IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 454
3228699

	BETWEEN	PENNY JACKSON AND OTHERS Applicants
	AND	FLETCHER DISTRIBUTION LIMITED Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Victor Corbett, counsel for the Applicants Rebecca Rendle and Matthew Austin, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	17 July 2023 from the Applicants 31 July 2023 from the Respondent	
Date of Determination:	17 August 2023	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Penny Jackson and eight other former employees (Mr Nicholas Rumore, Ms Lucy Smith, Mr Aaron Burns, Mr Louis Godinet, Ms Linda Burroughs, Mr Romel de Guzman, Mr Travis Wernimont and Mr Muslim Badami) of Fletcher Distribution Limited ("the Applicants") lodged a Statement of Problem with the Authority on 7 December 2022. They claimed they had all been unjustifiably dismissed as a result of a Vaccination Policy that had originated from Fletcher Building Limited ("FBL") and had been implemented by Fletcher Distribution Limited ("FDL").

[2] In addition to the nine unjustified dismissal claims, all of the Applicants alleged FDL had also breached its good faith obligations to them. Some of the Applicants further claimed they had been unjustifiably disadvantaged, as a result of being subjected to unlawful discrimination.

[3] A Case Management Conference ("CMC") was held with the parties on 26 April 2023, at which directions were agreed. These were recorded in Directions of the Authority ("DoA") dated 4 May 2023. The CMC addressed (among other things) various disputed jurisdictional issues and the Applicants were given time to clarify their position on each of those.

[4] On 2 May 2023 the Applicants confirmed that they wished to proceed to have the jurisdiction matters determined by the Authority in a preliminary determination(s). The DoA dated 4 May 2023 set out a timetable for the lodging of affidavit evidence and submissions that would enable the jurisdictional issues to be determined 'on the papers'. That preliminary determination(s) is/are yet to be issued by the Authority.

[5] On 9 May 2023 the Applicants lodged an application to remove the original proceedings under matter No. 3203559 from the Authority to the Employment Court for hearing in the first instance.

[6] The application for removal said that an important question of law was likely to arise other than incidentally, "*namely consideration of the joinder of* [FBL], *and Schedule 3A of the Act*", meaning the Employment Relations Act 2000 ("the Act").

[7] The removal application did not set out what the alleged important question of law was (other than what has been quoted above) or explain why it was likely to arise other than incidentally.

[8] The removal application also stated that the case was "*of such a nature and urgency that it is in the public interest that it be removed immediately to the court given*" for the following (summarised) reasons:

(a) The number of Applicants involved, including others who had apparently raised grievances but had not lodged a Statement of Problem with the Authority;

(b) The quantity of evidence, and the Court's ability to run comprehensive case management; and

(c) The ability for the Applicants to have their case heard together.

[9] The Applicants were asked to identify the specific question of law they believed warranted removal to the Court.

[10] That occurred on 7 June 2023, when the Applicants advised the Authority that the important question of law for removal was "*How should Schedule 3A, as it pertains to dismissals, be interpreted and defined according to their legislative intent and relevant legal precedents?"*

[11] The Applicant said that this was an important question of law because—

> Interpreting Schedule 3A in light of legislative intent and legal precedents ensures that employers and employees understand their rights and obligations under the law. A clear interpretation helps ensure that dismissals are carried out in accordance with the intended purpose of Schedule 3A, promoting fairness and protecting employees during the COVID-19 pandemic. By addressing this question of law, the Court can provide guidance on the correct interpretation, promoting legal consistency in similar cases.

[12] The Respondent lodged its opposition to the removal application on 24 May 2023. This pointed out that the Applicants had not provided sufficient particulars of their individual claims, or the important questions of law that they alleged were likely to arise in respect of each of their claims, other than incidentally.

[13] FDL pointed out that the issues to be determined in this matter were questions of fact, which the Authority is statutorily charged with investigating, and is experienced in determining. FDL pointed out that the Authority had previously made a number of determinations in relation to:

(a) Applications to join controlling third parties to proceedings; and

(b) The application of Schedule 3A of the Act.

[14] FDL also said that the case was not of such a nature or urgency that it was in the public interest to be removed to the Court immediately.

The Authority's investigation

[15] This matter was investigated 'on the papers' by agreement.

[16] Neither party considered there was a need to file affidavit evidence, and the Authority agreed with that. Each party filed written submissions, in accordance with an agreed timetable.

[17] The parties' submissions have been considered along with the information outlined in the Statement of Problem and Statement in Reply which were lodged by the Applicant and Respondent respectively.

Legal framework

[18] The Act sets out four grounds on which the Authority may order removal of a matter to the Employment Court in the first instance:

> **178 Removal to Court**
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> (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
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> (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
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> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[19] If a removal application satisfies one or more of the grounds set out in s 178 of the Act, then the Authority must exercise its residual discretion by considering whether there may be a good and sufficient reason not to remove the particular matter despite the establishment of one or more of the grounds for removal in s 178(2) of the Act.[1]

[20] Relevant in this application are the two phases of the ground concerning important questions of law. Firstly, an important question of law must be likely to arise. Secondly, that question must arise "*other than incidentally*", in the sense of being a minor or chance connection. The nature or character of such important questions has been summarised in this way:[2]

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1 *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[31].

2 *Johnston v The Fletcher Construction Co. Limited* [2017] NZEmpC 157 at 80 [22].

> A question of law need not be complex, tricky, or novel to warrant use of the descriptor "important". It may be important if the answer to the question is likely to have a broad effect or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it. The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point.

The issues

[21] The following issues are to be determined:

(a) Have one or more of the grounds of s 178(2) of the Act been established?

(b) If so, is there a good and sufficient reason not to remove the matter?

(c) Should removal be granted?

(d) What costs should the successful party be awarded?

Have any of the grounds for removal in s 178(2) of the Act been established?

Is there an important question of law that is likely to arise other than incidentally?

[22] The Authority finds that the important question of law posed by the Applicants, namely *"How should schedule 3A, as it pertains to dismissals, be interpreted, and defined according to the legislative intent and relevant legal precedents?"* is not an important question of law, justifying removal of this matter to the Court.

[23] The main focus of the Applicants' substantive proceedings is on whether or not their dismissal was justified in accordance with the justification test in s 103A(2) of the Act. The interpretation and application of s 103A of the Act is well settled, including in a judgment of the full Employment Court in *Angus v Ports of Auckland*.[3]

[24] Schedule 3A of the Act introduced an additional statutory overlay regarding an employer's decision to terminate an employee's employment in circumstances where they had assessed that the employee had to be vaccinated in order to carry out their work but were not vaccinated and did not intend to be vaccinated.

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3 [2011] NZEmpC 160.

[25] The requirements placed on an employer to ensure compliance with Schedule 3A are set out at subclauses 2-4 of Schedule 3A, and their application to the substantive matter in these proceedings are questions of fact, being:

(a) Whether the Respondent provided each individual Applicant with reasonable written notice specifying the date by which the employee must be vaccinated to carry out their work;

(b) Whether the Respondent provided each individual Applicant with four weeks' paid written notice of termination, or the paid notice period specified in each individual Applicant's terms and conditions of employment (whichever is greater); and

(c) Whether, before giving notice of termination, the Respondent ensured it had exhausted all reasonable alternatives that would not lead to termination for each Applicant regarding their own individual employment.

[26] Accordingly, no important questions of law arise in relation to the application of Schedule 3A to the substantive unjustified dismissal grievances raised by the Applicants in these proceedings, other than incidentally.

[27] None of the Applicants identified any particulars regarding a specific legal question that they claimed would arise as a result of the application of Schedule 3A in this matter. Instead, the Applicants appear to rely solely on the fact that because Schedule 3A is a recently enacted provision, consideration of it by the Authority must necessarily involve an important question of law. However, that is not the case.

[28] The issues to be determined regarding the unjustified dismissal personal grievances for each individual applicant will involve questions of fact, which the Authority is statutorily charged with investigating, and is experienced in determining.

[29] The application of Schedule 3A in the context of an unjustified dismissal claim will be a factual matter that will be investigated during the Authority's investigation, in the normal way. Factual findings will be made and if any legal issues arise from that, then the parties can address the Authority on that in submissions if they wanted to do so.

[30] Schedule 3A has also already been considered by the Authority on a number of occasions.[4]

[31] In *HLI v NZ* the Authority determined that the question of whether the Applicant in that matter was an "*affected person*" for the purposes of the COVID-19 Public Health Response (Vaccinations) Order 2021" ("*the Vaccinations Order*") was not an important question of law justifying removal.[5] In doing so, the Authority observed that determining whether a dismissal was justified in accordance with the statutory justification test "*as standard work for the Authority*".

[32] The Authority finds that in respect of this matter the claims that the Applicants seek to pursue in their originating proceedings under 3203559 involve claims that are encountered as a matter of routine by the Authority, on a daily basis.

[33] The Applicants' unjustified dismissal claims will be determined with reference to their own personal circumstances and to whether or not the Respondent' actions and how it acted meet the substantive and procedural justification requirements in all the circumstances. Schedule 3A compliance will be a part of assessing justification of each Applicant's dismissal.

[34] The Applicants' submission that because the *Whangamata Golf Club Incorporated v Harwood* is currently before the Employment Court then this matter must also involve an important question of law, is not accepted.[6]

[35] The Court in *Harwood* is dealing with a very specific point of law regarding the application of Schedule 3A of the Act. This was specific to that case and arose out of the Authority's determination regarding the giving of notice of termination, with reference to the collapsing of the specified notice of the date by which the employee in that matter was to become vaccinated, into the contractual dismissal notice the employee was given by the employer.

[36] The Respondent's submission that the Court's decision in *Harwood* does not automatically mean that this current matter involves an important question of law was accepted.

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4 *Fale v The Chief Executive, Oranga Tamariki – Ministry for Children* [2023] NZERA 323; *Thoms v Royal New Zealand Foundation of the Blind Incorporated* [2023] NZERA 254; *Hutch v Supercity Towing Limited* [2023] NZERA 74; *Maher v Solutions Team Limited* [2023] NZERA 185; *Hoyle v Healthcare NZ Limited* [2023] NZERA 66; and *Harwood v Whangamata Golf Club Inc.* [2022] NZERA 693.

5 [2023] NZERA 59.

6 [2023] NZEmpC 64.

[37] The Authority also finds that the alleged important question of law is not one which would be of general application to employees and employers in other workplaces, contrary to the Applicants' submission about that. Whether or not a particular employer has met the requirements of Schedule 3A in the Cat regarding a particular employee, will involve a factual inquiry into what actually happened in that particular case.

[38] Although the Applicants refer to the fact that there are other former employees of subsidiaries of the Fletcher Building Group (of which the Respondent is part), who are yet to lodge proceedings in the Authority, that is entirely speculative and is not relevant to this assessment of whether there is an important question of law that arises other than incidentally in this matter.

[39] The Respondent's compliance or otherwise with Schedule 3A of the Act will depend on the particular factual findings that are made regarding each individual Applicant's circumstances, meaning it is at best a mixed question of fact and law.

[40] The Authority was not satisfied that there is an important question of law that would arise other than incidentally in this matter. Accordingly, the ground for removal in s 178(2)(a) of the Act has not been established.

Is the matter of such a nature and urgency that removal is in the public interest?

[41] The Applicants appear to have submitted that because they have applied to join FBL as a controlling third party, which will be determined by the Authority as a preliminary issue in accordance with the DoA dated 4 May 2023, then that the joinder issue automatically makes this matter of such a nature and urgency that it is in the public interest that it be removed immediately to the Court.

[42] The Authority has determined a number of matters involving an application to join a controlling third party to the proceedings, so that it is a preliminary issue that falls within the Authority's normal handling of an investigation.[7]

[43] An agreed timetable is in place for the joinder application to be determined by the Authority 'on the papers'. The parties have lodged their evidence and submissions, and the

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7 *Hu v Passion Fresh Limited* [2023] NZERA 54; *Riddler v Meridian Energy Limited* [2022] NZERA 474; *Howe v Drake NZ Limited* [2023] NZERA 150; *Welten v McKay Limited* [2023] NZERA 60; and *Potgieter v Bliss Beauty NZ Limited* [2022] NZERA 275.

Authority is simply waiting of sworn/affirmed versions of affidavits to be lodged by some witnesses.

[44] The fact that a joinder application has been made does not in itself turn this matter into one where the nature and urgency of it means it is in the public interest that it needs to be removed.

[45] Removing the matter would restart the litigation clock back to zero, which is fundamentally inconsistent with the Applicants' submissions that this matter is so urgent the public interest requires removal of it. Removal in this matter will almost certainly result in more delay.

[46] The Applicants did not adequately explain why this matter was of such a nature and such an urgency that it was in the public interest for it to be removed immediately to the Court. They merely pointed out that since raising their grievance with the Respondent, 14 months had elapsed.

[47] However, it bears noting that this delay is down to the Applicants and what appears to the Authority to be the inefficient and untimely manner in which they have elected to progress their claims.

[48] The Applicants do not appear to have treated their claims with any urgency. While urgency can potentially develop over time, there was no explanation as to why this matter has supposedly now become so urgent. The Authority noted that:

(a) The Applicants delayed for eight months between the raising of their personal grievances and the lodging of a Statement of Problem in the Authority, which occurred three months after a group mediation had occurred;

(b) The nine Applicants elected to lodge one group Statement of Problem in the Auckland office, which for many of them was not the office closest to the place where they worked. Although that was raised with them during the CMC held on 26 April 2023 as an issue that would need to be addressed, none of the Applicants who worked outside Auckland have relodged their application in the correct Authority office;

(c) The Applicants took a further two months after lodging their Statement of Problem to specify the remedies that they were seeking in respect of their claims, and they are yet to provide further remedies related information;

(d) The application for removal was lodged six months after the substantive proceedings had been lodged;

(e) The Applicants decided to apply to join FBL as a controlling third party in circumstances where the Respondent (FDL) has accepted full responsibility for the Applicants' dismissals and it is in a position to pay any remedies that they may be awarded if their claims succeed. Because the joinder application was opposed that is being determined as a preliminary matter, which has delayed the Authority's ability to investigate the substantive claims;

(f) A number of Applicants also elected to pursue standalone unjustified disadvantage grievances involving allegations of discrimination, in circumstances where there is a dispute as to whether such grievances were raised within the 90-day time limited required by s 114(1) of the Act. The Authority assured the Applicants during the CMC and subsequent DoA that it could and would consider the facts they say gave rise to their disadvantage grievances as part of its investigation into the justification of their dismissal, so their concerns about those issues would still be heard, and considered, even if they did not pursue such concerns as standalone grievances. However, despite that they elected to pursue such claims which meant the disputed jurisdiction issues have to be determined as a preliminary issue, again delaying the Authority's ability to investigate and determine the substantive claims; and

(g) The Applicants have also refused to attend individual mediations of their own claims, which would on the face of it appear to be a sensible and appropriate way of ensuring that each Applicant had their own individual circumstances appropriately considered and addressed.

[49] The Authority finds that the Applicants have not acted with an urgency that would bring them within the grounds of s 178(2)(b) of the Act.

[50] The delays that have occurred in this case are attributed to the way in which the Applicants have been conducting their case, so they do not give rise to such urgency that removal is in the public interest.

[51] There is also no legitimate basis to the Applicants' submission that the matters involved in their joinder application and/or any other issues regarding the substantive proceedings more broadly are of such a nature and urgency that removal is in the public interest.

[52] The Applicants' submission that the Court is better placed to conduct case management or to hear a group claim is not accepted. This Member is currently investigating a matter involving 52 applicants. The Authority regularly investigates cases with multiple applicants, often many more than the nine applicants who are involved in this matter. The fact there may be multiple applicants in a matter is not a ground for removal.

[53] As discussed during the CMC, the Authority has a wide discretion and considerable scope and flexibility to ensure that an efficient investigation of each applicant's claims occurs. How and when and where that will occur will be addressed with the parties after the preliminary determinations (on the joinder application and disadvantage grievance jurisdiction issues) have been issued.

[54] The number of Applicants in this matter does not make it of such a nature and urgency that it is in the public interest to be removed to the Employment Court.

[55] The Applicants identified that the "*quantity of evidence, and the Court's ability to run a comprehensive case management*" was a factor that established the s 178(2)(b) ground for removal. That submission was not accepted.

[56] The Applicants have not identified what the "*quantity of evidence*" is. This Member is currently investigating a case that involves over 16,000 pages of evidence and it is not uncommon for Authority Members to investigate matters involving thousands of pages of evidence. A recent interim reinstatement claim this Member dealt with involved over 1,200 pages of evidence being lodged.

[57] The Authority has seen nothing that even suggests that "*quantity of evidence*" is a potential concern. These cases look like straightforward dismissals of unvaccinated employees, who were required to be vaccinated in their role but elected not to be vaccinated for various different reasons. No information has been provided about why the "*quantity of evidence*" in this case would be unusual or unable to be managed by the Authority in the normal way.

[58] The Authority has already engaged in a CMC with the parties to address the joinder application and the preliminary jurisdiction matters, so it is clearly able to run a comprehensive case management of all of the Applicants' claims, whether they are heard concurrently, consecutively, in one location (such has Auckland) or in the region in which the Applicant worked. These issues will be addressed with the parties after the preliminary determinations have been released.

[59] Another ground that the Applicants recorded in their application for removal, in support of the submission that the ground for removal in s 178(2)(b) of the Act had been established was "*the ability for the Applicants to have their case heard together*". That is not a ground for removal.

[60] The Authority has not yet decided how, when or where the claims made by each individual Applicant are to be investigated. The Applicants have been told these matters will be addressed at the appropriate time. The fact the Applicants want all of their multiple personal grievance and good faith claims heard together in one hearing does not make this matter of such a nature or urgency that removal is in the public interest.

[61] Likewise, the fact that there may be other former employees of the Respondent who have raised personal grievance but have not yet lodged proceedings with the Authority is speculative and of no relevance to this removal application, particularly regarding whether or not this matter is of such a nature and urgency that immediate removal is in the public interest.

[62] The Authority is more than capable of case managing these proceedings, however they are to be investigated, and has handled far more complex matters than the current matter. There is no evidence or information to suggest that removing this matter to the Court would enable the Applicants' claims to be heard any sooner, particularly in light of the preliminary issues which are in the process of being determined by the Authority.

[63] None of the factors the Applicants sought to rely on bring the matter within the nature and urgency that makes it within the public interest to be removed to the Court in the first instance. Accordingly, the Applicants are unable to establish that the s 178(2)(b) ground for removal in the Act has been established.

Is the Authority of the opinion that the matter should be removed?

[64] The Authority is not of the opinion that the circumstances of this matter require removal to the Court.

[65] One of the express objects of the Act is to recognise that resolution of employment relationship problems at the lowest level by the Authority, as a specialist decision making body. The Authority is well placed to deal with the investigation of disputed factual issues and the law involved in unjustified dismissal and breach of good faith claims is well established and widely understood.

[66] It is generally preferable for the Authority to issue a determination in the first instance, which means that the parties are not deprived of the rights of challenge if they are unhappy with the outcome.

[67] There did not appear to be any useful purpose served by ordering a removal of these proceedings to the Court, when the disputed questions of fact are more appropriately determined by the Authority in the first instance.

[68] The Authority is mindful that removal to the Court in the first instance would be likely to increase the costs for the parties and is also likely to result in a delayed hearing date, particularly in light of the fact that there are preliminary issues that need to be determined which the Authority already has underway.

[69] The s 178(2)(d) ground for the removal has not been established.

Outcome

[70] The Applicants have been unable to establish that any of the grounds in s 178(2) of the Act for removal have been established.

[71] Accordingly, it is not appropriate to remove this matter to the Court in the first instance, so the Applicants' removal did not succeed.

What costs should be awarded?

[72] The Respondent as the successful party is entitled to a contribution towards its actual costs.

[73] This matter will be treated as if it involved a half-day investigation meeting. On that basis, the notional starting tariff for assessing costs is $2,250 (being half of the current one-day notional daily tariff of $4,500).

[74] Because the Applicants have elected to pursue the removal application as one group it is appropriate for the costs liability to be imposed on all of them on a joint and several liability basis.

[75] Accordingly, the Authority orders the Applicants to pay the Respondent $2,250 towards its actual legal costs on this unsuccessful removal application. This costs liability is imposed on the Applicants on a ‘joint and several liability basis’.

Rachel Larmer
Member of the Employment Relations Authority