

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 88
3023251

BETWEEN ROHIT ARORA
 Applicant

A N D RESTAURANT BRANDS
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: E Telle and M Pollock Counsel for Applicant
 S Langton and T von Dadelszen , Counsel for
 Respondent

Investigation Meeting: On the papers

Submissions Received: 15 February 2018 from Applicant
 23 February 2018 from Respondent

Date of Determination: 16 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. This application is dismissed. Costs are reserved.

Employment relationship problem

[1] Rohit Arora seeks removal of this matter to the Employment Court under s178(2) of the Employment Relations Act 2000 (Act). He submits there are important questions of law and the nature of the case requires urgency and there is public interest sufficient to warrant removal. The respondent denies there are grounds for removal.

Relevant Facts

[2] Mr Arora was employed at a KFC restaurant in Papakura owned by Restaurant Brands Limited. He was injured on 17 December 2015 and did not return to work until March 2016. He received ACC for his injuries.

[3] On 11 September 2016 he was imprisoned for an unrelated matter.

[4] On 26 September 2016 the respondent sent a letter advising they were aware of his remand in custody and asked that he attend a meeting on 29 September 2016. The purpose of the meeting was to ascertain the restrictions this placed on his ability to work, his non-attendance at work to date and the possibility of any criminal conviction that may impact upon his employment.

[5] The respondent then sent another letter dated 6 October 2016 advising they had been contacted by an unnamed friend of Mr Arora's who advised he would be available to contact after 5 October. Interestingly it sought a further meeting on 29 September 2016 – a date prior to the letter being sent.

[6] The respondent then sent a letter dated 24 October 2016 terminating his employment. This letter referred to a letter dated 7 October 2016 (that was not filed) containing a request to attend a disciplinary meeting on 14 October 2016 and reference to an email from the applicant's partner advising he could not attend on 29 September but would be available for contact after 5 October 2016. It did not refer to the 6 October letter.

[7] Mr Arora was released from prison 27 January 2017.

[8] On 7 February 2017 Mr Arora raised a personal grievance of unjustified disadvantage due to injury and breaches of good faith relating to his injuries in December 2015. The letter also refers to him being wrongfully dismissed and accepted he was raising a personal grievance out of time.

[9] The respondent replied by emailed letter dated 15 March 2017 stating from its investigations the injuries did not occur at work. It also stated it had made a number of attempts to contact him and invited him to attend two meetings. It confirmed its awareness Mr Arora had been in police custody for at least some of the time he did

not attend work or the meetings to which he was invited. It denied any grounds to raise a personal grievance.

[10] On 31 August 2017 Mr Arora filed a statement of problem and an application for leave to raise a personal grievance out of time.

[11] As noted above, the applicant now seeks to have the matter removed in its entirety to the Employment Court.

Grounds for removal

[12] The grounds upon which the removal is sought are as follows:

- (a) an important question of law is likely to rise in the matter other than incidentally in accordance with s 178(2)(a) of the Act;
- (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 in accordance with s 178(2)(b) of the Act;

[13] The ground under s178(2)(d) that the Authority is of the opinion in all the circumstances that the Court should determine the matter was pleaded. No matters were submitted in support any exercise of this discretion other than those set out below. Given the result of this application, this ground must also fail.

Important question of law?

[14] The applicant submits the interaction between s 161(1)(b) of the Employment Relations Act 2000 and the Accident Compensation Act 2001 where an employee has sustained mental harm from a personal injury and that same injury has given rise to serious harm from the employer's breach of the employment agreement requires removal to the Court.

[15] I accept the respondent's submission that the interaction of the two statutes in terms of jurisdiction has already been authoritatively determined by the Court.¹ No further guidance is required from the Court on that matter.

[16] The applicant submits an important question of law arises in relation to how an unjustified dismissal claim comes to the notice of the employee being affected by an employer alleging it has taken all reasonable steps to inform the employee of a

¹ See *Robinson v Pacific Seals New Zealand Limited* [2014] NZEmpC 99 (EC) and *Lata v Auckland District Health Board* [2017] NZERA Auckland 76.

dismissal and how this is to be assessed taking into account the overriding obligations of good faith and that the parties to be active in constructive (s 4(1)(A)(b)) in the relationship.

[17] I further accept the respondent's submission that this does not raise an important question of law. The Court has dealt with these issues.² This does not warrant removal to the Court as an important question of law.

Urgency and public interest?

[18] The basis for raising this ground for removal is Mr Arora's possible deportation due to his job loss and inability to meet immigration requirements. While the deportation circumstances may make this an urgent matter for Mr Arora, it does not engage any public interest concern.

Culture an exceptional circumstance?

[19] Subsequent to a hearing of this matter in February 2018 the applicant filed further submissions that an important question of law to be removed is:

Should culture in terms of s 114(4)(a) be considered a s 178(2)(a) ground for removal to the Court?

[20] There is little (if any) law about a person's culture solely or in combination with post-traumatic stress disorder from an alleged workplace injury giving rise to an exceptional circumstance pursuant to s 114(4)(a). That does not necessarily give rise to an important question of law.

[21] It is accepted the categories of "exceptional circumstances" are not limited to those set out in s115. As the Court has said "those are only examples of extraordinary circumstances and if there are other circumstances which are extraordinary as the courts have defined that adjective, then these may be relied on also."³

[22] The Supreme Court has held that "exceptional circumstances" means unusual, in that it is the exception to the rule.⁴ Whether the applicant's evidence meets this

² See *Underhill & Anor v Coca Cola Amatil (NZ) Limited* [2017] NZEmpC 117 (EC) and *Wyatt v Simpson Grierson (the Partnership)* [2007] ERNZ 489.

³ *Roy v Board of Trustees Tamaki College* [2014] NZEmpC 153; ERNZ 332 at [30].

⁴ *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109 at [31].

legal threshold is a matter of fact that does not warrant reference to the Court in the first instance. The applicant has the right to challenge the substantive decision if unsuccessful in any event.

[23] This application is dismissed. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority