

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

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

**[2022] NZEmpC 150
EMPC 172/2022**

IN THE MATTER OF an application for judicial review

AND IN THE MATTER OF an application for an adjournment and
interlocutory orders

BETWEEN JOHN McDERMOTT
Applicant

AND EMPLOYMENT RELATIONS
AUTHORITY
First Respondent

AND EMPLOYSURE LIMITED
Second Respondent

Hearing: 19 August 2022
(Heard at Christchurch by telephone)

Appearances: A Halse, advocate for applicant
First respondent excused appearance
J Laphorne and C Sargison, counsel for second respondent

Judgment: 22 August 2022

**REASONS JUDGMENT OF JUDGE K G SMITH
(Application for an adjournment and interlocutory orders)**

[1] John McDermott was employed by Employsure Ltd until he was made redundant by that company in May 2020.

[2] A personal grievance Mr McDermott raised with Employsure was not resolved and that led to him lodging a statement of problem in the Employment Relations Authority.

[3] The Authority has not yet investigated the problem between Mr McDermott and EmploySURE. In anticipation of an investigation meeting, however, the Authority made directions enabling the company's witnesses to give evidence by audio visual link (AVL). It did so most recently in a minute of 19 May 2022 in which it approved of two witnesses giving evidence from Australia by AVL.¹ Mr McDermott opposed the Authority making that decision and has applied to judicially review it.

[4] Mr McDermott's application for judicial review is to be heard in Auckland on Monday 22 August 2022. On 15 August 2022, Mr McDermott applied to adjourn the hearing and for other interlocutory orders. He sought:

- (a) a direction to EmploySURE to file a strike-out application;
- (b) transfer of the proceedings to the Wellington Registry; and
- (c) an adjournment of the hearing set down for 22 August 2022 until the interlocutory matters have been determined.

[5] The hearing of this application for an adjournment was conducted at short notice, by telephone, on 19 August 2022.

[6] Mr Halse, who acts for Mr McDermott, confirmed at the beginning of the hearing that he understood an immediate decision would be made about the application. At the conclusion of submissions I dismissed Mr McDermott's application with reasons to be given in writing. These are those reasons.

[7] Mr Halse confirmed that the application relied on the first and second grounds. The third ground is the intended consequence if the application succeeds and is not intended to raise separate issues.

[8] Some further context is required. Mr McDermott has applied to review the Authority's minute on the basis that approving the use of AVL breached s 27 of the New Zealand Bill of Rights Act 1990, s 157 of the Employment Relations Act 2000

¹ *McDermott v EmploySURE Ltd* NZERA Auckland 3109492, 19 May 2022.

(the Act), and s 36 of the Health and Safety at Work Act 2015. The remedy sought is to quash the Authority's minute allowing the use of AVL.

[9] The parties have filed submissions in anticipation of the substantive hearing. The anticipated argument that prompted the first ground of Mr McDermott's application to adjourn was a discussion in EmploySURE's submissions to the effect that judicial review is not available where the claim is based on an alleged breach of natural justice.

[10] The submissions relied on s 184(2) of the Act imposing a restriction on this Court's ability to consider applications for judicial review. Relevantly, the section reads:

- (2) For the purposes of subsection (1), the Authority suffers from lack of jurisdiction only where,—
 - (a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
 - (b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or
 - (c) the Authority acts in bad faith.

[11] Mr Halse considered EmploySURE's submissions amounted to a "covert" way of seeking to strike out Mr McDermott's proceeding. It was, he said, something Mr McDermott has not had a chance to address, which he would obtain if EmploySURE was required to file an application to strike out the substantive proceeding. Then Mr McDermott could potentially file further affidavits, although Mr Halse did not say what they might deal with, and make additional submissions.

[12] This ground was unsuccessful because it is misconceived. For Mr McDermott to be successful in his judicial review proceeding he will need to establish that the Authority's decision in some way is able to be reviewed within the narrow confines of s 184(2). It is Mr McDermott's application that has raised that subject for consideration and in response to which EmploySURE's counsel argued the Court lacks jurisdiction to entertain the application. Submissions by Ms Lapthorne and Ms Sargison state why the company considers the Authority's decision was within its

jurisdiction meaning that s 184(2)(a), and/or (b), do not apply.² In short, the subject matter of Employsure's submissions was raised by the pleadings and will be dealt with at the substantive hearing.

[13] Mr Halse was served with Employsure's submissions on or about 8 August 2022. There has been more than sufficient time for him to consider those submissions and prepare responses to them for use at the substantive hearing. Anything Mr McDermott might have said in response to a strike-out application can be raised in the substantive hearing.

[14] There is a second but equally significant hurdle facing this part of the adjournment application. Mr Halse could not point to any provision of the Act empowering the Court to order Employsure to file an interlocutory application. There is no power to do so, but even if such a power existed it would be pointless to exercise it one business day prior to the substantive hearing where all arguments will be fully considered.

[15] The second ground relied on was a request for a transfer of the proceeding to Wellington. This application was made at the very last possible moment and well after directions conferences scheduled steps for the hearing. Mr McDermott filed his claim in Auckland. It is now far too late to reconsider that action and transfer the proceeding elsewhere. Had I granted the application that decision would have resulted in the loss of scarce Court hearing time and a delay which would be detrimental to both parties.

[16] Finally, although not identified in the application, Mr Halse mentioned recently difficulties he has encountered following the liquidation of his company, CultureSafe NZ Ltd. He did not, however, say that those problems compromised his preparation and acknowledged he would be in Court on 22 August 2022 to present Mr McDermott's case.

[17] For those reasons the application to adjourn was declined.

² There is no argument advanced in the pleading or in Mr McDermott's submissions arguing that the Authority acted in bad faith.

[18] Costs are reserved.

K G Smith
Judge

Judgment signed at 9.25 am on 22 August 2022