

**ORDER FOR NON-PUBLICATION OF INFORMATION
CONTAINED AT [7](A) AND (B) OF THIS JUDGMENT**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 84
EMPC 408/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to set aside protest to jurisdiction
BETWEEN	BEO Plaintiff
AND	THE VICE-CHANCELLOR OF THE UNIVERSITY OF AUCKLAND Defendant

EMPC 409/2019

IN THE MATTER OF	an application for special leave to remove Employment Relations Authority proceedings
BETWEEN	BEO Applicant
AND	THE VICE-CHANCELLOR OF THE UNIVERSITY OF AUCKLAND Respondent

Hearing: 9 March 2020
(Heard at Auckland)

Appearances: T Oldfield and B A Smith, counsel for plaintiff
P M Muir and R Judge, counsel for defendant

Judgment: 16 June 2020

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment is in relation to an Employment Relations Authority (Authority) determination that resolved two preliminary issues:¹

- (a) Whether the proceedings between BEO and the Vice-Chancellor of the University of Auckland (the Vice-Chancellor) should be removed to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act).
- (b) Whether a non-publication order should be granted, prohibiting the publication of BEO's name and identifying particulars.

[2] The Authority declined to remove the matter to the Court; it made a permanent non-publication order covering medical information relating to BEO and an interim non-publication order prohibiting publication of the name of BEO and any identifying particulars.

[3] BEO has filed a non-de novo challenge to the determination of the Authority covering what she says is a finding in one paragraph. The Vice-Chancellor responded to that challenge by filing an appearance under protest to jurisdiction. BEO has applied to set aside that appearance under protest.

[4] BEO also applies for special leave to remove the proceedings to the Court. Removal is opposed by the Vice-Chancellor.

[5] This judgment resolves:

- (a) the application to set aside the appearance under protest to jurisdiction;
and
- (b) BEO's application for special leave to remove the proceedings.

¹ *BEO v Vice Chancellor of University of Auckland* [2019] NZERA 616 (Member Robinson).

[6] It was accepted by both parties that if the appearance under protest was set aside and the challenge proceeded, removal would not be needed as the key issue would be before the Court.

[7] While neither party referred to non-publication in the Court, I am satisfied that it is appropriate to make orders in the Court similar to those in the Authority. Accordingly, there is:

- (a) An order that the name of the plaintiff (BEO) and any identifying particulars may not be published, unless there is a further order of the Court.
- (b) A permanent non-publication order in relation to all medical information relating to BEO.

The paragraph in issue arose in relation to the application for removal

[8] The context in which the Authority's determination was issued was that the Vice-Chancellor was undertaking a disciplinary process with BEO and BEO applied for interim and permanent injunctions restraining the Vice-Chancellor from proceeding with a proposed disciplinary meeting. BEO sought removal of her injunction applications to the Court. She submitted that important questions of law were likely to arise, other than incidentally, being:

- (a) Does the Authority have jurisdiction to grant an interim and permanent injunction restraining an employer's disciplinary process?
- (b) If the Authority does have jurisdiction to restrain an employer's disciplinary investigation, what factors/considerations should apply when considering whether it exercises that jurisdiction?

[9] The Authority Member found there was no uncertainty about the Authority's jurisdiction to halt an employer's disciplinary process such that it constitutes an

important question of law, since the case law established that the Authority could do so, but that such an order would be rare.²

[10] The Authority Member then considered whether the health of BEO might raise this case to the “rare” case status and, in that context, Member Robinson included the paragraph BEO now seeks to challenge:

[53] Whilst I accept, based on the untested affidavit and medical evidence, that the Applicant is currently experiencing some severe health issues, I do not find after due consideration that this elevates this case into the ‘rare’ category of cases in which an employer is restrained from proceeding with an investigative/disciplinary process.

[11] The Authority concluded that an important question of law did not arise and declined removal to the Court on that basis.³

The parties filed competing submissions

[12] In summary, BEO:

- (a) Accepts that, if the challenge she wishes to bring is precluded by statute the Court does not have jurisdiction to hear the challenge.
- (b) However, she says the challenge meets the requirements of s 179 of the Act and the Court has jurisdiction to hear it under s 187(1). It is not excluded by ss 179(5) or 179A–179C of the Act.
- (c) Paragraph [53] of the determination includes a finding.
- (d) In light of that paragraph, there is no realistic possibility of an injunction being granted by the Authority; the paragraph is unambiguous; it does not appear to be the result of a slip or error.

² At [49]–[51].

³ At [56].

[13] BEO submits that the finding is capable of being challenged because:

- (a) The Authority issued a written determination.
- (b) BEO is dissatisfied with part of the determination, being [53].
- (c) There is no need for there to be an order before a matter included in a determination may be challenged, provided there is a finding.
- (d) Accordingly, the Court has jurisdiction to hear the challenge and BEO has the right to challenge that part of the Authority's determination.
- (e) The protest to jurisdiction therefore should be set aside.

[14] The Vice-Chancellor submits:

- (a) That the Authority has not made any determination in relation to the application for an interim or permanent injunction, but rather has dealt with the preliminary issues of removal and non-publication.
- (b) The Authority's statement at [53] did not amount to a "determination" that was capable of challenge.
- (c) If the claim was able to be considered by the Court, that would lead to an absurd outcome rendering the removal application redundant. The substantive issues would be deemed to have been determined by the Authority in the absence of full evidence, investigation or submission, and therefore the Vice-Chancellor would lose the right to have the matter properly determined and heard by the Authority in the first instance.
- (d) If the Court does not have jurisdiction, it cannot hear and determine the challenge.

The parties do not disagree on the framework for considering the protest to jurisdiction

[15] Neither the Act nor the Employment Court Regulations 2000 provide a formal procedure for dealing with protests to jurisdiction. Therefore, the Court looks to the provisions of the High Court Rules 2016 affecting any similar case.⁴

[16] Under the High Court Rules, a defendant who objects to the jurisdiction of the Court to hear and determine a proceeding may, within the time allowed for filing a statement of defence and instead of doing so, file and serve an appearance stating the defendant's objection and the grounds for it.⁵ If the Court is satisfied that it has no jurisdiction to hear and determine the proceeding, it must dismiss the proceeding.⁶

Jurisdiction is to be given its ordinary meaning

[17] The Employment Court is created by the Act. It is competent to deal with matters that the Act empowers it to deal with. Its jurisdiction may be expressly or impliedly limited by the Act.⁷

[18] Here jurisdiction, if it is to be found, is pursuant to s 179(1) of the Act, which provides that a party to a matter before the Authority who is dissatisfied with a written determination of the Authority, or any part of that determination, may elect to have the matter heard by the Court.⁸

The context is important

[19] I acknowledge that, on one reading of [53], there has been a finding; however, the paragraph has to be read in context.

⁴ Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁵ High Court Rules 2016, r 5.49(1).

⁶ Rule 5.49(6)(a).

⁷ *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [25]–[26].

⁸ Employment Relations Act 2000, s 179(1), noting none of the exclusions contained in s 179(5), s 179A, 179B or 179C are applicable.

[20] The matters that were before the Authority were the application for removal and the issues of non-publication.⁹ BEO's substantive claims were not investigated or determined by the Authority. The plaintiff, being dissatisfied with the Authority's determination on the first matter, has applied to the Court for special leave. If dissatisfied with the Authority's finding on the second issue of non-publication, then a party could have challenged that finding.

[21] This also is not a case where the preliminary determination has the effect of resolving the employment relationship problem before the Authority.¹⁰ The Authority has not made a determination on the issues of interim and permanent injunction restraining the defendant's investigation process and retains jurisdiction to determine those claims.

[22] The opening words of the paragraph in question are instructive. The Authority acknowledges that it is dealing with untested affidavit and medical evidence. As is often the case, an assessment of the strength of a case was seen as relevant to the decision-maker's determination, here being whether the proceedings should be removed, and that is the context in which the Authority commented as it did in [53]. Despite the language used by the Authority, it was not making a substantive finding; rather, the Authority's statement demonstrated a step in its reasoning, leading to it declining removal.

[23] I also take the point made by the Vice-Chancellor that to find jurisdiction would lead to an absurd outcome, whereby BEO is able to bring her claims direct to the Court, where removal has not been considered appropriate by the Authority, thereby rendering her application for special leave to remove redundant. In view of s 178, such an outcome cannot have been intended.

[24] The application to set aside the protest to jurisdiction fails. The challenge is dismissed.¹¹

⁹ *BEO*, above n 1, at [7].

¹⁰ *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [59]–[60].

¹¹ High Court Rules 2016, r 5.49(6)(a).

The parties have different views on whether the matter should be removed to the Employment Court

[25] BEO submits that her application for special leave to remove the matter to the Employment Court should be granted on two grounds:

- (a) Important questions of law are likely to arise in the matter other than incidentally.¹²
- (b) The matter is of such nature and of such urgency that it is in the public interest that it be removed immediately to the Court.¹³

[26] The important questions of law that BEO says will arise are:

- (a) Does the Authority have the power to restrain an employer's investigation and disciplinary process by injunction?
- (b) If so, what considerations should be applied by the Authority when determining an application for injunction to restrain an employer's investigation and disciplinary process?
- (c) Is there an implied term of "managerial prerogative" in employment agreements, and if so, does it affect the Authority's power to restrain an employer's investigation and disciplinary process by injunction?

[27] In submitting that the case is of such a nature and of such urgency that it is in the public interest that it be removed, BEO points to her health issues, which she says are out of the ordinary and potentially life-threatening. She also submits that the employer, being a prominent publicly funded tertiary institution, adds to the public interest, as does the fact that the present case concerns sensitive allegations of sexual harassment at a public institution. BEO says it is unusual for an employee to face disciplinary action for making allegedly false allegations against another employee.

¹² Employment Relations Act, ss 178(2)(a) and 178(3).

¹³ Sections 178(2)(b) and 178(3).

[28] BEO says the broader public interest issues include:

- (a) The chilling effect the potential for dismissal may have on women wishing to raise sexual harassment issues if the sexual harassment is found not to be proven.
- (b) Whether a finding that sexual harassment is not proven means the person who raised it is lying.
- (c) The tests and standards of proof that should be applied by employers in such situations.

[29] In turning to discretionary factors, BEO submits that there are none that would warrant refusal of removal and says that the case is complex, that a challenge is almost inevitable and that the Court's more formal evidential processes would be more appropriate for matters involving sensitive allegations of sexual harassment and assault, and disclosure of the plaintiff's prior history of sexual trauma.

[30] The Vice-Chancellor opposes the application to remove the matter. She says an important question of law is not likely to arise in the matter other than incidentally; and the case is not of such a nature and urgency to necessitate immediate removal to the Court in the public interest.

[31] The Vice-Chancellor says that it is well established that the Authority has the power to restrain an employer's investigation and disciplinary process by injunction. The same legal principles apply in such cases as to any injunction application, that are then applied to the facts, which would not raise an important question of law.

[32] She also says that the implied term of managerial prerogative is well understood and does not raise an important question of law.

[33] The Vice-Chancellor notes that applications for interim and permanent injunctions routinely come before the Authority, as do cases where applicants allege that their employer's process is adversely impacting their health.

[34] She says the Authority regularly deals with matters involving sexual harassment and sexual assault and the University being a public institution is not a factor weighing in favour of there being any particular public interest in the matter being removed to the Court.

[35] She says there is no particular urgency and points out that BEO is currently on unpaid sick leave and the investigation process has been halted pending confirmation from BEO's medical practitioners that she is fit to resume her participation in the investigation.

The Court has an established approach to applications for special leave to remove proceedings

[36] In considering an application for special leave, the Court makes no presumption in favour of, or against, removal. It must have regard to the criteria set out in s 178(2)(a)–(c). It also retains a discretion to refuse leave, even where one or more of the factors listed in s 178(2) are made out.

[37] In considering whether an important question of law is likely to arise in the matter other than incidentally, the Court does not need to find that that question is complex, tricky or novel to justify the adjective “important”. A question of law may be important because the outcome will be decisive of the case, or the answer to it is likely to have a broad effect or assume significance in employment law generally. It need not, however, be important beyond the parties.¹⁴

The first question posed by BEO will not arise in this case

[38] Because the Vice-Chancellor accepts that the Authority has the power to restrain an employer's investigation and disciplinary process by injunction, the issue posed by BEO's first question will not arise in this case. Having applied for an interim injunction, BEO clearly will not be arguing otherwise. There may come a case where the issue is put in contest, but it is not in contest here.

¹⁴ *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].

No special issues arise in considering an application for injunction to restrain employer's investigation and disciplinary process

[39] There is no basis for suggesting that the Authority would adopt anything other than a conventional approach to an application for an interim injunction. The Authority would consider whether there is a serious issue to be tried in relation to the claim for permanent orders and the balance of convenience, and then stand back and look at the overall interests of justice.¹⁵

[40] As noted by the Vice-Chancellor, when considering whether there is a serious issue to be tried, there are a number of cases that the Authority will be able to look to and apply to the facts before it.

[41] The balance of convenience will also be determined by the facts. Importantly here, is the decision by the Vice-Chancellor to place the disciplinary process on hold pending confirmation that BEO is fit to resume her participation in the process.

[42] The question that arises is one that the Authority is well placed to consider in the first instance; either party can bring a challenge to the Court if dissatisfied with the outcome.

The ambit of “managerial prerogative” is unlikely to arise in the present case

[43] BEO poses a question of whether there is an implied term of “managerial prerogative” in employment agreements, and if so whether that affects the Authority’s power to restrain an employer’s investigation and disciplinary process by injunction.

[44] While the ambit of managerial prerogative raises potentially interesting issues in some contexts, there can be no suggestion that an employer is not entitled to carry

¹⁵ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC) at 133 and 137; and *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA) at 142.

out a disciplinary process, provided that it does so consistently with its legal obligations, including its obligation not to unjustifiably disadvantage an employee.

[45] Whether the Vice-Chancellor has complied with her legal obligations here will turn on the facts. Important questions of law do not arise.

Nature and urgency do not make removal in the public interest

[46] There is no basis for BEO's contention that removal is appropriate because her case involves the actions of a large, publicly funded employer. The Authority often deals with such employers and is well placed to do so.

[47] Contrary to the submission of BEO, this is not a legally complex case. The processes of the Authority, with the flexibility they include as to the procedure to be followed also allows the Authority to consider how best to receive evidence.

[48] BEO is currently on unpaid sick leave and the investigation process has been halted in the meantime. There is no need for the matter to be considered urgently by the Court.

Application for special leave to remove fails

[49] In conclusion, neither of the factors in s 178(2)(a) or (b) apply to this case. The Court declines BEO's application for special leave to remove these proceedings to the Court.

[50] The parties are to endeavour to agree on costs. If that does not prove possible, the Vice-Chancellor may file and serve a memorandum within 21 days of the date of this judgment. BEO is to file and serve submissions in response within a further 14 days. Any submissions in reply then must be filed and served within a further seven days.

J C Holden
Judge

Judgment signed at 11.15 am on 16 June 2020