

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 418
3333280

BETWEEN	JOHAN VAN DER MERWE Applicant
AND	WAIKANAЕ CHARTERED CLUB INCORPORATED First Respondent
AND	JOHN COOK Second Respondent
AND	TERRANCE MORRIS Third Respondent

Member of Authority: Shane Kinley

Representatives: Chris Street and Rob Macdonald, counsel for the
applicant
Alan Knowsley, counsel for the respondent

Investigation Meeting: On the papers

Submissions and affidavit
evidence: Up to 15 May 2025

Determination: 15 July 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Johan van der Merwe has raised a number of unjustified disadvantage claims and an unjustified dismissal claim in relation to his employment at the Waikanae Chartered Club Incorporated (the Club) and the ending of his employment. This preliminary determination addresses two issues, the first of which is the joinder of John Cook and Terrance Morris as second and third respondents. The second issue is whether the Authority has jurisdiction to make recommendations of the type Mr van der Merwe

has sought under s 123(1)(ca) of the Employment Relations Act 2000 (the Act) related to the Club's board or individual members of the Club's board.

[2] Mr Cook and Mr Morris do not oppose the application to join them to Mr van der Merwe's claims.

[3] The respondents do not agree the Authority can or should issue recommendations under s 123(1)(ca) of the Act, particularly regarding matters related to the operation of the Club as an incorporated society.

The Authority's investigation

[4] A case management conference was held on 10 March 2025 for this matter and a related matter involving Mr van der Merwe's partner, Andre de Klerk (matter 3354783). Counsel agreed both matters would be investigated on the papers, with the preliminary issues for both matters to be investigated on a consolidated basis under s 221 of the Act. This included combined submissions and witness statements being provided for both matters in relation to the preliminary issues only. I indicated separate determinations would be issued for each matter, reflecting the different focus on the preliminary issues for each matter.

[5] For the Authority's investigation written submissions were received from all parties, with affidavits lodged by Mr van der Merwe and Mr de Klerk, although I do not consider Mr de Klerk's affidavit relevant to this determination.

[6] As permitted by s 174E 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 preliminary issues and specified orders made. It has not recorded all evidence and submissions received.

The preliminary issues

[7] The preliminary issues requiring investigation and determination are:

- (i) Whether Mr Cook and Mr Morris should be joined as proposed third parties to Mr van der Merwe's personal grievance against the Club?
- (ii) Whether the Authority has jurisdiction to make recommendations of the type Mr van der Merwe has sought under s 123(1)(ca) of the Act related to the Club's board or individual members of the Club's board?

Mr Cook and Mr Morris are joined as second and third respondents to this matter

[8] Mr Cook and Mr Morris do not oppose the application to join them to Mr van der Merwe's proceedings. Submissions provided on behalf of the three respondents said Mr Cook and Mr Morris will abide the Authority's determination on this issue.

[9] At the time of the case management conference on 10 March 2025 counsel for the respondents were only representing the Club and did not have any instructions on whether the Club accepted Mr Cook and Mr Morris should be joined as respondents to this matter, or any instructions from Mr Cook and Mr Morris.

[10] As a consequence I directed, should the Club, Mr Cook and Mr Morris all consent to Mr Cook and Mr Morris being joined to the applications, then this preliminary issue would not need to be investigated, or to be addressed in submissions or affidavit evidence. Timetable directions were made for the respondents to provide a memorandum addressing the application to join Mr Cook and Mr Morris.

[11] Counsel for the respondents advised by email "We will not be opposing Mr Cook and Mr Morris being joined to the claim by [Mr van der Merwe] against the WCC. You will need to cover the jurisdiction to join them, but they will abide the decision of the ERA on that issue."

[12] Submissions for Mr van der Merwe said the claims against Mr Cook and Mr Morris were for inciting, instigating, aiding and or abetting breaches of Mr van der Merwe's employment agreement, under s 134(2) of the Act. Reference was made to the Authority's jurisdiction to deal with penalties' matters under s 133 of the Act and to join parties under s 221(a) of the Act.

[13] The basis for Mr van der Merwe's application to join Mr Cook and Mr Morris is now clear and in my view could have been dealt with by consent of the respondents.

[14] I order under s 221(a) of the Act that Mr Cook and Mr Morris are joined as second and third respondents to this matter.

Does the Authority have jurisdiction to make recommendations of the type Mr van der Merwe has sought under s 123(1)(ca) of the Act related to the Club’s board or individual members of the Club’s board?

Relevant law

[15] Section 123(1)(ca) of the Act provides the Authority’s jurisdiction to make recommendations and states:

123 Remedies

- (1) Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies: ...
 - (ca) if the Authority or the Court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring. ...

[16] The Authority or Court’s ability to make recommendations has been invoked on a relatively limited basis, for example, with the Court recommending in:

- (a) *Zhang v Sam’s Fukuyama Food Service Ltd* that “a meeting be arranged with an appropriate official or officials in the Labour Department who can explain to them (through a competent interpreter) how mediation operates and the basic obligations of an employer”;¹ and
- (b) *Harris v The Warehouse Ltd* how the employer should handle personal grievance investigations including support for managers investigating complaints, interview techniques and use of interview notes.²

Submissions of the parties

[17] Mr van der Merwe asserts the Authority has “inherent powers to recommend changes to the Club’s governance body and constituting document, without recourse to the specific wider powers the Authority can invoke”. He refers to the Act’s broader principles in ss 157 and 173, as well as the Authority’s “broad jurisdiction under section 161 to review and respond to the Club’s operations and governance because these have impacted on both applicant’s employment as problems”.

[18] Mr van der Merwe says in relation to the specific provisions of s 123(1)(ca) that this “must be given its broad and natural meaning, and that the Authority has full jurisdiction to grant the relief sought by [him]”.

¹ *Zhang v Sam’s Fukuyama Food Service Ltd* [2011] NZEmpC 28 at [49].

² *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [227] to [232].

[19] The Club says if the Authority considers recommendations about preventing future employment relationship problems are appropriate, then the Club will consider any recommendations made. It does not agree however that recommendations are appropriate and has indicated it will address this in the substantive proceedings for this matter.

[20] The Club says the governance structure of an incorporated society is outside the Authority's jurisdiction and recommendations cannot be made on its constitution, financial structure or Board membership.

Analysis

[21] I do not consider the Authority has the inherent powers asserted by Mr van der Merwe. The Court clearly observed in *Bay of Plenty District Health Board v Culturesafe New Zealand Ltd*:³

The Authority is a creature of statute, and one which does not possess an inherent jurisdiction. For purposes of the present case, there must therefore be a strong focus on the applicable statutory provisions. Ms Sawyer submitted that the Authority could not do whatever it wants to do. I agree. It is trite that the Authority must stay within the confines of its statutory mandate.

[22] Neither am I convinced the Authority has the jurisdiction to make the recommendations sought by Mr van der Merwe related to constitution, financial structure or Board membership of the Club as an incorporated society.

[23] The amended statement of problem recorded Mr van der Merwe as seeking "recommendations for removal from the respondent board (or other censure) of those individuals giving rise to the respondent misconduct, and for an enquiry into the workplace by an independent employment law specialist". Mr van der Merwe has clarified he considers "The Club should be reviewed by an independent best practice body like Clubs New Zealand" and "the Club should have an orthodox constitution under which members appoint and removed their governance body representatives."

[24] The recommendations sought seem to be well outside the scope of recommendations which have previously been made, including the examples from the Court judgments referenced at paragraph [16] above.

³ *Bay of Plenty District Health Board v Culturesafe New Zealand Ltd* [2020] NZEmpC 149 at [43] (footnote omitted).

[25] At this preliminary determination stage whether the recommendations sought should be granted is not however the question to be determined. On reflection, I do not consider the question of whether the Authority has jurisdiction to make the recommendations Mr van der Merwe has sought should be determined at this preliminary stage.

[26] Doing so would arguably be inconsistent with observations of the Court in *Halse v Employment Relations Authority* that “it is clear that once a person has commenced proceedings in the Authority, the role of the Authority is to resolve those proceedings”.⁴ The Court also observed in *WN v Auckland International Airport Ltd* “the Authority is focussed on problem solving, not requiring perfection in pleadings or technical legal expertise in bringing a claim to it for determination. In other words, the legal label put on a perceived problem, **and the remedy sought**, does not have the same impact as Court pleadings” (emphasis added).⁵

[27] Mr van der Merwe has unjustified disadvantage claims and an unjustified dismissal claim which will be the subject of the substantive investigation process and recommendations under s 123(1)(ca) of the Act may be appropriate if the Authority “finds that any workplace conduct or practices are a significant factor in the personal grievance”. Further consideration will be required in the substantive investigation of whether the specific recommendations sought can or should be made. Mr van der Merwe may wish to consider whether he continues to seek the specific recommendations he has sought, in light of the comments above.

Next steps

[28] An Authority Officer will contact counsel to arrange a case management conference to discuss next steps in relation to the investigation of Mr van der Merwe’s substantive personal grievance.

Costs

[29] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority

⁴ *Halse v Employment Relations Authority* [2023] NZEmpC 96 at [45].

⁵ *WN v Auckland International Airport Ltd* [2021] NZEmpC 153 at [14].