IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE

[2024] NZERA 197
3274439

	BETWEEN	SERENITY PILGRIM, ANNA PILGRIM, ROSE STANDTRUE, CRYSTAL LOYAL, PEARLVALOR AND VIRGINIA COURAGE Applicants
	AND	THE OVERSEEING SHEPHERD Respondent

Member of Authority:	David G Beck
Representatives:	Brian Henry and Dennis Gates counsel for the Applicants Philip Skelton KC and Carter Pearce counsel for the Respondent
Investigation Meeting:	On the papers
Date of Determination:	5 April 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for removal of a matter from the Authority to the Employment Court pursuant to s 178 of the Employment Relations Act (the Act). The matter, for which removal is sought, is an application to the Authority for various remedies by Serenity Pilgrim, Anna Courage, Crystal Loyal, Pearl Valor and Virginia Courage (collectively "Ms Pilgrim and

others") arising from the Employment Court decision *Pilgrim & Ors v The Attorney General (No2)*.[1]

[2] In *Pilgrim* the Court declared that Ms Pilgrim and others had the status of employees while working in a Christian community, Gloriavale. The Court did not deal with remedies stating that if they wished, Ms Pilgrim and others were able to pursue claims in the Employment Relations Authority for compensation, lost wages, penalties and the like, which is what they have done.

[3] In an application to the Authority of 19 January 2024, Ms Pilgrim and others detailed remuneration and damages claims they wish to pursue. For all applicants these are specified amounts to cover:

(a) Minimum wage arrears.

(b) Annual leave arrears.

(c) Payment for outstanding public holidays and alternate holidays.

(d) Compensation for "humiliation, loss of dignity and injury to feelings".

(e) An acknowledgment that the above be adjusted to take account of board and food provided.

(f) Interest on wage arrears claimed.

The Authority's investigation

[4] The parties have confirmed that this application is to be dealt with 'on the papers' by the Authority considering the Statement of Problem and the Statement in Reply on the removal issue, without the need for legal submissions.

[1] *Pilgrim & Ors v Attorney General (No 2)* [2023] NZEmpC 227.

The issue

[5] The issue for me to resolve in this matter is whether I should order the removal of this matter to the court because one or more of the grounds for removal, set out in s 178(2) of the Act are established and/or because the residual discretion of the Authority supports removal.

[6] The grounds advanced for removal to the Court by Ms Pilgrim and others are that:

(a) The matters are complex and urgent.

(b) The Court already has knowledge of the facts and issues from a nine-day hearing.[2]

(c) The Court has signalled removal from the Authority is an option.[3]

[7] The Overseeing Shepherd opposes the removal of matters to the court, asserting:

(a) This matter is neither complex nor urgent being a matter of calculating arrears of unpaid wages and leave, which the Authority regularly deals with. No important questions of law are at issue.

(b) While the Employment Court is familiar with the facts relevant to determining whether the Applicants were employees, that matter has now been resolved.

(c) The Employment Court is no better placed than the Authority to perform the simple calculation of the amounts owing to the Applicants.

(d) The fact that the Employment Court has previously dealt with the question of the Applicants' employment status does not justify the use of court resources to determine what is a "bread and butter" matter for the Authority.

[2] Ibid.
[3] Ibid at [7] and [69].

The law pertaining to removal applications.

[8] Section 178 (1) and (2) of the Act, provides:

> (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
>
> (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.

[9] Based on any sensible and orthodox approach to statutory interpretation, s 178(1) must be read in conjunction with s 178(2). Even if one (or more) of the grounds set out in 178(2) is found to exist, the Authority retains the residual discretion to decline removal based on the use of the word "may" in s 178(1) and the relevant considerations previously recognised as falling out of that.[4] There are several others but these are not applicable in the circumstances here.

[10] Whilst removal applications are governed by s 178 of the Act, when exercising my discretion and applying s 178(2) factors I must consider the relevant object set out in Part 10 of the Act.

[11] Part 10 of the Act, which deals with establishing the employment institutions, specifically identifies the object of that part at s 143. Section 143 recognises that there will "always be some cases that require judicial intervention", but it states that such intervention needs to be "at the lowest level" and conducted by a "specialist decision-making body that is

[4] See, *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74, 83 and *Auckland District Health Board v X (No.2)* [2005] ERNZ, 561-562

not inhibited by strict procedural requirements". [5] The Act further states that "investigations" are "generally concluded before any higher court exercises its jurisdiction in relation to the investigations".[6] The only exception is at s 143(g), that recognises that "difficult issues of law will need to be determined by higher courts. [7]

[12] In my view the deliberate use of the term "investigations" in s 143 of the Act, which delineates and reinforces the role and jurisdiction of the Authority, as set out in s 161 of the Act. Section 143 supports the Authority being the primary institution for the resolution of employment relationship problems that have not been resolved at mediation.

[13] The unique advantage of the Authority which was recognised by Chief Judge Inglis, in *Canterbury Westland Kindergarten Association v Barnes* and is that the Authority "is designed as an accessible forum" where unlike "an adversarial context such as the Court", the Authority takes a key role in investigating the matter which creates a forum where legal costs ought to be modestly incurred. [8]

[14] The Authority's 'first stop' role as an adjudicative body and exclusive jurisdiction for employment relationship disputes, has been affirmed by the Supreme Court in both *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* and *FMV v TZB.* [9]

[15] In short, an application for removal to the Court is governed by applying factors detailed in s 178(2)(a)-(d) of the Act. But this must be assessed in the context that the Authority is a unique, specialist, investigatory body that was set up to be the first step in investigating and resolving employment relationship problems. This first step is low level, less technical in terms of process, led by the Authority through its investigation mandate and, should in almost every case, be taken and completed before judicial intervention by a higher court.

[16] What all of this means for a removal application is best summarised by the Court of Appeal's view in *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill*

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[5] Employment Relations Act 2000, s 143 (f).
[6] Employment Relations Act 2000, s 143 (fa).
[7] Employmnet Relations Act 2000, s 143 (g)
[8] *Canterbury Westland Kindergarten Association v Barnes* [2020] NZEmpC 349 at [22].
[9] *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* [2021] NZSC 184 and *FMV v TZB* [2021] 1 NZLR 466.

Pizza Ltd where it stated that *"*... 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."[10]

Discussion

[17] With these principles in mind, I will consider the specific grounds advanced by Ms Pilgrim and others for removal.

An important question of law?

[18] The first ground for removal advanced by Ms Pilgrim and others is that the matter lodged with the Authority is complex and urgent. This potentially engages s 178(2)(a) of the Act – that an important question of law is likely to arise in the matter, and s 178(2)(b) of the Act – that the case is of such a nature and urgency that it is in the public interest that the matter be removed.

[19] Turning first to an important question of law, Ms Pilgrim and others have not made out or alluded to a specific question of law for the Authority to consider. There is the reference to complexity but this is not fully developed.

[20] The employment relationship problem set out in the matter that is subject of the removal application, is predominantly one of minimum wage, holiday pay arrears and compensation.

[21] Given the specific circumstances of this case, determining the quantum of, for example, wage arrears, may prove challenging but frequently the Authority deals with such matters. The overall experience of the Authority in such matters reflects the fact that it is the leading and primary institution for the resolution of wage arrears.

[22] Also pertinent to this matter is s 161(1)(g) of the Act confers exclusive jurisdiction on the Authority to determine wage arrears claims.

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[10] *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192 at [48].

[23] Further, the difficulty that arises in this case is not so much legal or even one of determining the quantum of remedies - it is evidential, in that there is a lack of record keeping and no wages and time records or holiday and leave records have been kept.[11] The investigatory mandate of the Authority means it is uniquely placed to resolve this type of dispute using its experience in dealing with evidence and the relevant guidance from the Act and the Holidays Act 2003, where no wages and time records or holiday and leave records exist.[12]

[24] The Authority is often called upon to deal with such cases ranging from minimum standards claims initiated by the Labour Inspector, to situations where the status of an employee is determined where previously the parties had wrongly operated in a contracting situation, and these matters are not removed to the Court.

[25] Turning to complexity, I do not accept that this matter engages any level of complexity that warrants removal to the court.

[26] The Employment Court in *Danske Mobler Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [13] dealing with the first factor noted caselaw suggests:

> A question of law does not need to be complex, tricky or novel to warrant being called important.[14] It may be important if the answer is likely to have a broad effect or could assume significance in employment law generally. But previous cases have made it clear that it is not necessary for the issue to have an impact beyond the particular parties. A question may be regarded as important if it is decisive of the case, or some important aspect of it, or is strongly influential in bringing about a decision in the case, or a material part of it.[15]

[27] Applying this criterion to the matter I cannot see how there is a question of law that arises.

[28] I am not satisfied that the ground in s 178(2)(a) of the Act is established.

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[11] See Employment Relations Act 2000, s 130 and Holidays Act 2003, s 81.
[12] See Employment Relations Act 2000, s 132 and Holidays Act 2003, s 83(3) for guidance on where the burden of proof lies when records are not compiled or retained.
[13] *Danske Mobler Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 233 at [18]. See also CJ Goddard comment on a question of law in respect of predecessor provision to s 178 in *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ at [7].
[14] *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].
[15] *Auckland District Health Board v X* (No 2) [2005] ERNZ 551 (EmpC) at [35].

Urgency

[29] There has been no reason advanced to suggest that this matter is of such a nature and such urgency that it is in the public interest that it be removed.

[30] This matter is unique. It relates to work undertaken by Ms Pilgrim and others when they were members of Gloriavale and lived in that closed community. It is difficult to see how the resolution of remedies arising out of the declaration of their status would have any impact on others outside of Gloriavale. As a result, the matter is not of such a nature as to have any public interest other than curiosity over what has been a secluded and private community or an interest in the legal principles applying to the status declaration, but not the calculation of any wage claim.

[31] Likewise, the matter does not have any urgency factors identified other than what is reflected in the time it has taken for the matters to get to this point – noting that some of the remedies sought relate to entitlements sought going back as far as 2017**.**

[32] I am not satisfied that the ground in s 178(2)(b) of the Act has been made out.

Similar or same proceedings before the court

[33] The second and third grounds for removal advanced by Ms Pilgrim and others are that the court already has knowledge of the facts and issues and the court has signalled that removal is an option.

[34] Ms Pilgrim and others do not state that these grounds engage s 178(c) of the Act – the court has proceedings between the same parties that involve the same or similar issues, but I will address that possibility in any event.

[35] The simple point is the court has no extant proceeding before it of a same or similar nature. The court has dealt with the issue of status and the identity of the employer, as I understand it from this matter, there is nothing before the court to consider. The court recognised this by advising that a new application needed to be made to advance any claim for remedies and rightly advised that this would need to be in the Authority.

[36] In terms of the submission that the court has signalled that removal is an option, I make two points:

(a) I do not read the court's reference to removal as a signal – it is nothing more than a statement of the position in law.

(b) In any event, if there was a signal this has no weight in terms of the exercise of my discretion regarding removal and I would not be persuaded by this.

[37] I am not satisfied that the ground in s 178(2)(c) of the Act has been made out.

The Authority is of the opinion that the court should determine this matter.

[38] It seems more likely that the second and third grounds for removal advanced by Ms Pilgrim and others is a reference to s 178(2)(d) of the Act, which provides for removal if the Authority considers in "all of the circumstances the court should determine the matter".

[39] In this context, given the lengthy and complex procedural and substantive matters determined by the court it is possible, in all of the circumstances, to consider this employment relationship problem has intractable and unique features. In of themselves, these could be arguable grounds for letting the court determine matters further. In this regard, Member Urlich in *Talent Propeller Ltd v YJL* has observed that: [16]

> Parties come before the Authority because they are in dispute and seek resolution of that dispute using the statutory scheme. To remove a matter because it is perceived as intractable or difficult, or has features of such, does not weigh in favour of removal because such factors cannot be said to be unusual features of matters before the Authority. Indeed, it would not be in the public interest to remove matters on such grounds. With respect to the inevitability of challenge that may well be Talent's view but it is not a given in light of the statutory scheme and the progress of this matter, including determinations which have not been challenged.

[40] I agree with this approach – to simply remove a matter because it is perceived as intractable or difficult runs contrary to the object of the Act and Part 10 of the Act, that

[16] *Talent Propeller Ltd v YJL* [2021] NZERA 575 at [18].

employment relationship problems should be resolved at the lowest level by a specialist body i.e., the Authority.

[41] A similar approach to the application of s 178(2)(d) established by the court was addressed in *Johnston v Fletcher Construction Company Ltd*.[17] The court specifically referred to s 178(2)(d):

> [39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a)-(c), which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose. The overarching point will be whether a particular case is best suited for resolution by the Authority's investigative processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[42] In the context of this matter, I note the court spent considerable time on the "gateway" issue of whether an employment relationship existed in a unique context and then pointed to the need to commence action in the Authority should remedies be pursued.[18] I am not satisfied that the same issues will arise with remedies as did with the status issue and overall, I do not consider the adversarial approach of the court will assist or enable a more efficient resolution of this matter.

[43] There are distinct stages in an employment relationship problem and it is not at all unusual for parties to be directed by the court back to the Authority to determine remedies. The fact that the court has in this case extensive contextual knowledge may not necessarily assist in the quantification or computation of remedies. Whereas the investigatory powers of the Authority will ensure that the appropriate matters for answering the issues pertaining to remedies are canvassed and considered.

[44] I do not find that the ground set out at s 178(2)(d) has been established.

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[17] *Johnston v Fletcher Construction Company Ltd* [2017] NZEmpC 157
[18] OP-cit 1 at [7] and [69].

Residual discretion

[45] The ground set out in s 178(2)(d) of the Act has been referenced as being an example of the overall residual discretion the Authority has when it comes to the issue of removal. In *Auckland District Health Board v X (No 2)* the Court stated:[19]

> .... The addition of the new subs (2)(d) reinforces the conclusion that the Authority's discretion under s 178 is both residual and intended to determine if there are factors against removal.

[46] Whilst I am not satisfied that any of the grounds in s 178(2) of the Act have been established, I should still consider the residual discretion and identify if there are matters that factor against removal.

[47] On this aspect I note that the Overseeing Shepherd does not oppose the matter being determined by the Authority which is suggestive of a desire to avoid further negative publicity and contain further legal costs beyond those already incurred.

[48] Further, and to conclude my analysis, the factors I have addressed relating to the purpose of the Act and Part 10 clearly factor against removal of this matter.

[49] I decline to exercise my residual discretion in favour of removing this matter to the court.

Conclusion - should the removal be granted?

[50] For the reasons discussed above, I have found that no grounds exist for removing this matter of determining potential remedies to the Employment Court. The application for removal is declined.

Costs

[51] Costs are reserved.

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[19] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 561 – 562.

[52] The parties are invited to resolve the matter of costs between themselves.

[53] If the parties are unable to resolve costs, and an Authority determination on costs is needed, The Overseeing Shepherd may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Serenity Pilgrim and others will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[54] The parties can expect the Authority to determine costs on its usual "daily tariff" basis unless specific circumstances or factors, require an adjustment upward or downward. [20]

David G Beck
Member of the Employment Relations Authority

[20] For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1