IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE

[2026] NZERA 218
3445844

	BETWEEN	HEALTH NEW ZEALAND – TE WHATU ORA Applicant
	AND	TOPUTANGA TAPUHI KAITIAKI O AOTEAROA : THE NEW ZEALAND NURSES ORGANISATION INCORPORATED Respondent
Member of Authority:	David G Beck	
Representatives:	Susan Hornsby-Geluk, counsel for the Applicant Peter Cranney and Machrus Siregar counsel for the Respondent	
Investigation Meeting:	On the papers	
Date of Determination:	10 April 2026	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by Health New Zealand – Te Whatu Ora (HNZ), for removal of a matter to the Employment Court pursuant to s 178 of the Employment Relations Act 2000 (the Act). The matter concerns an amended application before the Authority of 11 March 2026[1], being pursued by Toputanga Tapuhi Kaitaki o Aotearoa; The New Zealand Nurses Organisation Incorporated (NZNO) pertaining to a disputed interpretation of clauses 12 and 13 of Schedule

[1] *Application 3440364 Tōpūtanga Tapuhi Kaitiaki O Aotearoa: The New Zealand Nurses Organisation Incorporated & Health New Zealand*

1B of the Act's Code of good faith for the public health sector that details obligations between HNZ and union members engaged by them during an industrial dispute (the Code).[2]

[2] NZNO has indicated they consent to the application being made by HNZ to have the matter removed to the Employment Court.

[3] The disputed matter stems from ongoing industrial action NZNO are engaged in, aimed at renewing an expired collective agreement between the parties. Specifically, HNZ's belief that certain strike actions should not be engaged in by NZNO members as they arguably contravene an obligation contained in the Code, that NZNO members may be called upon to assist in developing contingency plans to provide life preserving services during periods of industrial action to ensure patient safety. [3]

[4] The parties have had advanced correspondence and discussions over the dispute in mid-January 2026 and narrowed the dispute to one issue, i.e. the suggestion in a strike notice that NZNO members intend to ignore HNZ policy restrictions including the prohibition on the displaying of visible union stickers, badges, clothing, signage or placards or flags on HNZ property or individuals. [4]

[5] HNZ has asserted (in summary) that the contravening of cited policies may have potential hygiene issues and/or problems in identifying key staff members in clinical settings; the placement of union campaign material may prove hazardous and staff potentially engaging with patients may cause unnecessary distress.

[6] The Code provides for adjudication by a clinical expert should the parties not be able to reach agreement on the scope of contingency measures. [5] This adjudication that was initiated by HNZ, led to a 17 January 2026 determination by a local Chief Medical Officer that essentially upheld HNZ's concerns.

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[2] Employment Relations Act 2000, Schedule 1B - Code of Good faith for public health sector.
[3] Note 1, clause 12(2).
[4] Notice of Strike, 14 January 2026.
[5] Note 1, clause 13.

[7] NZNO's application to the Authority contests the adjudicator's 'determination', asserting it is of "no effect" and seeks rulings from the Authority on the following summarised questions:

a) Whether the disputed proposed industrial action (described as "partial strike" action), can trigger HNZ's duties under either clause 11 or clause 12(1) of the Code to develop a life preserving contingency plan.

b) Was HNZ justified in seeking to develop contingency plans in responding to the strike notice, by categorising the need to ensure life preserving services were under threat and thus triggering the obligation of involving NZNO in assisting such preservation.

c) Whether HNZ was justified in invoking the negotiation and then adjudication provisions, in the Code.

d) Is the adjudicator's determination "legally valid and binding"?

e) Did the actions that NZNO members subsequently undertook present a "serious threat to life or permanent disability" that necessitated HNZ engaging in contingency planning in terms of cl 11 of the Code?

The Authority process

[8] The parties have confirmed that this matter is to be dealt with 'on the papers' by the Authority considering the content of the respective parties' Statements of Problem and in Reply, without the need for legal submissions.

[9] The grounds advanced for removal to the Employment Court by HNZ, in summary, include that:

(a) The Employment Court already has proceedings before it initiated by HNZ, involving the same or similar issues and the same fact situation currently before

the Authority pertaining to the Code – that is the court already has knowledge of the facts and issues.

(b) An important legal issue is likely to arise concerning the reviewability of the clinical adjudicator's determination and/or whether the Authority or court can substitute its own views over that of a clinical expert.

(c) The question of law is novel and complex concerning the parties' obligations in seeking to agree on life preserving services during an industrial dispute where strike action is occurring and it is vital that clarity of the matter occurs promptly to overcome the perceived risk to patient safety.

(d) The matter involving an ongoing nationwide dispute is of a magnitude that requires urgency and it is in the public interest it be removed to the court.

(e) Should the Authority determine the matter there is a real likelihood the unsuccessful party may seek to challenge the Authority determination which would cause further delay.

The law pertaining to removal applications.

[10] While removal applications are governed by s 178 of the Act, the Authority in exercising its discretion and applying s 178 (2) factors, must also consider that Section 3 of the Act setting out the Act's scheme or objects, at 3(a) (vi), identifies the reduction of the need for judicial intervention to be a key part of the Act's purpose.

[11] The Act's objects are explicitly reinforced by Part 10 of the Act, s 143, that deals with establishing procedures and institution. Section 143(e) recognises that while employment relationships are ideally best resolved promptly by the parties there will "always be some cases that require judicial intervention" but such intervention needs to be "at the lowest level" and conducted by a "specialist decision-making body that is not inhibited by strict procedural

requirements". The Act further states that "investigations" are "generally concluded before any higher court exercises its jurisdiction in relation to the investigations". [6]

[12] The exception is at s 143(g), that recognises that "difficult issues of law will need to be determined by higher courts. It is the deliberate use of the term "investigations" in s 143 of the Act, that delineates and reinforces the role and jurisdiction of the Authority, as set out in s 161 of the Act.

[13] The unique advantage of the Authority recognised by Chief Judge Inglis, in *Canterbury Westland Kindergarten Association v Barnes*, is the Authority "is designed as an accessible forum" where unlike "an adversarial context such as the Court", the Authority takes a key role in investigating the matter which creates a forum where legal costs ought to be modestly incurred. [7]

[14] The Authority's 'first stop' role as an adjudicative body and exclusive jurisdiction for employment relationship disputes has been affirmed by the Supreme Court in both *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* and *FMV v TZB.* [8]

[15] The factors I must consider are set out in s 178 of the Act. It states:

> (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
>
> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
>
> (a) an important question of law is likely to arise in the matter other than incidentally; or
>
> (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; or
>
> (c) the court already has before it proceedings which are between the same parties, and which involve the same or similar or related issues; or

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[6] Employment Relations Act 2000, ss 143(f) and 143 (fa)
[7] *Canterbury Westland Kindergarten Association v Barnes* [2020] NZEmpC 349 at [22].
[8] *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* [2021] NZSC 184 and *FMV v TZB* [2021] 1 NZLR 466.

> (d) The Authority is of the opinion that in all the circumstances the court should determine the matter.
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> (3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

[16] In short, an application for removal to the court is governed by applying factors detailed in s 178(2)(a)-(c) of the Act. In addition, the Court of Appeal in *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* has emphasised that "…. removal under s 178 is contemplated only in relatively limited circumstances, with caution expected in cases that have not been fully investigated by the Authority". [9]

Discussion

An important question of law and complexity?

[17] The Employment Court in *Danske Mobler Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [10]dealing with the first factor noted caselaw suggests:

> A question of law does not need to be complex, tricky or novel to warrant being called important.[11] It may be important if the answer is likely to have a broad effect or could assume significance in employment law generally. But previous cases have made it clear that it is not necessary for the issue to have an impact beyond the particular parties. A question may be regarded as important if it is decisive of the case, or some important aspect of it, or is strongly influential in bringing about a decision in the case, or a material part of it.[12]

[18] A difficulty I have here is the way the questions framed by the NZNO in their application to the Authority, lend themselves to a relatively uncomplicated objective factual analysis of whether or not on general grounds, the parties have met mutual obligations under the code to "use their best endeavours to resolve, in a constructive manner, any differences

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[9] *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192 at [48].
[10] *Danske Mobler Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZEmpC 233 at [18]. See also CJ Goddard comment on a question of law in respect of predecessor provision to s 178 in *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ at {7].
[11] *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].
[12] *Auckland District Health Board v X* (No 2) [2005] ERNZ 551 (EmpC) at [35].

between them". [13] In fulfilling this objective, I concur with Member van Keulen's analysis in a similar application for removal involving matters pertaining to the Code during a backdrop of industrial action, that in applying the code:

> The parties must commit to the safety of patients and with regard to their employment relationships, the parties must engage constructively, participating fully and effectively and using their best endeavours to resolve differences between them. [14]

[19] I do not find the matters under dispute raise novel questions of law in how they have been framed. However, in the Authority determination cited above the decision to not grant removal to the Employment Court was subsequently challenged and the Employment Court found broadly that the enforceability of a life preserving service agreement, whether a party can refuse to enter such, and whether potential breaches arise, were important questions of law. The Court also found against a backdrop of an upcoming strike, that the matter was of such urgency and in the public interest to remove it to the Court. A further factor the Court considered in the parties' favour (as both supported removal) was the likelihood of a challenge to the Authority's determination, reasoning "from a time-efficiency perspective, to remove the matter to the Court for an urgent hearing". [15] I accept that given the history between the parties a challenge to whatever determination the Authority makes is likely.

Urgency

[20] Given the parties are currently still engaged in unresolved collective bargaining in a high-profile dispute there is a degree of urgency to resolve this matter both for short- and long-term reasons.

Public Interest

[21] I assess the 'public interest' factor as being high.

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[13] Note 1, clause 4(4).
[14] *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZERA 346.
[15] *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 123 at [9], [10] and [12]

Similar or same proceedings before the Employment Court

[22] The Court has before it proceedings that bear upon this dispute.

Residual discretion

[23] Having considered the factors contained in s 178(2)(a) -(c) the Authority has a residual discretion to consider (s 178(d)). In this context given the lengthy bargaining dispute and the fact that past issues between the parties pertaining to the Code have remained unresolved it is objectively reasonable in all the circumstances to consider this dispute is intractable and has some unique features.

[24] I would exercise the Authority's residual discretion in favour of removing this matter to the Employment Court.

Conclusion - should the removal be granted?

[25] For the reasons discussed above, I have found that grounds exist for removing this matter to the Employment Court. The removal of application 3440364 to the Employment Court is granted.

Costs

[26] In certain categories of disputes including collective bargaining matters, it is not the presumption of the Authority to award costs and apply the normal daily tariff. In these circumstances we take the view that the parties should bear their own costs. [16] In my view this matter falls into this category particularly as both parties sought removal to the Employment Court.

David G Beck
Member of the Employment Relations Authority

[16] *www.era.govt.nz/determiantions/awarding-costs-remedies/*