

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2024] NZERA 200

3274459

BETWEEN HOSEA COURAGE, DANIEL
PILGRIM, AND LEVI COURAGE
Applicants

AND THE OVERSEEING SHEPHERD
Respondent

Member of Authority: David G Beck

Representatives: Brian Henry, Dennis Gates and Stephen Patterson 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 to the Employment Court pursuant to s 178 of the Employment Relations Act (the Act).

[2] The matter, for which removal is sought, is an application to the Authority for various remedies by Hosea Courage, Daniel Pilgrim, and Levi Courage (collectively “Mr Courage and others”) arising from the Employment Court decision *Courage & Ors v Attorney General*.¹

[3] In *Courage & Ors* the Court declared that Mr Courage and others had the status of employees whilst working in a Christian community, Gloriavale. The Court did not deal with

¹ *Courage & Ors v Attorney General* [2022] NZEmpC 77.

the identity of the employer nor did it deal with remedies. However, in *Pilgrim v The Attorney General (No2)*² the Court identified the employer for the plaintiffs and it stated 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. As the claim by Mr Courage and others is based on similar allegations to those made by Ms Pilgrim and others, this finding of the Court is the basis on which Mr Courage and others have lodged their application in the Authority on 17 January 2024.

[4] Mr Courage and others identified that subject to a deduction for board and meals, they are seeking specified amounts to cover:

- (a) Minimum wage arrears.
- (b) Annual leave arrears.
- (c) Payment for oputstnadign public holidays and alternate holidays.
- (d) Compensation for “humiliation, loss of dignity and injury to feelings”.
- (e) Interest on wage arrears claimed.

The Authority’s investigation

[5] 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.

The issue

[6] The issue for me to resolve is the same that arises in *Pilgrim & Ors v The Overseeing Shepherd*,³ that is, whether I should order the removal of this matter because one or more of the grounds for removal, set out in s 178(2) of the Act, are established and because the residual discretion of the Authority favours removal.

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

³ *Pilgrim & Ors v The Overseeing Shepherd* [2024] NZERA 197.

[7] The grounds advanced for removal to the court by Mr Courage and others are the same as advanced by Ms Pilgrim and others in their application (Ms Pilgrims application). They are:

- (a) The matters are complex and urgent.
- (b) The Employment Court already has knowledge of the facts and issues from a nine-day hearing.⁴
- (c) The Employment Court has signalled removal from the Authority is an option.⁵

[8] The Overseeing Shepherd opposes the removal of matters to the court, likewise on the same basis as it did to Ms Pilgrim’s application, it says:

- (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.

The law pertaining to removal applications

[9] The law applying to this removal application is the same as set out in my determination in *Pilgrim & Ors*, which I repeat.

[10] 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.

⁴ Ibid.

⁵ Ibid at [7] and [69].

- (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.

[11] Based on the principles of statutory interpretation, s 178(1) of the Act must be read in conjunction with s 178(2) of the Act. So that, 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. This is based on the use of the word “may” in s 178(1) of the Act and the relevant considerations previously recognised as falling out of that.⁶

[12] 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.

[13] Part 10 of the Act, which deals with establishing the employment institutions, specifically identifies the object of that part at s 143. Section 143 of the Act 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 not inhibited by strict procedural requirements”.⁷ The Act further states that “investigations” are “generally concluded before any higher court exercises its jurisdiction in relation to the investigations”.⁸

[14] The only exception is s 143(g) of the Act that “recognises that difficult questions of law will need to be determined by higher courts”.

[15] In my view, the deliberate use of the term “investigations” in s 143 of the Act, delineates and reinforces the role and jurisdiction of the Authority as set out in s 161 of the

⁶ 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

⁷ Employment Relations Act 2000, s 143 (f).

⁸ Employment Relations Act 2000, s 143 (fa).

Act. Section 143 supports the Authority being the primary institution for the resolution of employment relationship problems that have not been resolved at mediation.

[16] The unique advantage of the Authority's approach which was recognised by Chief Judge Inglis, in *Canterbury Westland Kindergarten Association v Barnes* 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. This creates a forum where legal costs ought to be modestly incurred.⁹

[17] 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*.¹⁰

[18] In short, an application for removal to the Court is governed by applying factors detailed in s 178(2)(a)-(d) of the Act. These factors are 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 and led by the Authority through its investigation mandate and should in nearly every case be a step taken and completed before judicial intervention by a higher court.

[19] 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 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."¹¹

⁹ *Canterbury Westland Kindergarten Association v Barnes* [2020] NZEmpC 349 at [22].

¹⁰ *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* [2021] NZSC 184 and *FMV v TZB* [2021] 1 NZLR 466.

¹¹ *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192 at [48].

Discussion

[20] With these principles in mind, and in line with my reasoning in *Pilgrim & Ors*, I consider the specific grounds advanced by Mr Courage and others for removal.

An important question of law?

[21] The first ground for removal advanced by Mr Courage 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 situation is of such a nature and urgency that it is in the public interest that the matter be removed to the court.

[22] As with Ms Pilgrim’s application, Mr Courage and others have not made out or alluded to a specific question of law for the Authority to consider.

[23] The employment relationship problem set out in this matter relates to claims for minimum entitlements and compensation. As I noted in Ms Pilgrim’s application, 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. Also pertinent to this matter is s 161(1)(g) of the Act confers exclusive jurisdiction on the Authority to determine wage arrears claims.

[24] Further, the difficulty that arises in this case is not so much legal or even one of quantum - it is evidential, in that there is a lack of record keeping with no wages and time records or holiday and leave records to assess.¹² 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 have been kept.¹³

[25] 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

¹² See Employment Relations Act 2000, s 130 and Holidays Act 2003, s 81.

¹³ 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.

is determined where previously the parties had wrongly operated in a contracting situation, and these matters are not removed to the Court.

[26] Turning to complexity, I accept there is a specific complexity in this matter as the Court declared employment status spans periods where Mr Courage and others were employed in three age brackets:

- (a) Six to 14 years (before and after school);
- (b) 15 years of age (a “transitional” year); and
- (c) 16 years plus.

[27] An assessment of remedies below the age of 16 may be hampered by the Minimum Wage Act 1983 only applying to workers “who are aged 16 years or older”.¹⁴ This will potentially entail a determination of a notional child worker’s wage.

[28] I observe no such problem occurs in the application of the Holidays Act 2003¹⁵ that uses the same definition as s 6 of the Act to define an employee.¹⁶

[29] I am not satisfied that this complexity elevates a wage arrears claim to one that has an important question of law as that has been set out in the relevant case law.¹⁷

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

Urgency

[31] 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.

[32] Mr Courage and others’ claim in the Authority and the claim relating to Ms Pilgrim’s application are unique. They relate to work undertaken by prior members of Gloriavale when they lived in the 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

¹⁴ Minimum Wage Act 1983, s 4(1)(a).

¹⁵ Holidays Act 2003, s 5.

¹⁶ Employment Relations Act 2000, s 6 – Meaning of employee.

¹⁷ *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].

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 minimum entitlements claims.

[33] Likewise, the matter does not have any particular urgency other than that reflected in the time it has taken for the matters to get to this point – noting that some of the remedies sought relate to a period beginning in late 2019.

[34] 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

[35] The second and third grounds for removal advanced by Mr Courage and others are the same as in Ms Pilgrim’s application; the Court already has knowledge of the facts and issues and the Court has signalled that removal is an option and it follows that my assessment of these grounds are the same as I applied to my determination of Ms Pilgrim’s application.

[36] Mr Courage and others do not state that these grounds engage s 178(c) of the Act – in that the Court may have proceedings between the same parties that involve the same or similar issues, but I will address that possibility in any event.

[37] The simple point is the Court has no extant proceeding before it of a same or similar nature. The issue of the identity of the employer of Mr Courage and others was not resolved by the Court but based on the Court decision in *Pilgrim & Ors* this issue will not be difficult.¹⁸

[38] The Court has dealt with the issue of status and, as I understand it from this matter, there is nothing before the Court to consider. The Court recognised this by advising in *Pilgrim & Ors* 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.¹⁹ That principle applies to this matter.

[39] In terms of the submission that the Court has signalled in *Pilgrim & Ors* that removal is an option, I make two points:

- (a) I do not read the Court’s reference to removal as a signal – it appears to be nothing more than a statement of the position in law.

¹⁸ *Pilgrim & Ors v Attorney General (No 2)* [2023] NZEmpC 227

¹⁹ *Ibid.*

(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.

[40] 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.

[41] It seems more likely that the second and third grounds for removal advanced by Mr Courage and others is a reference to s 178(1)(d) of the Act, which provides for removal if the Authority considers in all the circumstances, the Court should determine the matter.

[42] In this case the argument that can be advanced is the same as the argument I considered when I determined Ms Pilgrim's application. That is, given the lengthy and complex procedural and substantive matters determined by the Court it is possible, in all 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.

[43] The answer to this is the same as my answer to Ms Pilgrim's application, applying what Member Ulrich observed in *Talent Propeller Ltd v YJL*:²⁰

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.

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

²⁰ *Talent Propeller Ltd v YJL* [2021] NZERA 575 at [18].

[45] For completeness, I also record here that a similar approach to the application of s 178(2)(d) of the Act established by the Court was addressed in *Johnston v Fletcher Construction Company Ltd*.²¹ The Court specifically referred to s 178(2)(d) as:

[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.

[46] 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 an action in the Authority should remedies be pursued.²² I am not satisfied that the same issues will arise with remedies here 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.

[47] 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.

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

²¹ *Johnston v Fletcher Construction Company Ltd* [2017] NZEmpC 157.

²² *Courage & Ors v Attorney General* [2022] NZEmpC 77 at [7] and [69].

Residual discretion

[49] 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:²³

.... 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.

[50] Whilst I am not satisfied that any of the grounds in s 178(2) of the Act have been established, I will still consider the residual discretion and identify if there are matters that factor against removal. 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 publicity and contain further legal costs beyond those already incurred.

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

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

Conclusion - should the removal be granted?

[53] 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

[54] Costs are reserved.

[55] The parties are encouraged to resolve any issue of costs between themselves.

[56] 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

²³ *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 561 – 562.

memorandum Hosea Courage 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.

[57] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.²⁴

David G Beck
Member of the Employment Relations Authority

²⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1