

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 377
3146683

BETWEEN FGH
 Applicant

AND RST
 Respondent

Member of Authority: Claire English

Representatives: Stuart Henderson, counsel for the Applicant
 Megan Richards, counsel for the Respondent

Investigation Meeting: 20 August 2021 by teleconference

Submissions Received: 27 July and 19 August 2019 from the Applicant
 10 August and 20 August 2019 from the Respondent

Determination: 26 August 2021

DETERMINATION OF THE AUTHORITY

Prohibition from Publication

[1] An order of non-publication applies to the names of the parties to this proceeding and to information which may otherwise identify the parties, in accordance with the judgement of the Employment Court (court) dated 2 February 2018¹.

Background

[2] FGH and RST have been engaged in a protracted disagreement, beginning in mid-2015. RST commenced various formal employment processes. FGH raised

¹ FGH v RST, [2018] NZEmpC 145.

disadvantage grievances, including bullying, and stated that there were medical concerns that the employer should take into account.

[3] The parties filed proceedings with the Authority, and following a 5-day investigation meeting, the Authority issued a determination in 2017, dismissing FGH's claims.

[4] FGH then issued a *de novo* challenge before the court. The court issued a judgement on 1 June 2018, and held that FGH had established a disadvantage grievance with regard to the allegations pleaded in the first, sixth, and eighth causes of action. The remaining causes of action (second, third, fourth, fifth, and seventh) were not established².

[5] Following this, the parties were unable to agree on a return to work plan for FGH, and FGH raised further grievances relating to this. A statement of problem was filed in the Authority, and the matter was removed to the court. The court issued a further judgement on 15 October 2019.

[6] FGH then returned to work around November 2019.

[7] In March 2021, RST became aware of various comments posted by FGH on social media. It had concerns with these comments, and wished to raise these concerns with FGH in a formal disciplinary setting. Without going into detail, it is relevant to note that these comments included comments by FGH critical of named Members of the Authority.

[8] FGH continued working for RST. In response to the concerns raised by RST, FGH disclosed further medical information. In-depth correspondence between the representatives for the parties then took place, over a period of some weeks, between April 2021 and June 2021.

[9] This correspondence attempted to reach agreement between the parties about appropriate ways to progress RST's concerns, the provision of medical information by FGH, and adjustments to FGH's hours of work.

² *FGH v RST*, [2018] NZEmpC 60, at [313].

[10] Apart from adjustments to FGH's hours of work, the parties have not been able to reach agreement on how to move forwards.

[11] Against this background, FGH has now raised a claim in the Authority against RST for the sum of \$40,000 compensation, and has specifically pled that RST's actions are in breach because they do not observe the guidance provided by the Employment Court in its previous rulings between the parties.

[12] The employment relationship is on-going.

The application for removal

[13] FGH seeks that the matter be removed to the Court for determination. RST supports this application.

[14] The grounds for removal are set out in section 178 of the Act. They are that:

- a. an important question of law is likely to arise in the matter other than incidentally (the "question of law" ground); 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 (the "public interest" ground); 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 (the "similarity" ground); or
- d. the Authority is of the opinion that in all the circumstances the court should determine the matter (the "all other circumstances" ground).

[15] FGH submits that the matter should be removed to the court on the public interest ground, and the similarity ground.

[16] In addition, FGH's counsel submitted via a memorandum that as RST agreed to the removal of the matter to the court, it could now be granted.

[17] RST agrees that the matter should be removed to the court, and states that, even if the matter were to be heard in the Authority, given the history of litigation between the parties, it would be expected that the outcome would then be challenged in the court.

[18] RST submits that the question of law ground applied, in addition to the public interest ground, and the similarity ground.

[19] The parties have filed a significant amount of documentation. Following a case management conference with counsel, both parties agreed that the application for removal could be determined “on the papers” and neither party wished to file further legal submissions, but would rely on the documents already filed.

[20] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all evidence and submissions received.

Outcome

[21] The permissive language used in section 178 of the Act makes it clear that the Authority has a discretion whether or not to remove a matter to the court, and if it decides to do so, that decision must be based on the statutory grounds, rather the agreement of counsel. Accordingly, I turn to consider the grounds for removal as set out in the Act.

[22] The matter is of such a nature that it ought to be removed to the court. In addition, this is arguably a matter that the court has or has already had before it, between the same parties and which involve the same or similar or related issues.

[23] The reason for this is that the parties are not simply in dispute about the nature and extent of RST’s powers and how they can properly be exercised – a key part of the dispute between the parties is the explicit allegation by FGH that RST’s actions were in breach because RST failed to “observe the guidance” previously provided by the court, and further, that RST should have taken other or additional steps in light of the previous court judgements issued as between the parties.

[24] In these circumstances, it is necessary and appropriate for the matters between the parties to be heard and determined by the court in the first instance.

[25] I note that a small part (although by no means all) of the factual background to the employment concerns currently raised by RST is public adverse comments apparently made by the applicant against named Authority Members. This also points to removal to the court as being the most appropriate course of action, under the all other circumstances ground.

[26] Finally, I acknowledge that RST has submitted that certain important issues of law arise in this matter. Given that the heart of FGH's substantive claims is a dispute about what actions RST might reasonably take, interpreted in light of the court's previous judgements, I am of the view that it is appropriate that I make no findings in relation to these suggested questions of law, including whether or not they meet the test for removal. Given that I have already found that removal is appropriate under other grounds, this does not change the outcome of this determination.

Costs

[27] Neither party made specific claims for the costs relating to this application. Accordingly, no orders for costs are made.

Claire English
Member of the Employment Relations Authority