

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 261B/08  
5100170

BETWEEN IAN BREEZE  
Applicant

AND BAY OF PLENTY DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: Dzintra King

Representatives: Philip Bartlett, Counsel for Applicant  
Mark Beech and Shima Grace, Counsel for Respondent

On the Papers

Submissions/Memoranda 12, 18, 27 November 2008 from Applicant  
Received 11,18, 19, 28 November 2008 from Respondent

Determination: 15 December 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] I have before me an application for removal to the Employment Court and a costs application.

**Background**

[2] On 6 October I issued a determination (AA261A/08). The sole issue for determination, as agreed at the investigation, was whether the respondent gave Dr Breeze undertakings or alternatively created a reasonable expectation that it would support him in progressively credentialing him back to general surgery at Tauranga Hospital; and whether the DHB also gave an undertaking, or, in the alternative,

created a reasonable expectation that it would allow him to resume his former role as a general surgeon employed by it on an 8/10 basis on completion of a retraining programme in accordance with the New Zealand Medical Council requirements. I found that there was an agreement to that effect. It was agreed that other aspects of the Statement of Problem would be dealt with, if necessary, at a later hearing.

[3] The respondent has challenged that determination, seeking a de novo hearing; and made an application for a stay of proceedings. Ms Grice submitted that if the stay were granted it would apply to any costs determination as well and asked that I rescind paragraph 46 of my determination which dealt with costs; and that the issue of costs be held in abeyance until all matters in the applicant's Statement of Problem have been determined. In the respondent's view, an assessment of costs would be premature.

### **Removal**

[4] Section 178 Employment Relations Act 2000 provides for removal to the Employment Court.

[5] *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*

*(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

[6] The removal application is made pursuant to s 178 (2) (c). The respondent says that it would be expedient to remove the remaining issues, which were not dealt with or determined, to be consolidated into a single hearing before the Employment Court.

[7] The applicant says he would agree to the removal subject to the imposition of conditions pursuant to s 178 (4). These are twofold:

- That Mr Breeze's salary be restored to an 8/10 FTE equivalent basis pending the outcome of the Court proceedings.
- That the DHB use its best endeavours to cooperate with Mr Breeze in progressing toward, and obtaining, the earliest practicable hearing date in the Employment Court.

[8] The reinstatement of Mr Breeze to an 8/10 salary would require a modification of his APC so that he carry out general surgery. The respondent has challenged the determination that Mr Breeze has completed his retraining and it would be inappropriate to impose a condition when the basis of that condition has been challenged.

[9] The respondent does not agree to a condition requiring the DHB to progress the matter to a hearing before the Court. While agreeing that it is the DHB's interests to expedite the matter, Ms Grice said the listing of any hearing date would be subject to pre-existing commitments and such a condition was not appropriate. I am not prepared to impose such a condition but would say that it is the interests of justice and a requirement of good faith that parties progress matters as expeditiously as possible.

[10] The Court has before it proceedings that are between the same parties and involve similar or related issues. It is clearly desirable that related proceedings be disposed of together. In the circumstances of this case, removing the matter before the Authority would enable a speedier resolution than for the parties to wait until the challenge has been determined and then have to return to the Authority to argue the matter still undetermined.

[11] The matter is to be removed to the Employment Court.

**Costs**

[12] Mr Bartlett seeks an award of \$4,500 plus disbursements of \$70 (the filing fee). This amount is sought in respect of the issue that was determined on 6 October 2008.

[13] Mr Bartlett's hourly charge-out rate is \$340 plus GST. Based on that, the applicant's direct costs of preparing for the investigation meeting and attending the meeting amount of approximately \$12,500 plus GST and disbursements.

[14] The hearing took place on 17 and 18 September 2008. The costs sought do not include costs for the strike out and 90 day issue. I will deal with those separately.

[15] I accept Mr Bartlett's submission that it is entirely speculative that a stay would also apply to the costs. I agree that fixing of costs now would enable a dissatisfied party to challenge that matter.

[16] As to the request that I rescind para 46, the respondent did not provide any rationale for how I might have the ability to do that. Schedule 2, 15 (2) gives the Authority the power to alter or vary any costs order that has been made.

[17] Mr Breeze was successful in his claim. Costs normally follow the event and I can see no reason to depart from that principle. The amount sought by the applicant is reasonable. The respondent is to pay the applicant the sum of \$4,500 plus disbursements of \$70.

Dzintra King

Member of the Employment Relations Authority