

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 420
3275340

BETWEEN

NICHOLAS JOHNSTON
Applicant

AND

TE WHATU ORA – HEALTH
NEW ZEALAND
Respondent

Member of Authority: Natasha Szeto

Representatives: Ashleigh Fechney, advocate for the Applicant
Anthony Russell, counsel for the Respondent

Submissions received: 10 May and 24 May 2024 from the Applicant
24 May 2024 from the Respondent

Date: 12 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Johnston was formerly employed by Te Whatu Ora as a Community Occupational Therapist. He was dismissed from his employment in December 2022, after his registration was suspended by the Occupational Therapy Board of New Zealand (OTBNZ). Shortly after his dismissal, Mr Johnston raised a personal grievance with his employer.

[2] On 28 January 2024 Mr Johnston lodged a Statement of Problem with the Authority and applied for his matter to be removed to the Employment Court for hearing and determination. He says important matters of law are likely to arise in this case other than incidentally, and it is in the public interest that it be removed because of the nature and urgency. Te Whatu Ora opposes the application because it says there are jurisdictional issues with the questions of law presented by Mr Johnston, and there are no public interest reasons for the matter to be removed.

The Authority's investigation

[3] Both parties agreed for the removal application to be determined on the papers and agreed to timetabling directions. Mr Johnston filed submissions on 10 May, and Te Whatu Ora filed submissions on 24 May. Mr Johnston filed a brief clarification in response on 24 May.

[4] As permitted by s174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Application for removal

[5] Mr Johnston applies for removal to the Employment Court on the following grounds:

- (a) Two important questions of law are likely to arise in the matter other than incidentally, being:
 - (i) Whether Mr Johnston is barred from bringing a personal grievance with respect to the complaint made to the OTBNZ;¹ and
 - (ii) What does “a reason to believe” mean?²
- (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.

[6] Both questions of law arise out of provisions of the Health Practitioners Competence Assurance Act 2003 (HPCA Act). In relation to the first question of law, Mr Johnston says he is not barred from bringing a personal grievance because the core question is whether Te Whatu Ora was obligated to make a notification to the OTBNZ. However, Mr Johnston raises the issue because he anticipates Te Whatu Ora will raise civil immunity as a defence to his claims.

[7] Mr Johnston says the second question of law is an issue that sits squarely within the employment jurisdiction because the notification was made during the employment

¹ Health Practitioner's Competence Assurance Act 2003, s34(4).

² Health Practitioner's Competence Assurance Act 2003, s34(1).

relationship and in a work context. He also says determining his claim will involve an in-depth analysis of an employer's obligations under the HPCA Act, the Human Rights Act 1992, and the Act.

[8] In relation to the nature and urgency, Mr Johnston says determination of the second legal question carries profound implications for the employment rights of disabled practitioners and will influence how similar notifications are handled within the healthcare sector. On that basis, he says it is crucial to determine whether a complaint or notification should be made prior to, or following, a formal employment process.

Opposition to removal

[9] Te Whatu Ora opposes the application for removal. It says the Authority does not have jurisdiction over the notification to the OTBNZ, and there are consequently no questions of law to remove to the Employment Court. This jurisdictional issue applies to the questions of law raised by Mr Johnston, both of which concern interpretation of specific provisions of the HPCA Act.

[10] Te Whatu Ora further says the grounds under the Act are not made out for removal because the issues Mr Johnston seeks to remove relating to the notification are incidental to the central issue. There is nothing about the nature of the case that requires removal, and urgency has not been established.

Analysis

[11] The Authority may order the removal of a matter or any part of it to the Employment Court without investigating it, if one or more of the statutory grounds are met.³ The Authority's power to remove is discretionary and in exercising the discretion, the Authority must consider a key part of the Act's object is to reduce the need for judicial intervention⁴ while recognising there will always be some cases that require it.⁵ The Authority is a unique, specialist investigatory body established to investigate and resolve employment relationship problems. An Authority investigation should almost always be the first step taken and completed before judicial intervention by a higher court. The Supreme Court has affirmed the Authority's role as a specialist

³ Employment Relations Act 2000, s178.

⁴ Employment Relations Act 2000, s3(a)(vi).

⁵ Employment Relations Act 2000, s143(e).

decision-making body that provides judicial intervention at the lowest level, and has exclusive jurisdiction to determine employment relationship disputes.⁶

[12] In deciding whether a matter should be ordered to be removed, the Authority should first determine whether a ground or grounds under s178 of the Act exist, and then whether it is an appropriate exercise of the discretion to order removal.

Is an important question of law likely to arise in the matter other than incidentally?

[13] Mr Johnston has framed the issue of law as an intersecting relationship between the HPCA Act, the Human Rights Act 1993, and the Act. In applying for removal, Mr Johnston relies on the case of *Evans-Walsh v Southern District Health Board*⁷ in which the Authority removed the matter to the Employment Court because there was an important question of law about the relationship between records of settlement under the Act and s34(4) of the HPCA Act.

[14] In *Evans-Walsh*, the parties had entered into a binding agreement under s149 of the Act. The Authority's jurisdiction to consider issues of breach was invoked by the operation of the statutory scheme that created the record of settlement and made provision for how it would be enforced.⁸ That case was a wholly different statutory context to the current case. The current case is about whether Te Whatu Ora acted as a fair and reasonable employer when it dismissed Mr Johnston after his registration was suspended, and whether Mr Johnston has been discriminated against in his employment in relation to the termination of his employment (although Te Whatu Ora says the discrimination claim was raised out of time). While Te Whatu Ora's notification to the OTBNZ is part of the context for Mr Johnston's claim of unjustifiable dismissal, the claim is not about the notification per se.

[15] To the extent a jurisdictional question arises in relation to the first proposed question of law, the Authority is best placed to determine the issue. I agree with Te Whatu Ora's submission that this does not change the nature of the case to one that requires removal because the jurisdiction is clear and defined, and is not ambiguous and arguable.

⁶ *Gill Pizza Limited v Labour Inspector Ministry of Business, Innovation and Employment* [2021] NZSC 183 and *FMV v TZB* [2021] 1 NZLR 466.

⁷ [2017] NZERA Christchurch 133.

⁸ Employment Relations Act 2000, ss 149(4) and 151.

[16] The second question of law raised by Mr Johnston is a matter outside the employment jurisdiction, arising out of interpretation and application of the HPCA Act. I acknowledge Mr Johnston has reasons for seeking clarity about the interpretation and operation of s34 of the HPCA Act, but the appropriate avenue to obtain that clarity would be a review or challenge to the notification or the decision of the OTBNZ to the body that administers the HPCA Act.

[17] I also consider the questions of law Mr Johnston has raised are only likely to arise in the context of his personal grievance claims incidentally. Mr Johnston has raised an unjustified dismissal claim and a discrimination claim relating to the termination of his employment. The Authority's investigation into Mr Johnston's claims will involve consideration of Te Whatu Ora's actions in the lead up to his dismissal, and whether they were the actions of a fair and reasonable employer in all the circumstances in light of the test of justification in s103A of the Act. Mr Johnston's discrimination claim will involve investigation into whether a personal grievance was raised in accordance with the Act, and (if so) the factual and legal basis for his claim under s103(1)(c) and s104 of the Act. Again, both claims relate to the termination of Mr Johnston's employment and not the notification.

[18] For these reasons, I am not satisfied the ground under s178(2)(a) of the Act is established.

Is the case of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court?

[19] Mr Johnston's submission regarding nature and urgency is that there is public interest in the second question of law being resolved for disabled practitioners generally, and those in the healthcare sector in particular.

[20] Having found this legal question is not within the Authority's jurisdiction or the employment jurisdiction, and is incidental to the personal grievance claims Mr Johnston has brought, the support for the matter being removed on the basis of public interest falls away.

[21] I note removal on public interest grounds contains two prerequisite conditions: the nature and the urgency of the matter require it. Mr Johnston has focused on nature, and does not strongly argue for urgency. For the sake of completeness, I record my

agreement with Te Whatu Ora's submission that there has been no urgency demonstrated to date in the way that Mr Johnston's case has been pursued.

[22] For these reasons, I am not satisfied the ground under s178(2)(b) of the Act is established.

Conclusion

[23] For the reasons discussed above, I find no grounds exist for removing this matter to the Employment Court under s178(2) of the Act.

Costs

[24] Costs are reserved for determination of the substantive matter, or on earlier application by either party.

Natasha Szeto
Member of the Employment Relations Authority