[38] The Respondent submits that no real question of law arises, as any compensation under s 123(1)(c)(ii) of the Act which is not yet even specified or quantified, involves the exercise of a discretion by the Authority and factual findings about whether the Applicant would have reasonably been expected to obtain the benefit if the grievance had not arisen.

[39] In summary it is submitted that the Applicant has not identified any important questions of law that are central to disposition of the claim.

Section 178(2)(b) The case is of such a nature and such urgency that it is in the public interest to be removed immediately to the Court

[40] It is submitted by the Respondent that in order for this ground to be made out, the Applicant must show that the case was urgent. However this ground cannot be made out because the case is not urgent.

[41] The Respondent notes that the Applicant filed her claim eight months after she found out her application was unsuccessful and six months after she found out her appeal against that decision was unsuccessful. It has not been granted urgency by the Authority nor had the Applicant herself treated it as urgent.

---

[9] *Haddon* above n 3 at 149.
[10] *Ramkissoon v Commissioner of Police* [2017] NZEmpC 85 at [238] – [247].

Section 178(2)(d): The Authority is of the opinion that in all the circumstances the court should determine the issue

[42] The Respondent submits that an allegation of discrimination by reason of sex does not mean the Court should hear the matter. The Respondent refutes there is a broader issue of discrimination by reason of sex at its institution. The Dean of the Faculty and the Head of School are both women, the majority of the panel that considered the Applicant's application were women as was its chair (the Deputy Vice-Chancellor) and the panel also reflected an unconscious bias when considering the applicant's application for promotion.

[43] It is submitted that no broader societal issue arises and the Respondent has taken steps to address gender equality when considering applications for promotion that were applied in the Applicant's case.

[44] In respect of the concerns of the Respondent about litigation costs, it is submitted that costs in the Authority should be lower given its investigative role. The potential liability for costs is also lower.

[45] The Respondent does not accept the Applicant's submissions about the Employment Court's procedures being more suitable for this matter. The Authority has the power to call for evidence and other information, including documents, it must allow cross-examination, and evidence is given under oath.

[46] The Respondent submits that the Applicant's reference to appeal rights is not relevant to the test under s 178(2)(d) of the Act. The presence or absence of appeal rights cannot be material to the Authority forming an opinion that the Court should determine the matter in all the circumstances under s 178(2)(d) of the Act. It could never be proper for the Authority to determine the Court should hear the matter solely to deprive a party of appeal rights. It is only a factor to consider in the exercise of its discretion whether or not to remove if the Authority determines one or more of the grounds in s 178(2) are made out.

[47] Even if the Authority determines one or more grounds in s 178(2) are made out, the Authority still has a discretion whether or not to remove, and it is submitted that removal would be undesirable because the Authority is well placed to conduct the factual inquiry necessary to determine the matter; a challenge is not inevitable because the Applicant has already applied for an internal review of the promotion decision and had that determined, and because increased costs will likely be incurred if the matter is determined by the Court rather than the Authority.

Should the Removal Application be granted?

General Principles of Removal

[48] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[49] As observed by the Court of Appeal in *A Labour Inspector* v *Gill Pizza Limited & Ors:*

> … 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. [11]

[50] In the event that the party or parties applying for removal satisfy the tests set out in s 178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[12].

On the basis of important questions of law

[51] In regard to the questions posited on claims of discrimination on the grounds of sex or age, I note that such issues are not novel questions nor I am persuaded that it is Parliament's intent to have such matters determined by the Court. On the contrary I observe that the Act contemplates the Authority as determining the majority of employment relationship problems, and these issues are predominantly factual in nature. The Authority is experienced in determining factual issues.

[52] I am also not persuaded that the Authority would have undue difficulty determining whether or the correct comparators have been used by the Respondent, guidance as to the appropriate comparators is provided in s 104(1)(a) of the Act and there is further guidance provided by the Supreme Court.[13]

[53] In regard to the revisiting of the Court of Appeal's judgment in *Haddon*, I find that the judgment does not provide a blanket prohibition against an unjustifiable disadvantage on the basis of a lack of promotion, providing the grounds are established to support such a claim as confirmed by the Employment Curt after the passing of the Act.[14]

---

[11] *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors* [2020] NZCA 192.
[12] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83].
[13] *McAlister a*bove n 1.
[14] *Ramkissoon* above n 10.

[54] In regard to the question based on remedies, I observe that the Authority invariably addresses the issue of remedies in its determinations and is well experienced in making such decisions.

[55] In conclusion I do not find that an important question of law arises such as to support removal being granted on the basis of s 178(2)(a) of the Act.

On the basis of the case being of such a nature and such urgency

[56] The basis for removal on this ground as set out in s 178(2)(b) of the Act is the nature and urgency of the case. The nature of the case involves issues of possible discrimination on the basis of sex or age. Whilst I accept that society has a justifiable interest in such matters, both elements of the test must be met i.e. that the matter is also urgent.

[57] As observed by Mr Oldfield in his submissions on behalf of the Respondent, the Applicant herself has not progressed this matter on an urgent basis.

[58] I do not find that the case is of such nature and urgency that it should be removed immediately to the Court pursuant to s 178&2)(b) of the Act.

The Authority in its discretion considers the Court should determine the matter.

[59] I consider that the issues raised by the Applicant are such that the Authority is not only able to determine them, but that it is Parliament's intention that it do so on the basis that the Authority's role is to establish the facts and make determinations according to its findings. This is case in which factual finds will be intrinsic to the determination.

[60] It is intended by Parliament that the Authority's process will offer the parties speedy and informal justice. [15] This has a beneficial impact upon the costs to the parties involved. As noted by the Supreme Court in *Gill Pizza* it is the express object of the Act that*:* decisions are made as efficiently and cheaply as possible and are not inhibited by strict procedural requirements.[16]

[61] The Authority has power to call for evidence and information from the parties. [17] This power is not limited and I do not consider this aspect poses any grounds for concern.

[62] I do not find that the Authority should exercise its discretion to remove the matter on the basis of s 178(2)(d) of the Act

---

[15] Regulation 4 (1)(c) of the Employment Relations Act 2000 Regulations.
[16] *Gill Pizza Limited & Ors v A Labour Inspector & Ors* SC 67/2021 at [64](a).
[17] Section 160(1)(a) Employment Relations Act 2000.

[63] In conclusion I am not satisfied that any of the grounds for removing a matter to the Employment Court pursuant to s 178(2) of the Act have been met.

[64] In these circumstances I decline to order the removal of this matter to the Employment Court.

Costs

[65] Costs are reserved. It is my view that costs should lie where they fall but if the parties decide otherwise costs will be determined following which is likely to be an appropriate outcome.

Eleanor Robinson
Member of the Employment Relations Authority