

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 26  
3109832  
3109834

BETWEEN TOMISLAV KALIC  
Applicant in 3109832

AND MANUKA HEALTH NEW  
ZEALAND LIMITED  
Respondent

BETWEEN BOJAN KOSTIC  
Applicant in 3109834

AND MANUKA HEALTH NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Allan Halse, advocate for the Applicants  
Geoff Bevan, counsel for the Respondent

Investigation Meeting: On the papers

Date: 20 January 2023

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**SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY**

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[1] This determination deals with a preliminary issue Manuka Health New Zealand Limited (MHNZL) has raised regarding Mr Halse's authority to represent Mr Kalic and Mr Kostic in these proceedings. It follows an earlier determination of the Authority and review of that determination to the Employment Court.<sup>1</sup> MHNZL says there is insufficient information before the Authority that Mr Halse has relinquished his ability to make decisions about Mr Kalic and Mr Kostic's cases.

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<sup>1</sup> *Kalic & Kostic v Manuka Health New Zealand Ltd* [2021] NZERA 26 and *CultureSafe NZ Limited v Employment Relations Authority & Manukau Health New Zealand Limited* [2022] NZEmpC 134.

[2] To that end it requests the Authority find Mr Halse has not established his authority under s 236 of the Employment Relations Act 2000 and directs Mr Halse to establish that authority by:

- a) filing the full terms of engagement between himself and if applicable the entity Hamilton CultureSafe and Mr Kalic and Mr Kostic; and
- b) confirming to the Authority that neither he nor Hamilton CultureSafe retains the power of decision over the applicants' cases.

[3] Mr Halse says his authority is established and has refused to provide the requested information voluntarily. He has sought evidence of Mr Bevan's authority to act for MHNZL. Such authority has been established by Mr Bevan's confirmation that he was acting as MHNZL's solicitor.<sup>2</sup> For completeness there are no unusual or compelling circumstances to cause the Authority to question this confirmation as sufficient to establish Mr Bevan's authority to act for MHNZL.

### **The Authority's investigation**

[4] The investigation of these employment relationship problems was suspended on 6 April 2021 pending Mr Kalic and Mr Kostic filing authorities to act (ATAs) which comply with s 236. This occurred on 18 October 2022 when updated ATAs were provided. On 14 November 2022 a case management conference was held with the representatives to progress the investigation during which Mr Bevan raised a concern as to Mr Halse's authority to represent Mr Kalic and Mr Kostic in this matter. The issue was unable to be resolved voluntarily. A timetable for filing memoranda and relevant information was directed, which the parties have met.

[5] 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.

### **Relevant Law**

[6] Section 236 of the Employment Relations Act 2000 (the Act) provides:

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<sup>2</sup> Statements in reply 31`09834 and 3109832, 9 July 2020, [9] and [10].

### **236 Representation**

(1) Where any Act to which this section applies confers on any employee the right to do anything or take any action—

(a) in respect of an employer; or

(b) in the Authority or the court,—

that employee may choose any other person to represent the employee for the purpose.

(2) Where any Act to which this section applies confers on an employer the right to do anything or take any action—

(a) in respect of an employee; or

(b) in the Authority or the court,—

that employer may choose any other person to represent that employer for the purpose.

(3) Any person purporting to represent any employee or employer must establish that person's authority for that representation.

[7] On a plain reading it is a mandatory requirement of section 236 that a representative establish their authority to do so – “must establish”.

### **Discussion**

[8] MHNZL accepts the most recently provided ATAs are, on their face, compliant with s 236. It submits more is required given the history of this matter, including the prior ATAs gave Mr Halse the power to make decisions about Mr Kalic and Kostic’s claims, Mr Halse’s conduct including seeking review of the Authority’s earlier determination regarding the inadequacy of the prior provided ATAs, his criticism of that determination and the Court’s subsequent judgment and his strong opposition to providing the terms of engagement on request or confirming he does not hold power of decision. It submits this indicates he retains ultimate control over Mr Kalic and Mr Kostic’s proceedings. MHNZL submits given the particular circumstances of this matter along with the varying and flexible ways in which authority can be established, this is a case where more is required from Mr Halse to establish the statutory representation test is met.

[9] I accept MHNZL does not raise this issue as a technicality and that it is a fundamental point. Having considered the arguments raised and the supporting information I do not accept there is a sufficient basis to go beyond the most recently provided ATAs because they are compliant with the s 236 obligation and were signed by Mr Kalic and Ms Kostic on 10 October 2022 following the Employment Court’s judgment dated 1 August 2022 which found they would need to do so in order to

pursue their claims.<sup>3</sup> Given this sequence of events and despite Mr Halse's comments in his memorandum about the judgment and the Authority's earlier determination, it is most likely Mr Kalic and Mr Kostic have had the benefit of considering the judgment, have reflected on the scope of the authorisation to Mr Halse and subsequently executed and filed updated ATAs.

[10] As the investigation of these employment relationship problems proceed there may be occasion to hear evidence from Mr Kalic and Mr Kostic directly on this issue but as matters stand today, I decline to make the findings and directions sought.

### **Costs**

[11] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority

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<sup>3</sup> Above *CultureSafe NZ Ltd* at [45].