

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 160
3304060

BETWEEN ANDRIES GOUWS
Applicant

AND OPTIMAL FIRE LIMITED
Respondent

3307520

BETWEEN ESTENE GOUWS
Applicant in 3307520

AND OPTIMAL FIRE LIMITED
Respondent

3352800

BETWEEN OPTIMAL FIRE LIMITED
Applicant

AND ANDRIES GOUWS
Respondent

Member of Authority: Robin Arthur

Representatives: Paul Wicks KC and Beth Smith, counsel for Andries
Gouws and Estene Gouws
Andrew Swan, counsel for Optimal Fire Limited

Investigation: On the papers

Determination: 17 March 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns removal of three applications to the Employment Court to hear and determine without investigation by the Authority: s 178 of the

Employment Relations Act 2000 (the Act).

[2] Andries Gouws has a personal grievance application awaiting investigation regarding his dismissal for serious misconduct. Optimal Fire Limited (OFL) dismissed Mr Gouws from his employment as its Assistant Commercial Manager. At the time Mr Gouws was also a director of OFL. He was removed as a director on 12 August 2024 but remains a shareholder.

[3] On 26 August 2024 the Authority reinstated Mr Gouws, on an interim basis, to his employment with OFL, pending the hearing of his personal grievance.¹ As permitted by the Authority's order OFL has opted for Mr Gouws' interim reinstatement to be served on a paid garden leave basis.

[4] Estene Gouws also has a personal grievance application awaiting investigation. She was dismissed for serious misconduct from her employment as OFL's human resources manager.

[5] Mr and Mrs Gouws are husband and wife.

[6] Their dismissals both relate to their involvement in what are alleged to have been irregular and unauthorised payments of salary, expenses and reimbursements to Mr Gouws and a company called JAG Consult Limited (JAG). Mr and Mrs Gouws are joint shareholders of JAG.

[7] Both deny the allegations made against them. They say all payments made were of types known of and approved by OFL's other directors. They say some payments were repayments of money loaned to OFL from funds of their own.

[8] OFL also has its own application against Mr Gouws awaiting investigation. The company is seeking an award of damages for \$868,852. It says that sum is its loss from misuse of OFL funds by Mr Gouws made in breach of his obligations as an employee.

[9] The Authority agreed to jointly investigate all three applications because of the substantial overlap of evidence and witnesses necessary to be heard for each matter.

¹ *Gouws v Optimal Fire Limited* [2024] NZERA 509.

Consideration of removal to the court

[10] During preparation for the Authority investigation it became apparent that the scope and nature of the evidence and the issues arising from it were within one or more of the categories of case which may be removed to the court.

[11] Asked to comment on the prospect that these three matters could be removed to the court on the Authority's own motion, counsel advised by joint memorandum they agreed the circumstances of these proceedings favoured their removal. In particular they advised they had agreed:

- (a) important questions of law are likely to arise in more than an incidental manner;
- (b) the examination of the financial transactions, would be best conducted in an adversarial setting; and
- (c) it is highly likely that the outcome in the Authority will be subject to a de novo challenge in the Court, irrespective of which party prevails.

[12] Section 178 of the Act identified four circumstances where the Authority may remove a matter to the court to hear and determine without the Authority first investigating it. Two were relevant here:

- (a) an important question of law is likely to arise in the matter other than incidentally; or
- ...
- (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[13] For the following reasons, both factors favoured removal.

[14] Firstly, from a review of the pleadings and evidence lodged (both for the earlier interim reinstatement application and in preparation for an investigation of the substantive issues) it appeared highly likely that important questions of law would arise for decision, other than incidentally.

[15] Such questions, where the answer could be decisive on points at issue, concerned aspects of the directors' obligations in company law, the application of tax and accounting principles to practices followed in the business, and whether some of the activities under scrutiny were within the scope of the employment relationship or conducted as officers of the company.

[16] Secondly, the impugned financial transactions by the Gouws and the other OFL directors will require extensive examination. In its allegations against Mr and Mr

Gouws OFL had reached negative conclusions based on analysis by a forensic accountant of hundreds of transactions in which they were involved over several years. In their defence Mr and Mrs Gouws had pointed to what they said were similar transactions by OFL's other three directors which the accountant engaged by the company had also identified as not fully explained by appropriate documentation in each instance.

[17] The necessarily extensive and complex examination of those contested transactions, not just of the Gouws but also of the three directors, may best be conducted through the questioning regime of the court's adversarial model rather than the Authority's member-led questioning. An initial four-day investigation meeting, on liability issues only, had been scheduled and counsel had expressed doubt on whether that would be long enough for that purpose. A further investigation meeting on quantum for remedies, if liability for damages was established, would also be necessary.

[18] Thirdly, this is one of the relatively rare cases where the very high likelihood of challenge to any determination of the Authority was a factor that appropriately weighed in favour of removal.

[19] OFL's three directors and Mr Gouws all had strong business and personal connections developed through working together over a number of years to build the company's operations. The financial effect of any determination will be of great importance to each person. The sums potentially involved would likely be seen as warranting further litigation if one or more party were not happy with whatever outcome was reached in the Authority.

[20] In that context, removal now would mean preparation to date would not be wasted, not add ultimately to delay in final resolution, and would reduce overall costs to the parties. Those factors, in the complex circumstances of this particular case, outweigh the countervailing factor of loss of an appeal right by moving to the court now rather than after an Authority investigation.

[21] Having reached that conclusion, it was also necessary to consider the Authority's residual discretion not to remove a matter, even where one or other of the statutory factors permitting removal has been met. This was a matter where removal likely made best use of the resources of the parties and the Authority. No other circumstances of the case suggested that removal should not be ordered.

Order

[22] For the reasons given, and on the Authority's own motion, these three matters are to be removed to the Employment Court to hear and determine.

Robin Arthur
Member of the Employment Relations Authority