IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 542
3299679

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	KH68 TRADING LIMITED First Respondent
	AND	ALEX89 LIMITED Second Respondent
	AND	THOM DAO Third Respondent
	AND	DUONG ALEC NGUYEN Fourth Respondent
	AND	VIET HUNG NGUYEN aka KHANH DINH NGUYEN Fifth Respondent

Member of Authority:	Nicola Craig
Representatives:	Martin Denyer, counsel for the applicant Michael Kilkelly, counsel for the respondent
Investigation Meeting:	On the papers
Submissions and Further Information Received:	10 June and 30 August 2024 for the applicant 10 June, 4 July and 30 August 2024 for the respondents
Determination:	9 September 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Labour Inspector Melissa MacRury seeks removal of an application alleging a failure to keep records for two former workers at Auckland nail salons.[1] The records

[1] File 3299639.

application concerns wages and time and holiday and leave records. The first worker is said to have been employed one or both of the respondent companies, the second worker by the second respondent. The remaining respondents are said to be persons involved in the employment of the two workers, with the third and fourth respondents being directors of one or both companies.

[2] Penalties are sought against the companies and individuals.

[3] The respondents' position/s on the claims have not been required to be identified to the Authority, as noted below. They do not oppose the removal application.

[4] Claims under Part 9A of the Employment Relations Act 2000 (the Act) were simultaneously filed in the Employment Court in relation to the Minimum Wage Act 1983 for minimum wages not paid, the Wages Protection Act 1983 for deductions from contractual wages and the Holidays Act 2003 for public and alternative holiday pay and unpaid sick leave. Banning, compensation and pecuniary penalty orders are being sought.

The Authority's process

[5] Shortly before the statement in reply was due into the Authority on the records application, counsel for the respondents was instructed and a joint memorandum of counsel provided.

[6] The parties indicated that the Court proceedings set out serious allegations with the potential for significant consequences to follow if the allegations are established. Responding to the statement of problem, in essence, would have requires the respondents to plead to the Court claims well in advance of their statement of defence being due.

[7] If the Authority matter is removed, the parties are likely to be asked to amend their Court pleadings and it may be more efficient for the respondents to reply once it is clear in which of the employment institutions the records application will be heard.

[8] The Authority set a time for the lodging any notice of opposition to the removal application. A statement in reply to the records application was timetabled if removal did not go ahead.

[9] No notice of opposition to the removal application was lodged.

[10] Once this matter was allocated to me, the parties were given the opportunity to provide any further submissions. No substantive comment was received, other than referral to an Authority determination which might assist.

[11] The substantive allegations have yet to be investigated by the Authority.

[12] This determination does not record everything received from the parties but states findings, expresses conclusions on issues necessary to dispose of the matter and specifies orders made as a result.[2]

The grounds for removal

[13] Removal to the Court may be granted if the Authority considers that any or all of the grounds in s 178(2) of the Act are satisfied. Of significance here is para (c) where:

> The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[14] The grounds specified in the Labour Inspector's removal application focus on the Court already having before it proceedings which are between the same parties as this proceeding and which involve similar and related issues.

Proceedings in the employment institutions

[15] The Authority and Court proceedings both concern the same two workers, as well as involving all the same parties to the litigation. There would likely be overlap in evidence required in both matters.

[16] There is a question about whether one of the workers was employed by KH68 Trading Limited or Alex89 Limited or both, which it seems both the Authority and the Court would have to decide if the proceedings remain where they currently sit. Such an overlap is undesirable.

[17] There are distinctions in possible outcomes from the two proceedings. The penalties sought in the Authority for breaches of record-keeping obligations are not

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[2] Employment Relations Act 2000 (the Act), s 174E.

matters for which pecuniary penalties can be sought. Pecuniary penalties are being sought in the Court for breaches of minimum entitlement provisions. Those penalties are the sanction under s 142E of Part 9A of the Act for a "serious" breach.

[18] Under Part 9A the Labour Inspector has also sought compensation orders pursuant to s 142J in the Court as well as banning orders under s 142M. If breaches are found to be serious the Court has first-instance jurisdiction to make orders under Part 9A of the Act.

[19] If breaches are established but found not to be serious, upon removal the Court will be able to make orders under s 135 of the Act for what could be referred to as simple breaches by exercising the Authority's jurisdiction to order penalties under that section. The Court will also be able to make orders for the records matters, if established, which are not minimum entitlement breaches and thus not subject to the pecuniary penalty regime. Arrears could also be ordered.

[20] It is a more efficient use of judicial resources in this case for one institution to undertake one hearing to investigate all the alleged breaches and determine the issues, rather than two hearings occurring in different institutions. Similarly, it saves the parties from preparation for and participation in two hearings.

[21] In conclusion there is a sound basis for removal to the Court under s 178(2)(c) of the Act. The Court has before it proceedings between the same parties and involving related issues. There is nothing apparent which speaks against removal.[3]

Orders

[22] The application for removal is granted – the proceedings in file 3299639 are to be removed to the Employment Court for it to hear and determine without consideration by the Authority.

Nicola Craig
Member of the Employment Relations Authority

[3] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551.