

[5] Mr McPherson now seeks a removal to the Court of the Authority proceedings 3182099 to the Employment Court on the basis that the two matters are closely related pursuant to s 178(c) of the Employment Relations Act 2000 (the Act).

[6] The Respondent opposes removal on the basis that none of the grounds pursuant to s 178 (2) of the Act are met.

Issues

[7] The issue requiring investigation is whether or not the Authority proceedings should be removed to the Court.

The Authority's Investigation

[8] The Authority has determined this matter on the papers, that is based upon the application received from the Applicant who declined the invitation to file submissions, and a response and submissions from the Respondent.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Brief Background

[10] Mr McPherson, a #2 Pulp Dryer Dry End Operator at Oji's Kinleith Mill, was contacted on 22 April 2021 by the D Shift Manager and given notice that he needed to attend for work for the following day, 25 April 2021 which was a rostered day off for him. Mr McPherson advised that he was unavailable but did not provide a reason for his unavailability.

[11] Mr McPherson was contacted the following day and again advised that he needed to attend for work, or the matter might need to be escalated as a potential disciplinary issue. Mr McPherson again advised that he was unavailable and provided Mr Yukich's details to the D Shift Manager.

[12] The following day, 24 April 2021, the Acting Shift Manager contacted Mr McPherson who repeated he was unavailable to work on 25 April 2021, but did not provide a reason for being unable to do so.

[13] Mr McPherson failed to attend for work on 25 April 2021 and disciplinary proceedings ensued during which process Mr McPherson provided the explanation that he had a bad back which he needed to rest, and provided a medical certificate.

[14] Mr McPherson was dismissed following the disciplinary proceedings for failure to follow a lawful and reasonable instruction and a failure to disclose why he was unavailable for work.

[15] On 8 and 9 June 2022 the Authority investigated a dispute brought before it by seven Oji employees, all members of the same union and including Mr McPherson, regarding the interpretation of clauses in individual employment agreements. The dispute concerned whether the clauses in issue constitute availability provisions pursuant to s 67D of the Act.

[16] The Authority determination in that matter has been challenged and is before the Court.

[17] The Applicant relies on the grounds set out in the statement of problem, namely that Mr McPherson is an applicant in both this matter and *Hastie and Ors v Oji Fibre Solutions (NZ) Ltd* which is before the Court.

[18] The Respondent has filed submissions opposing removal on two grounds:

- a. That s 178(2)(c) does not apply and that the proceedings before the Court do not involve "the same or similar or related issues" to the personal grievance claim that the Authority is investigating.
- b. If s 178(2)(c) does apply, the Authority should exercise its residual discretion to decline to remove the matter to the Court.

Section 178 (2)(c) does not apply.

[19] The Respondent submits that the proceeding before the Court does not meet the requirement of being "between the same parties and which involve the same, or similar, or related issues".

[20] This is on the basis that the proceeding before the Employment Court involves an interpretation dispute, whereas the matter before the Authority is a personal grievance claim alleging unjustified dismissal in which the applicant is seeking reinstatement. It is submitted that the Authority has a good understanding of the relevant issues in this matter due to the investigation of the interim reinstatement application, and the determination of that matter (*McPherson & Oji Fibre Solutions (NZ) Ltd* [2021] NZERA 383, 1 September 2021).

[21] The facts giving rise to the dismissal include Mr McPherson's refusal to come to work in accordance with his agreement that he would work an additional 175 un-rostered hours as provided in his terms of employment. Mr McPherson says he was entitled to refuse to work because there was no provision in his terms of employment for an availability allowance to

which he claims he is entitled to. The application relies on this claim in arguing that the Employment Court proceeding involves "the same or similar or related issues".

[22] It is submitted Mr McPherson's argument as to his dismissal being related to the dispute that is now before the Court is too simplistic and does not accurately reflect the facts that are relevant in determining whether the dismissal of Mr McPherson was a decision the respondent could make as a fair and reasonable employer in all the circumstances. The reasons for dismissal included that the applicant had breached company policy, had refused to follow a lawful and reasonable instruction and had failed to disclose why he was unavailable to work at the time he was told he was rostered on (three days in advance) or at any time prior to the shift he had been rostered on to work (as deposed in the affidavit evidence of witnesses for the respondent provided as part of the interim reinstatement matter).

[23] In considering s 178(2)(c) it is submitted that : -

- a. The proceeding in the Employment Court is not the same as this matter in the Authority. In particular one involves a dispute as to interpretation and application of an employment agreement, whereas the other (this matter before the Authority) involves a personal grievance claim and a claim for reinstatement;
- b. The proceeding for the Court is not similar to this matter before the Authority. This matter before the Authority involves an investigation into whether the decision by the respondent to dismiss the applicant following findings by the respondent that the applicant had breached company policy, failed to follow a lawful and reasonable instruction and failed to disclose why the applicant was unavailable to work, was a decision that the respondent, as a fair and reasonable employer, could make in all the circumstances at the time the decision was made.
- c. The proceedings before the Court do not involve related issues to those before the Authority. In particular, the matter before the Authority involves the application of the test of justification and involves considering whether, if the Authority determines the dismissal was unjustified, it is practicable and reasonable to reinstate the applicant into the applicant's former position or into a position no less advantageous to the applicant.

[24] It is submitted therefore that the grounds relied on by Mr McPherson for removal, being s 178(2)(c) have not been met in the circumstances.

The Authority should use its residual authority to decline removal

[25] It is submitted by the Respondent that s 178 provides that the Authority "may" order the removal of an Authority matter to the Court if one of the four criteria in s 178(2) is found to be present. Therefore, even if the Authority was to determine that the Employment Court proceeding involves "the same or similar or related issues", the Authority may exercise its residual discretion to decline to remove the matter.

[26] The Employment Court has previously commented that the discretion can be exercised where there is the existence of factors which present ... a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests".¹

[27] It is submitted that this is an occasion where the Authority should exercise its discretion not to remove the matter to the Employment Court, even if it determines that the requirements of s 178(2)(c) have been met.

[28] It is noted in submissions that Mr McPherson was dismissed on 27 May 2021 and shortly thereafter filed proceedings in the Employment Relations Authority seeking reinstatement.

[29] The Authority matter is set down for an investigation hearing on 26 and 27 October 2022, which is in seven weeks' time, and the Authority will no doubt be in a position to determine the proceeding before the end of 2022.

[30] There has been a lengthy period of time from when Mr McPherson was dismissed, to the investigation hearing dates in October. The respondent is entitled to have the proceeding against it dealt with and for there to be an outcome on the unjustified dismissal claim and the reinstatement claim.

[31] This is particularly the case where the remedy of reinstatement is being sought. Where reinstatement is granted it can have a significant impact on an organisation, including on how the applicant is to be reintegrated into the workplace and the area in which he worked after such a long time away from employment with the respondent. It is submitted that personal grievance claims involving applications for reinstatement should not be dragged out longer than they need to be.

[32] If the matter is removed to the Employment Court, the applicant and respondent could be facing a period of over two years before the personal grievance proceeding and reinstatement application is heard by the Employment Court, and longer again before a judgment is issued.

¹ *Auckland District Health Board v X* (no 2) [2005] ERNZ 551 at 562.

There is also no guarantee that the matter will be heard together with the current proceeding before the Employment Court, if that is the purpose behind the applicant's application for removal.

[33] If the applicant is successful in the Authority, he will have obtained a positive outcome in relation to his personal grievance before the end of 2022. Whether or not the respondent in such a situation chooses to challenge the Authority determination is of course up to the respondent. Should it not challenge a determination against it, then the applicant will have finality on his personal grievance claim before the end of 2022.

[34] If the applicant is unsuccessful and challenges the determination, his circumstances are no different to if the Authority matter was removed. The Employment Court proceedings will still not have been heard, and the applicant will have the opportunity to apply to the Court for that challenge to be joined to the current proceeding before the Employment Court.

[35] With the pending dates of the investigation hearing, the Authority is in a position to investigate and determine the personal grievance claim promptly so as to bring closure to the Authority investigation process. This is consistent with one of the purposes of the Authority, as provided in section 143, which describes an object of the Act as being to "ensure the investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigation." (s143 (fa)).

[36] Consistent with that object, and as the Court of Appeal observed in *Labour Inspector (Ministry of Business Innovation and Employment) v Gill Pizza Limited* [2021] ERNZ 237, 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. "

[37] It is therefore submitted that the application for removal should be declined.

Should the Removal Application be granted?

[38] Mr McPherson is claiming unjustifiable dismissal and claiming reinstatement. Mr McPherson's claim of unjustifiable dismissal will require the Authority to determine whether the respondent acted as a fair and reasonable employer in all the circumstances at the time the dismissal occurred, and whether or not reinstatement should be granted. That will involve examining whether Mr McPherson breached company policy, failed to follow a lawful instruction, and failed to disclose why he was unavailable to work to the respondent.

[39] I find it pertinent to consideration of this ground for removal that during the interim reinstatement application consideration, there was no evidence before the Authority that Mr

McPherson had provided a lack of an availability provisions to his employer as a reason for his refusal to attend for work on 25 April 2021.

[40] As observed by the Respondent, the matter before the Court is a dispute over the interpretation of the clauses in individual employment agreements, and I consider it is not “the same as or similar to” the matter the Authority is to investigate.

[41] I find no basis for removal under s 178(2)(c) of the Act.

[42] In regard to the second basis for removal, I observe that Mr McPherson’s substantive hearing is set down for investigation on 26 and 27 October 2022. Although that is relatively soon, this matter has been subject to some delay and this has left both Mr McPherson and the respondent in a state of uncertainty on the issue of whether or not Mr McPherson would be reinstated to his former position.

[43] The issues before the Authority for investigation and determination are not complex. Moreover, in the circumstances it should be possible to have a determination issued before the end of the year and I consider this would be to the benefit of both parties because a determination would alleviate any uncertainty enabling both parties to move forward.

[44] Moreover if the matter were to be removed to the Court, a hearing is unlikely to take place before October; and as observed by Mr France, there is no guarantee that the Court would hear both matters together.

[45] I also observe that in the event that Mr McPherson is not satisfied with the determination, he will have the right to challenge it. This is an important right which would be unavailable should this matter be removed to the Court for a first hearing of the substantive claims by Mr McPherson.

[46] In these circumstances I am not of the opinion “that in all the circumstances the Court should determine the matter” pursuant to s 178(2) (d) of the Act.

[47] Having carefully considered the application for removal, I do not find that the grounds for removing a matter to the Employment Court pursuant to s 178(2)(c) and (d) of the Act have been satisfied. Accordingly I decline to order the removal of this matter to the Employment Court.

Costs

[48] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority