**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI**
**TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 85
3210959
3212819

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| | BETWEEN | VIETNEW CORPORATION LIMITED T/A SAIGON RESTAURANT & BAR PALMY<br>Applicant |
| | AND | JASON SHAND<br>Respondent |

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| Member of Authority: | Michael Loftus |
| Representatives: | Jeremy McGuire, counsel for the Applicant<br>Phillip Drummond, counsel for the Respondent |
| Investigation Meeting: | On the papers and by telephone conference on 23 February 2023 |
| Date of Determination: | 23 February 2023 |

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## DETERMINATION OF THE AUTHORITY

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[1] Last year I issued two determinations concerning various claims Jason Shand brought against Vietnew Corporation Limited (Vietnew) and with which he was successful.[1] Similarly they dealt with some counterclaims brought by Vietnew with which it was unsuccessful. A costs determination followed.[2]

[2] Subsequently Vietnew challenged the determinations de novo in the Employment Court. In turn, Mr Shand has issued a statutory demand seeking payment of my orders while Vietnew is seeking to have that set aside by the High Court. In addition, Vietnew lodged an

[1] *Shand v Vietnew* [2022] NZERA 318 and *Shand v Vietnew* [2022] NZERA 336
[2] *Shand v Vietnew* [2022] NZERA 393

application in the Authority seeking an interim stay of the orders in the earlier determinations (File 3210959).

[3] Mr Shand has replied by lodging an application asking consideration of the stay be removed to the Employment Court (File 3212819). Vietnew opposes that application.

[4] Appended to both applications, and the replies thereto, are what amount to legal submissions on the issues being contested.

[5] During the telephone conference of 23 February 2023 it was decided the removal would have to be determined first if only because the stay would no longer be before the Authority were it to be granted. With respect to this both parties advised they had nothing further to add to the material already provided and they agreed the Authority should proceed with its determination of the removal application on the papers. That led to advice that for reasons we had already discussed during the call the stay application would be removed. What follows are those reasons.

[6] The applicable section is 178(2) of the Employment Relations Act 2000. It provides:

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

[7] This is what I must characterise as a standard challenge to a routine constructive dismissal and wage arrears claim which means an important question of law does not arise. Similarly, this is a dispute between two private parties and there is no public interest given that implies public welfare as opposed to public curiosity.[3] While Vietnew considers the matter urgent, urgency is an "and" additional to public interest. Urgency itself does not satisfy the test and both criteria must be met.

[3] *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at [35]

[8] What there is, however, is the criteria raised in ss 178(2)(c) and (d). The prime, indeed only, argument being tendered in support of the stay application is that a failure to grant it would render Vietnew's challenge nugatory with the argument being that having been passed the money might then be dissipated and unrecoverable should the challenge succeed. That argument and Mr Drummond's concession he has no objection to an accommodation which addresses this concern gives a good reason to consider removal on my own volition as the Court is far better equipped to deal with this than the Authority. That is because of "… the usual practice of requiring, as a condition of the stay, that the amount ordered by the determination be paid into the Court."[4] The Court is equipped to deal with such an arrangement while the Authority, having no trust account, is not.

[9] There is another reason which supports a view the Court's ability to secure the funds at issue is advantageous and that is comments from both representatives during the telephone conference gave me cause to have concerns about Vietnew's ability, or at least willingness, to pay, especially in the longer term should a stay be granted.

[10] More importantly, however, is the fact the papers before me indicate the challenge relies, in part, on material that postdates my substantive determination. That must mean material which was never before me is before the Court and could affect consideration of the stay.

[11] Similarly, the fact of the challenge means the Court is already seized of a number of related issues which are related to and might influence determination of the stay application. Not only is that a ground for removal under s 178(2)(c), it is well established that such a situation should, in the normal course of events, see removal as the fact the Court is seized of part of an employment relationship problem means it should then be seized of the matter in its entirety.[5]

**Conclusion and Orders**

[12] For the above reasons I conclude there are grounds to remove the stay application to the Employment Court pursuant to both ss 178(2)(c) and (d) of the Employment Relations Act 2000. Accordingly removal is ordered.

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[4] *Lawrence McDonald Holdings v MacDonald* AC51/02 [2002] NZEmpC 127 at [8]
[5] For example *Abernethy v Dynea New Zealand Ltd (No 1)* [2007] NZEmpC 83, [2007] ERNZ 271 at [35]

[13] Costs are reserved though I must express the view they should, at least as far as the removal application is concerned, lie where they fall. Should either party disagree it should lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date the other party will then have 14 days to lodge a reply memorandum.[6]

**Michael Loftus**
**Member of the Employment Relations Authority**

[6] **www.era.govt.nz/assets/Uploads/practice-note-2.pdf**