IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 522
3176667

	BETWEEN	GARY OWEN BURGESS Applicant
	AND	TUTTON SIENKO AND HILL PARTNERSHIP Respondent

Member of Authority:	Philip Cheyne
Representatives:	Gary Owen Burgess, the Applicant Amy Keir, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	23 August 2023 from the Applicant Not sought from the Respondent
Date of Determination:	12 September 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

The substantive matter

[1] By his statement of problem, Mr Burgess seeks compensation for pecuniary and non-pecuniary losses which he says were the result of his personal grievances against his former employer. The personal grievances are constructive dismissal and unjustified actions by his employer causing him disadvantage.

[2] His application includes leave to raise grievances out of time, if required. Mr Burgess also seeks a finding of unlawful or improper conduct by his former employer, and a declaration that his employer breached the duty to behave as a fair and reasonable employer.

[3] The respondent Partnership says Mr Burgess was not constructively dismissed and was not unjustifiably disadvantaged. It opposes the application for leave with respect to any personal grievances not raised within time.

[4] Following a case management conference, directions were made about steps required in preparation for the investigation meeting which was also scheduled.

Preliminary matter – the removal application

[5] Around the time for lodging his statements of evidence, Mr Burgess indicated he would seek to have at least part of the matter removed to the Employment Court. Mr Burgess considered that he had not received disclosure of all relevant material, so he would seek at least that part of the matter to be removed to the Court. Mr Burgess did not lodge statements of evidence.

[6] During a further case management conference, Mr Burgess confirmed that he would pay the fee required for the removal application. Based on that assurance, arrangements were made to substitute the pending investigation meeting with a meeting to consider submissions regarding the removal application.

[7] Mr Burgess completed the requirements for his removal application and the Partnership lodged a notice of opposition to the removal application.

[8] Mr Burgess did not appear on the day set for consideration of the removal application. When he was contacted, he explained that he had diarised a date in the following week for the removal investigation meeting. Mr Burgess was not able to appear at short notice, given travel distances. To avoid delay with finding another date in my diary, I decided to deal with the removal application on the papers. No objection was raised to that arrangement.

[9] I now have Mr Burgess' written submissions, Mr Burgess' statement styled as an affidavit in support and an application in form 7. The Partnership's position is set out in its notice of opposition. I did not require the Partnership to lodge submissions to support its position.

[10] This determination resolves the preliminary matter of whether part of the matter should be removed to the Employment Court.

Grounds for a removal to the Court

[11] The grounds on which I may remove a matter or part of it to the Employment Court without the Authority investigating it are set out at s 178(2) of the Employment Relations Act 2000. There are no current proceedings before the Court. Accordingly, the potentially relevant grounds here are: an important question of law arises other than incidentally; or that the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately; or the Authority is of the opinion that in all the circumstances the Court should determine the matter.[1]

[12] Mr Burgess relies on the last-mentioned ground, but I briefly refer to the other grounds.

An important question of law is not likely to arise other than incidentally

[13] Mr Burgess does not advance the removal application on this basis.

[14] The Partnership says that the substantive claims are "simple claims relating to dismissal and disadvantage" of an unremarkable type in the Authority, and the Authority is able to identify relevant documents required to complete its investigation. The description "simple" might downplay the multiplicity of claims, the lengthy period of time and the not uncomplicated factual situations that might need to be canvassed.

[15] Putting aside that observation, I agree that the substantive dismissal and disadvantages claims are reasonably typical of the sorts of matters dealt with by the Authority. Issues of law

[1] Employment Relations Act 2000 s 178(2)(a) and (b).

will arise incidentally, but none that have any broader implication or that the outcome of the case will turn on.

[16] Grounds for the removal of any part of the matter on the basis of s 178(2)(a) do not arise.

The case is not of such a nature and of such urgency that it is in the public interest that it be removed immediately

[17] Mr Burgess lodged his statement of problem on Monday 27 June 2022, just within the time allowed for him to commence proceedings in the Authority in relation to personal grievances apparently raised by him on 28 June 2019. The grievances raised included a constructive dismissal. Mr Burgess also claims that, by November 2020, his employer's actions made it impossible for him to return to employment.[2]

[18] Mr Burgess' employment relationship problems followed a work accident in October 2018 and a second work accident in December 2018. From then, it appears Mr Burgess did not return to work despite medical certificates regarding light duties for limited hours. Grievances were raised on 28 June 2019 and perhaps subsequently. There was correspondence between Mr Burgess and the respondent's then representative until early 2021.

[19] Resolution of Mr Burgess' problem probably requires investigation of matters from 2018 until perhaps early 2021. I mention dates just for the purpose of assessing whether the case is of such urgency that it is in the public interest that it be removed immediately.

[20] Mr Burgess does not advance the removal application on this ground. The matter will be important to the parties but is not urgent. Grounds for the removal of any part of the matter on the basis of s 178(2)(b) do not arise.

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[2] Statement of problem, page 8.

The Authority is of the opinion that in all the circumstances the court should determine the matter

[21] Mr Burgess correctly observes that the Employment Relations Authority Regulations 2000 do not include provisions such as are found at regulations 37 – 52 in the Employment Court Regulations 2000. He describes it as a lacuna. Mr Burgess considers that the principles of natural justice would not be complied with without disclosure, and it would not be in the interests of justice to require a party to "appeal" in order to get access to documents that might have rendered further action unnecessary, if discovered.

[22] The difficulty for Mr Burgess is Part 10 Institutions of the Employment Relations Act 2000. I will paraphrase some provisions. The object of Part 10 is to recognise first instance judicial intervention is by a specialist decision making body not inhibited by strict procedural requirements, whose investigations are concluded generally before a higher court exercises its jurisdiction. The Authority's role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case. The Authority must comply with the principles of natural justice, promote good faith behaviour and further the Act's objects. The Authority must act as it thinks fit in equity and good conscience, but may not act inconsistently with the Act.

[23] The Authority may call for evidence and information from parties or others and require them to attend an investigation meeting to give evidence. The Authority may issue a witness summons. Evidence may be taken on oath. The Authority may fully examine any witness and must allow cross-examination.

[24] The short point from this is that Parliament considered that the Authority is able to meet its role in accordance with the principles of natural justice, without a statutory regime under which one party can by notice require the other party to make available for inspection relevant documents.

[25] The form by which proceedings are commenced in the Authority requires the applicant to include documents they consider are relevant, as does the statement in reply. The

parties did this. Those requirements are supplemented by the Authority's investigatory powers. At this point of the Authority's investigation, the respondent has met my directions.

[26] I am referred to *Johnston v The Fletcher Construction Company Limited*.[3] There, the Court granted special leave to remove the whole matter to the Court on the basis that important questions of law were likely to arise other than incidentally. The Court also noted that it does not have the same broad discretion conferred on the Authority by s 178(2)(d) of the Employment Relations Act 2000, a factor that led it to consider than an application for special leave under s 178(3) of the Act based on the grounds at s 178(2) (a) – (c) of the Act was available, but a general right of challenge was not.

[27] The extracts of the decision I am referred to are in the part of the Court's judgment dealing with the exercise of the Court's residual discretion to decline leave, even if grounds under s 178(2)(a) – (c) of the Act were made out. They are not directly relevant at present.

[28] Mr Burgess says that the Partnership has been obstructive. Mr Burgess requested disclosure of employment agreements, time and wage records and employment records concerning other employees, but the Partnership objected. I declined Mr Burgess' earlier request to order disclosure. Continued non-disclosure by the Partnership provides no basis now for removal to the Court. It would amount to a collateral challenge to my earlier direction that such documents need not be disclosed at this point of the Authority's investigation. I leave open the possibility that Mr Burgess can establish the appearance of substance to his assertion about disparity of treatment, with respect to a grievance or part of his problem properly before the Authority, so as to require investigation.

[29] There is mention that documents covered by privilege are not discoverable, followed by a passage describing limits to that rule. I take this as a reference to Mr Burgess' earlier request for correspondence between the Partnership and its previous advisors. I remain unconvinced that I should require the Partnership to disclose the communications about Mr Burgess between it and McPhail, Gibson & Zwart. It is not necessary to go behind the

[3] *Johnston v The Fletcher Construction Company Limited* [2017] NZEmpC 157.

correspondence Mr Burgess received directly from his employer or from that firm to investigate and determine his employment relationship problems.

[30] Mr Burgess sought records of any change in policy, following his December 2018 accident. Directions were made. There is no reason to think at present that the Partnership holds relevant documents that have not been disclosed.

[31] In his statement Mr Burgess refers to records for other employees across a range of topics. It is wider than the directions he had previously sought from the Authority. Records with respect to individual employees may yet be required, as above. To the extent that there are general policies, they should have been provided already.

[32] I agree with Mr Burgess' point that the Authority must exercise a discretion in accordance with principle.[4] Mr Burgess submits that the interests of justice require that part of the Authority's investigation be removed to the Court, so he can utilise the Court's processes regarding disclosure. I disagree. As explained above, Parliament must be taken as having considered that the interests of justice do not necessitate a court-like adversarial discovery process, in order for the Authority to fulfil its role.

[33] Mr Burgess has brought his employment relationship problem(s) to the Authority for investigation and determination. The investigation will include consideration of relevant documents, possibly extending beyond those already produced. If that eventuates, arrangements will be made to ensure that Mr Burgess has a reasonable opportunity to consider and respond to that material.

[34] Mr Burgess refers to s 196 of the Employment Relations Act 2000 (and s 196(3)(b) specifically) as empowering the Authority to deal with a failure to comply with directions. This power appears not to have any present relevance, as the Partnership has not disobeyed an order or direction of the Authority made in the course of the hearing of any proceedings.

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[4] *Shirley v Wairarapa District Health Board* [2006] NZSC 63.

Summary and Conclusion

[35] The only relevant power of removal potentially applicable here would arise under s 178(2)(d) of the Employment Relations Act 2000 – the Authority is of the opinion in all the circumstances the court should determine the matter.

[36] Assuming that a requirement for disclosure of relevant documents was "any part" of the matter before the Authority, capable of removal to the Court for it to hear and determine it, I am not of the opinion that in all the circumstances the court should determine it.

[37] Mr Burgess' application is declined. A further investigation meeting will be timetabled, in consultation with the parties.

[38] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority