IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 21
3174462

	BETWEEN	JOE BAGRIE, MARK FORDER, IAN GLENISTER, WARREN LAWRENCE, TAMMY LUCA, CHRIS MEHLHOPT, MARK RITCHIE AND 26 ORS Applicants
		AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Charlotte Parkhill and Charlotte Evans, counsel for the Applicants Andrew Caisley and Laura Chapman, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and further information received:	30 September 2022, 25 August and 16 October 2023 from the Applicant 31 August, 14 October 2022 and 20 September 2023, from the Respondent
Determination:	17 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In June 2022 the applicants lodged in the Authority an employment relationship problem for personal grievances of unjustified dismissal and/or unjustified disadvantage. All the personal grievances relate to Air New Zealand's adoption of a mandatory vaccination policy and the impact of the implementation of the policy on the

applicants. They say before the Authority investigates and determines these personal grievances important questions of law should be removed to the Employment Court for resolution. To that end they have applied under section 178 of the Employment Relations Act 2000 for removal of specified questions of law.

[2] Air New Zealand supports the removal application, although it says different questions of law should be removed to the Court for resolution.

The Authority investigation

[3] In August 2022 the applicants applied for the entire matter to be removed to the Court.[1] This was opposed by Air New Zealand who proposed referral of questions of law under section 177 of the Act. The applicants adopted the referral proposal and timetabling was accordingly set for the filing of relevant information. In June 2023 the parties, by consent sought to resume the removal application albeit partial removal. In addition to the information already before the Authority relevant to the removal application, a timetable was set for filing further relevant information. The parties complied with the then varied timetable, including one of the applicants filing an affidavit in support of removal sworn on 25 August 2023.

[4] By consent this application is determined on the papers. As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Why do the applicants seek removal?

[5] The applicants' say the following questions of law should be removed to the Court:

(i) Was Air New Zealand's vaccination policy lawful at the time it was introduced, having particular regard to:

[1] Application for removal to the Employment Court, 16 August 2022.

a. the reliance on health and safety to justify the implementation of the vaccination policy; and
b. the individual and fundamental human rights connected to personal health decisions.

(ii) If Air New Zealand's vaccination policy was lawful at the time it was introduced, then did Air New Zealand's vaccination policy cease to be lawful at some time after it was introduced, and, if so, when.

(iii) If the vaccination policy is found to be unlawful at either inception or at some later time, then did the applicants' consent to take forms of leave or change roles under unlawful duress by Air New Zealand.

[6] The applicants say these are important questions of law which are likely to arise other than incidentally and that in all the circumstances removal is appropriate because:

(i) the Authority can be satisfied these are in fact questions of law;

(ii) they are questions which have not been considered by the Authority or Court before;

(iii) the questions are of fundamental importance to these proceedings, employees of Air New Zealand and potentially numerous companies across New Zealand; and

(iv) a challenge is likely if the referral is not granted.

What does Air New Zealand say?

[7] Air NZ says there are three key questions of law which should be removed to the Court for resolution first:

(i) was Air New Zealand entitled to adopt a policy of mandatory vaccination in response to the COVID-19 pandemic?

(ii) if so, was Air New Zealand's vaccination policy lawful at the time it was introduced?

(iii) if Air New Zealand's vaccination policy was lawful at the time it was introduced, then did the policy cease to be lawful, at some time after it was introduced, and if so, when?

[8] Air New Zealand submits the questions of law are:

(i) novel and have not yet been determined by the Court;

(ii) critical to determination of all the personal grievances the applicants have raised and the resolution of the questions of law would assist the Authority and the parties in the resolution of the personal grievances;

(iii) relevant to a large group of employees because the vaccination policy applied to all 4,000 of the Air New Zealand's employees; and

(iv) relevant not just to these parties but to any employer who has implemented a mandatory vaccination policy or any employee who has been affected by a mandatory vaccination policy.

How can removal be sought?

[9] Implicit in any application for removal is that the application is properly before the Authority because the Authority has jurisdiction to determine the dispute between the parties. This is true for this application. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.[2] The parties do not dispute the Authority is well placed to determine the applicants' personal grievance applications.

[10] In addition the Authority has the ability to deal with any question related to the employment relationship including any question connected with the construction of the employment agreement, the Employment Relations Act or any other Act which arises during the course of any investigation.[3]

[11] As stated by the Court of Appeal in *Gill v Pizza*:

> …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.[4]

[12] This appears to be the situation here – an issue for which the Authority has jurisdiction to deal with appears to have arisen during the course of the investigation of this employment relationship problem. How then can removal be sought?

---

[2] Employment Relations Act 2000, s 161(1).
[3] Employment Relations Act 2000, schedule 2, clause 1.
[4] A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors [2020] NZCA 192.

[13] The Authority is constrained in its ability to remove proceedings before it to the court by s 178(2) of the Act. Four grounds of removal are set out in s 178(2) of the Act. The parties seek to rely on two of those grounds:

- An important question of law is likely to arise other than incidentally; and
- The Authority is of the opinion that in all the circumstances the court should determine the matter.[5]

[14] In the event a party or parties applying for removal satisfy the tests set out in s 178(2) of the Act the Authority has residual discretion to determine whether or not the matter should be removed to the Court.[6] Any relevant factors against removal must be considered.[7] In *NZAEPMU Inc v Carter Holt Harvey Ltd* the Court considered a range of factors in favour of declining removal including:

> It is not inevitable that there will be a challenge by any party to the Authority's determination. Outcomes in that forum are not necessarily stark wins or losses of everything at stake. The Authority's methodology and remedial powers enable it to craft solutions that parties can, by modifying their behaviours towards each other, live with. That is the scheme of the legislation Parliament intended to apply now and henceforth in employment relations.[8]

What is the test for an important question of law?

[15] In *Hanlon v International Educational Foundation (NZ) Inc* Chief Judge Goddard said in respect of the predecessor provision to s 178:

> It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised

[5] Employment Relations Act 2000, s 178(2)(a) and (d).
[6] Auckland District Health Board v X (No 2) [2005] ERNZ 551 at 561- 562.
[7] NZAEPMU Inc v Carter Holt Harvey Ltd [2002] 1 ERNZ 74 at 83.
[8] Ibid at 83 – 84.

> into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.[9]

[16] *Hanlon* confirms that the context of the case is a relevant factor in assessing the importance of a question of law. Questions of law do not need to be complex, tricky or novel to be important.[10] The s 178(2)(a) test is met if the issue arises other than incidentally so that the outcome turns on the answer.[11]

Discussion

[17] The key issue between the parties is the lawfulness of the vaccination policy Air New Zealand adopted. I am satisfied it is an important question of law that is likely to arise in the matter other than incidentally because it concerns whether there was a lawful basis for Air New Zealand to adopt a policy of mandatory vaccinations in response to the COVID-19 pandemic and if so, the legal basis of such including matters of individual rights and health and safety requirements. This is a question of law and it is an important question because the outcome turns on the answer.

[18] The issue does not appear to have previously been determined by the Court or Authority in particular whether a policy which requires an employee to undergo a medical treatment can be lawfully adopted. Though there are a number of cases in this jurisdiction which deal with employment relationship problems arising from the pandemic response none resolve the question of the legality of a vaccination policy having regard to personal health decisions.

[19] The factual matters for the identified part of the matter which the Court may need to canvass are, as submitted by the parties, likely confined to how Air New Zealand came to adopt the vaccination policy and may not involve significant disputed evidence or the impact of the policy implementation on individual applicants.

---

[9] Hanlon v International Educational Foundation (NZ) Inc [1995] 1 ERNZ 1 at [7].
[10] Johnston v Fletcher Construction Co Ltd [2017] NZEmpC 157, [2017] ERNZ 894 at [22].
[11] Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment [2018] NZEmpC 95 at [22].

[20] The remaining questions, as posed by the parties, cascade from the answer to the above identified key part of the matter and are to a significant degree factual matters which the Authority is well placed to investigate.

[21] Having considered whether the s 178(2) test has been met I must now consider whether the residual discretion not to remove this particular case should be exercised. The parties have raised a number of issues which they submit weigh in favour of removal including the potential number of employees and businesses which may be impacted by the determination of this matter and the high likelihood of challenge if the removal application is declined. The principles for the Authority's exercise of that residual discretion were described in Auckland District Health Board v X (No 2) in this way:

> …the inquiry must not be on the desirability or undesirability of removing cases, generally, because Parliament has decided some should be removed. Rather, it should be on whether it may be undesirable to remove a particular case. The legislative scheme makes paramount, satisfaction of one or more of the express statutory tests for removal. The discretion then remaining is residual and should not be employed to re-litigate, avoid or defeat the statutory test or tests established. Rather, it should be applied to determine whether there may be a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests. That is reinforced by the addition of the new fourth test for removal (subs (2)(d)) in the 2000 legislation. It cannot have been Parliament's intention to provide both for new broad discretionary grounds for removal and then the exercise of a second independent but otherwise identical discretion. 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 whether there are factors against removal.[12]

[22] While the application has been before the Authority for some time the investigation of the substantive matters between the parties has not commenced due to the progress of this preliminary issue. This is not then a situation of an Authority investigation being disrupted by removal. Nor is it a situation where removal is sought because of a perception that the matter is 'too complex'. There is a legal question to be answered and given the nature and context of that question the public interest is met as are the objects of the Employment Relations Act by removal of the part of the matter identified.

---

[12] Auckland District Health Board v X (No 2) [2005] ERNZ 551 at 561- 562.

Should removal be granted?

[23] For the reasons set out above the part of the matter necessary to resolve the question of whether Air New Zealand was entitled to adopt a policy of mandatory vaccination in response to the COVID-19 pandemic is removed to the court under section 178 of the Act.

[24] The Authority investigation of the applicants' personal grievances is suspended until the removed part of the matter is resolved by the Court.

Costs

[25] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority