

**Note: An order prohibiting publication of names of the parties applies to this determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 112  
3001443

BETWEEN                      FMV  
   Applicant  
  
AND                                TZB  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:              Li Yan, Advocate for the Applicant  
   Tim Clarke, Counsel for the Respondent  
  
Investigation Meeting:        12 April 2017  
  
Oral determination:            12 April 2017  
  
Written record issued:        12 April 2017

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Order prohibiting publication of parties names**

[1]     The particular circumstances and the point in proceedings at which this matter is presently before the Authority make it appropriate to order that the names of the parties not be published.<sup>1</sup> There are three reasons.

[2]     Firstly, the capacity of FMV to proceed has become a preliminary issue to determine. As a result, the parties have not yet attended mediation about the application lodged in the Authority. They have not yet had the opportunity that a direction to mediation normally provides to discuss, on a confidential basis and without their respective names becoming a matter of public record, whether the matter

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<sup>1</sup> Employment Relations Act 2000, Schedule 2 clause 10.

can be resolved without continuing through the public process of an Authority investigation.

[3] Secondly, FMV has expressed some concerns about her personal health information being publicly disclosed.

[4] Thirdly, FMV has made serious allegations about how she was treated during her former employment by TZB that have yet to be tested.

[5] For the moment, and on my own motion rather than at the request of either party, I concluded an order prohibiting publication of their names was appropriate. If the matter does proceed to further stages of investigation and determination, the order would be reviewed as part of that process and, more likely than not, the names of the parties would be published in any later Authority determination which is publicly available online.

[6] In the written record of this determination each party is to be referred to by three randomly selected letters, the Applicant as FMV and the Respondent as TZB.

### **The Applicant's claim**

[7] FMV was employed to work for TZB from 9 February 2009. She resigned on 21 January 2010. Her application to the Authority was lodged more than six years later, on 23 December 2016. It claimed her employment ended in circumstances that really amounted to a constructive dismissal, not a voluntary resignation. She said that she had become unwell by June 2009 due to how she was treated by managers and colleagues at her workplace, that her illness was a disability, and that TZB had unlawfully discriminated against her by failing to accommodate that disability. She said she was so unwell and traumatised by the time her employment ended she had been unable, until recently, to properly consider raising grievances about bullying, discrimination, different treatment and breach of contract she said she had experienced during her employment. In her statement of problem FMV said she was also pursuing a discrimination claim in the Human Rights Review Tribunal.

[8] TZB's statement in reply referred to a complaint made by FMV to the Human Rights Commission earlier in 2016. The complaint alleged unlawful discrimination in employment on the prohibited grounds of disability under the Human Rights Act 1993. The Commission sought to arrange mediation about the complaint. Mediation

was scheduled for 9 December 2016. It was cancelled because TZB was not satisfied FMV had “the requisite capacity to participate in mediation or enter into any agreement with it in relation to her various claims”. TZB took that position because, on 29 November, FMV’s lawyer had advised TZB’s lawyers of the contents of a letter from FMV’s consultant psychiatrist. The letter, dated 29 November, expressed the following opinion about FMV’s health:

She is relatively stable though quite fragile in her mental health. She will thus be unable to manage any legal issues. She expresses an opinion that she feels stable enough to go in for mediation. We are happy for her to attempt the mediation process. However it would be important for both parties involved to keep in mind the fragile but stable mental health of [FMV] during the mediation process.

### **The Authority’s investigation**

[9] Against that background I made arrangements for the Authority to consider preliminary issues arising from the application in two stages. Firstly there were two ‘gateway’ issues. One was about whether FMV had already begun proceedings under the Human Rights Act so was barred from going ahead with her claims in the Authority. The other ‘gateway’ issue was about FMV’s capacity to proceed with her claim. The capacity issue include aspects such as being able to instruct her representative and make the decisions necessary to resolve or pursue her claim.

[10] I had advised the parties that if those gateway issues were resolved in FMV’s favour, that is no statutory bar to going ahead in the Authority and sufficient capacity established, the parties would then be directed to mediation, with the assistance of a Ministry of Business employment mediator, as that had not yet been done. If the matter was not resolved in mediation, the Authority would then have to consider and determine other preliminary issues. One of those issues was whether or not FMV could be said to have raised a personal grievance before the end of her employment or soon after in 2010. If she had raised a grievance then, the present application, made in 2016, appeared to be ‘time-barred’. There is a statutory prohibition on commencing an action in the Authority more than three years after the date on which a grievance was raised.<sup>2</sup> If a grievance was not raised in 2010, FMV sought leave for an extension of time to do so now.<sup>3</sup> Her statement of problem indicated she would do so on the grounds of one of the exceptional circumstances in which the Employment

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<sup>2</sup> Employment Relations Act 2000, s 114(6).

<sup>3</sup> Employment Relations Act 2000, s 114(3) and (4).

Relations Act 2000 allows such leave to be granted – that she was so affected or traumatised by the matter giving rise to her grievance that she was unable to properly consider raising the grievance within the 90-day statutory period.<sup>4</sup>

[11] The gateway issues have been considered under a timetable for the parties to lodge written submissions, relevant background documents and affidavit evidence from medical specialists about FMV's health. I have considered those submissions and documents, along with oral arguments in reply heard today, and reached the conclusions set out in the remainder of this determination. As permitted by s 174A and s 174E of the Employment Relations Act 2000, the oral determination and the written record of it state findings and specify orders but do not set out a record of all evidence and submissions.

### **Choice of procedure**

[12] Where the circumstances giving rise to a personal grievance are such that an employee could make a complaint under the Human Rights Act 1993 or apply to the Authority for resolution under the Employment Relations Act 2000, the employee is required to make a choice between the procedures provided in both acts.<sup>5</sup> Once an employee has applied to the Authority for a resolution of a grievance under the Employment Relations Act, she or he may not exercise or continue to exercise rights in relation to the subject matter of the grievance that she or he might have under the Human Rights Act.

[13] At the outset of FMV's application to the Authority it appeared she was seeking to proceed in both forums as her statement of problem referred to pursuing a discrimination claim in the Human Rights Review Tribunal. Her written submissions confirmed she had not filed a claim in the Tribunal. Inquiries I made to a senior solicitor of the Human Rights Commission earlier, and had told the parties about, confirmed that was so. Around August 2016 FMV had made a complaint under the Human Rights Act which was referred to the mediation, which had been scheduled to take place on 9 December 2016. However the prospect of mediation did not trigger the choice of procedure under either Act as, for the purposes of the Human Rights

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<sup>4</sup> Employment Relations Act 2000, s 115(b).

<sup>5</sup> Employment Relations Act 2000, s 112 and Human Rights Act 1993, s 79A.

Act, the choice to go ahead under that legislation is not made until a party has filed a statement of claim with the Tribunal.<sup>6</sup>

[14] By the application lodged in the Authority on 23 December 2016, FMV has however now made a choice of procedure to go ahead under the employment relations legislation.<sup>7</sup> The claim includes the circumstances in which FMV says she suffered discrimination so, if it can be dealt with at all, it must now be dealt with in the Authority and cannot be the subject of a separate claim in the Human Rights Review Tribunal. A copy of this determination is to be provided to the Human Rights Commission for its information about the status of proceedings in the Authority.

### **Capacity to proceed**

[15] The general rule or presumption is that a party who makes an application to the Authority, or responds to one, has the capacity or competence to proceed. There are a range of definitions of what is meant by capacity. In cases where there may be an issue over whether a party has some temporary or permanent mental impairment, which I take could include a period where a person experiences clinically-diagnosed and serious mental ill-health, the following questions adopted from a High Court Rule could assist in answering whether a person had the necessary capacity.<sup>8</sup> Was she or he capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings? And, was she or he able to give sufficient instructions to a representative to issue, defend or compromise or settle proceedings? If the person was self-represented that latter question could be applied as elements of the earlier question about their capacity to understand.

[16] It is important to emphasise that this point is not suggesting any person clinically diagnosed with some disorder or other condition of mental ill-health therefore lacks capacity as it might be assessed for legal purposes. Just as a person who experiences a physical injury or illness, like a sprained ankle or a debilitating viral infection like measles or shingles, may still be able to carry out many of their usual physical activities reasonably well, so a person experiencing a mental injury or illness may be able to carry out as competently as anyone else activities that require rational evaluation, including being a party in legal proceedings. Just being unwell, in

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<sup>6</sup> *Wang v Hamilton Multicultural Services Trust* [2009] ERNZ 322 at [12] and [13].

<sup>7</sup> Employment Relations Act 2000, s 112(3).

<sup>8</sup> High Court Rules 4.29.

itself, is not the problem or the issue here. In each case the question concerns the current extent or severity of the condition or illness, how effective the treatment a person might be receiving is in managing the negative effects of the condition or illness, and the effect that the severity and treatment might be having on the person's capacity to evaluate and make decisions and so on.

[17] In the particular circumstances of FMV's case this question of capacity has only arisen because she had put it in issue herself in earlier dealings with TZB, over the prospect of mediation in the Human Rights Commission.

[18] On 29 November 2016 legal counsel acting for her at the time advised TZB's representative of the opinion of FMV's psychiatrist that she would "be unable to manage any legal issues" in the mediation scheduled for 9 December. Her application to the Authority was lodged 14 days after the date that mediation had been planned to take place.

[19] During her employment TZB had become concerned about FMV's health and arranged for her to be assessed by a medical practitioner specialising in occupational medicine. She had refused permission for that doctor to tell TZB about personal health information she disclosed to him but, from his assessment, the doctor had told TZB that FMV appeared to have a thought disorder that might progress to paranoid schizophrenia. She had reported to her work coach she thought she was being monitored through the webcam on her laptop. Part of FMV's present complaint was that TZB had not told her or her parents about the doctor's assessment in 2009 and she had not learned of its contents until making a Privacy Act request in 2015. FMV said it was not until 2011 that her mother had worked out she was ill and she was referred to a specialist service. Her statement of problem said FMV had suffered extremely poor physical and mental health and continued to suffer poor health. It said she was "constantly under heavy medication" and suffered severe side-effects.

[20] FMV was given the opportunity to provide evidence about her capacity to proceed with the Authority process by lodging an affidavit from her psychiatrist. The lawyer representing her at the time of lodging her statement of problem withdrew from the proceeding, along with his instructing solicitor, on 28 February 2017. From then, confirmed by written notice on 1 March 2017, FMV has been represented solely by Mrs Yan.

[21] Mrs Yan reported difficulties in getting FMV's psychiatrist to provide an affidavit. Instead she provided a copy of a letter from the psychiatrist dated 10 March 2017 addressed to FMV's former counsel. It included the following statement:

As of today 10/03/2017, it is my considered opinion that [FMV] presently has the capacity, sufficient and necessary, to meaningfully participate in an Authority proceeding including attending mediation.

[22] There was no reason to doubt the authenticity of the letter as being from the psychiatrist or expressing his opinion but I agree with TZB's submissions that the letter was inadequate for the Authority's purposes. I do so for the following reasons.

[23] The letter refers to confirming at a meeting on 3 February with FMV's lawyer at that date that FMV "was well and stable to attend to any legal issues that she might be involved in". It does not refer to FMV attending that meeting or seeing the psychiatrist that day or any day up to 10 March. FMV's written submissions also refer to the 3 February meeting being with her previous lawyer, but not with her.

[24] The only interviews with FMV referred to in the psychiatrist's 10 March letter are said to have occurred on 11 July and 29 December 2016. In short, the psychiatrist's opinion is not current.

[25] Further, a letter FMV had sent to the Authority on 20 February, with the heading "My information for my constructive dismissal claim" included passages that described her health condition as fluctuating.

[26] In one passage (on page 1) FMV said she wanted to continue with her claims under both the Act and the Human Rights Act for the following reason:

As the illegal behaviour conducted by [TZB] and [the doctor who assessed her in 2009] from August 2015 caused my health to worsen again, I have been worrying that a complicated court process addressing all my claims together at one time will place me under a big foreseeable stress and I may become unable again to properly participate in proceedings.

[27] Another passage (page 7) referred to what FMV described as "the fact that my health condition fluctuates from time to time".

[28] The directions made by the Authority for investigation of this 'gateway' issue allowed for FMV's state of health and capacity to be established by way of affidavit

from her psychiatrist and, if that were done, for TZB to request she also attend an assessment with a registered health professional of its choosing who could then also provide an affidavit. It was a proposal intended to help the Authority establish, in as objective and as balanced a way as possible, the true position based on reliable, tested assessments by registered health professionals. FMV did not achieve the first stage of those arrangements. While there may have been practical problems in doing so, because the psychiatrist was said to have been unwilling to make arrangements to provide information by way of affidavit, I have not accepted her representative's submission that TZB could have gone ahead with getting its own medical assessment of FMV. She suggested, not having organised for FMV to attend an assessment itself, TZB had to accept the psychiatrist's letter on what was effectively an unchallenged basis.

[29] Rather, as of the date of this determination, there was not sufficient evidence available to me today that FMV had the requisite capacity to continue with her proceedings. Having put the question of her capacity to proceed in issue herself, FMV bore the burden of establishing she was competent to go ahead. This included questions of whether she understood the risks of litigation, including the prospect of paying costs if unsuccessful, and could make reasonable assessments about whether or not to compromise her claim, if that were in prospect. For that reason I have accepted TZB's submission that the Authority ought to be cautious about allowing the claim to proceed and determine FMV's legal rights in the present circumstances. Her right to appear and conduct her claim had to be balanced against harm and prejudice that both parties might suffer if she presently lacked the capacity required to make binding decisions that might be needed before the Authority's investigation, such as during mediation, or in preparation for and during the investigation. The appropriate course was for the Authority to stay the proceedings until FMV could provide firmer evidence of her capacity to proceed. This would ensure she was properly protected, rather than disadvantaged, while TZB, meanwhile, was not forced to incur costs of unnecessarily defending the claims.

### **Likely problems in getting leave to raise and pursue grievance out of time?**

[30] A further point in support of that conclusion concerns the prospects for FMV succeeding in her application for leave to raise, and pursue, her grievance out of time. The Act allows for leave to be granted if the Authority is satisfied the delay was

caused by exceptional circumstances, such as being too traumatised to raise a grievance, and the Authority also considers it is just to grant the leave.

[31] FMV faces some difficulties if she were to reach this next point in proceeding with her case, that is to establish she met the criteria of this exceptional circumstance to be given leave to go ahead. Her evidence to date has referred to seeking to contact TZB as early as 3 and 5 March 2010 because she wanted to raise a personal grievance and then sending “many emails” between January and August 2011 to complain about how she was treated while working for TZB.<sup>9</sup> In a response sent on 12 January 2011 to one of those emails, a TZB representative suggested FMV contact the Department of Labour if she had concerns about her previous employment. She did not because, according to FMV’s account, “[u]nfortunately my illness caused me to lose my capacity to properly consider raising my personal grievance”. And when, according to FMV’s account, her recovery began to stabilise in August 2015, she was then again active in seeking information from TZB and the doctor and through the Privacy Commissioner.

[32] The case law suggests a high standard of proof is required to establish that what gave rise to a grievance was so affecting and traumatising, a person could not properly consider raising a grievance within 90 days of it occurring:<sup>10</sup>

Although it is not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than 3 months, most cases are unlikely to meet that test.

### **Order: stay of proceedings**

[33] No further steps are to be taken to investigate and determine FMV’s application to the Authority until such time, if at all, that she can provide an appropriately verified and comprehensive medical report that she has the necessary capacity to proceed with her application.<sup>11</sup> In the event that FMV can provide such a report, she should also expect TZB would ask that a registered health professional of its choosing also review relevant medical notes, which would need to be provided,

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<sup>9</sup> Document attached to Statement of Problem headed: “My capacity to seek my justice from [TZB]”.

<sup>10</sup> *Telecom New Zealand Limited v Morgan* [2004] 2 ERNZ 9 at [25].

<sup>11</sup> Employment Relations Act 2000, s 160(1)(f) and s 173(1).

and interview FMV in order to be able to provide a report to assist the Authority in assessing that evidence.<sup>12</sup>

### **Costs**

[34] Costs are reserved.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>12</sup> Employment Relations Act 2000, s 160(1)(a).