

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 76
5603673

BETWEEN MARILYN LATA
 Applicant

AND AUCKLAND DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Catherine Stewart for Applicant
 John Rooney and Carl Blake for Respondent

Investigation Meeting: On the papers

Submissions Received: 3 and 24 February 2017 from Applicant
 17 February 2017 from Respondent

Determination: 22 March 2017

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The application for removal to the Employment Court is declined.**

- B. The parties are directed to attend mediation before 2 June 2017.**

- C. Costs are reserved.**

Removal Application

[1] This is an application under section 178(2) of the Employment Relations Act (the Act) to remove Ms Lata's claims against Auckland District Health Board (ADHB) in their entirety to the Employment Court without prior investigation by the Authority.

[2] ADHB opposes removal. It says there are no grounds to remove this matter to the Court and wishes the Authority to investigate and determine Ms Lata's claims in the first instance.

Employment relationship problem

[3] On 12 October 2016 Ms Lata lodged a statement of problem in Authority claiming one or more conditions of her employment had been affected to her disadvantage by the unjustified actions of ADHB, that she had been unjustifiably constructively dismissed, that ADHB had breached the collective agreement and had breached its statutory obligations of good faith. Ms Lata lodged an application for removal at the same time.

[4] On 2 December 2016 Ms Lata lodged an amended statement of problem withdrawing her claims that one or more conditions of her employment had been affected to her disadvantage by the unjustified actions of ADHB.

[5] By consent the application for removal is being dealt with on the papers currently before the Authority. Section 178 of the Act allows the Authority to remove a matter to the Court without investigating it if one of the following four grounds of removal are established:¹

- 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 grounds relied on by Ms Lata are threefold:

¹ Employment Relations Act 2000 section 788(2).

- a) The case is such a nature and of such urgency that it is in the public interest that it be removed;
- b) An important question of law is likely to arise other than incidentally; and
- c) As an alternative, the Authority should exercise its discretion to remove the matters because in all the circumstances the Court should determine the matter.

Issues

[7] The Authority needs to determine whether one or more of the grounds in section 178(2)(a) to (d) of the Employment Relations Act 2000 (the Act) are made out.

Public Interest

[8] Section 178(2)(b) requires *both* the nature *and* the urgency of the case to be such that it is “*in the public interest*” to order removal to the Court.

[9] Ms Lata says there is a likelihood of far-reaching consequences arising from any determination in this matter. This is because ADHB is a large employer and the nature of the work completed by its employees has direct and closely related consequences on the safety and health of ADHB employees and members of the public.

[10] Ms Lata also says the ADHB is subject to intense public interest and scrutiny as are other public health providers, particularly in the mental health services. The services are directly related to the welfare of the public.

[11] Ms Lata claims she was unjustifiably constructively dismissed following an assault on her by a service user in August 2015. Ms Lata attributes the occurrence of the assault to a failure of the ADHB to adequately provide a safe working environment. Ms Lata says her case relates to the emergency response and staff training policies of ADHB which were put in place to protect the health and safety of staff, patients and members of the public in the event that a serious injury occurs.

[12] The nature of Ms Lata’s claims are matters that will be established through a factual enquiry. The fact that ADHB is a large employer in the public health sector does

not dictate that the case will hold consequences for public welfare or be subject to intense public interest or scrutiny. The Authority frequently hears and determines matters involving District Health Boards including matters related to health and safety.

[13] There is no evidence to support Ms Lata's submission that the outcome of her matter may affect many thousands of employees.

[14] Even if I accepted there were public interest concerns – that is being of public importance as matters of principle and policy – there was no information before the Authority suggesting Ms Lata's case needed to be resolved more promptly than others who are waiting to have their personal grievance applications heard. The urgency ground is not established.

[15] The application for removal based on section 178(2)(b) is declined.

An important and decisive question of law is likely to arise in the matter other than incidentally

[16] An important question of law is one that will arise other than incidentally. Its importance has to be measured in relation to the case in which it arises and is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.²

[17] Ms Lata says that the important questions arising out of this case are:

- a) whether damages for breach of contract are available in the instance of an alleged health and safety breach; and
- b) whether damages for breach of good faith are available.

[18] Ms Lata says these two important issues of law arise out of the factual background of the case, and her claim for damages directly relates to an assessment of the respondent's conduct.

Damages for breach of contract

[19] Ms Lata received Accident Compensation (ACC) payments in respect to the injury she suffered following the assault. Section 317 of the Accident Compensation Act

² *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1.

2001 (AC Act) prohibits the bringing of proceedings independently of the AC Act for damages arising from personal injury covered by the AC Act.

[20] There is no dispute that Ms Lata's injuries were covered by the AC Act. ADHB submits that on that basis, Ms Lata is not able to claim damages for her injuries. In *Robinson v Pacific Seals (NZ) Ltd* the Court held:³

Section 317 prevents an employee who has suffered a personal injury from receiving damages for the injury's effects, such as loss of earnings, distress, embarrassment, and humiliation because such consequences are exclusively compensatable under the accident compensation legislation.

[21] Section 113(1) of the Act states that an employee who has been dismissed may only challenge that dismissal or any aspect of it in the Authority. Ms Lata's claim for breach of contract appears to rely on the same facts as her constructive dismissal. In *Hall v Dionex*, Mr Hall was prevented from pursuing a claim of breach of contract which fell within the factual matrix that gave rise to his dismissal and accordingly comprised a challenge to an aspect of his dismissal which is precluded under section 113(1) of the Act.⁴

[22] The Court in *Hall v Dionex* held that the claims were "*inextricably intertwined*" and that it would be artificial to separate out different aspects of the chain of events which culminated with Mr Hall's dismissal.

[23] I agree with the submissions made on behalf of ADHB that no matter how Ms Lata's claim is framed (whether as a personal grievance or breach of employment agreement) Ms Lata is barred from receiving compensatory damages for her personal injury.

[24] These are issues that the Authority routinely deals with and are within my jurisdiction. I am satisfied there is more than adequate case law on the topic and it is unnecessary for the Court to consider the issue before it is investigated by the Authority.

Damages for breach of good faith

[25] Ms Lata is claiming damages for alleged breaches of good faith. Both parties have referred me to the case of *Hally Labels Ltd v Powell*⁵ to support their position. In that case the Court referred to the substantial modifications to the good faith provisions

³ [2014] NZEmpC 99 at [43].

⁴ [2015] NZEmpC 29 at [105] – [110].

⁵ [2015] NZEmpC 92.

and the introduction of section 4A which introduced penalties for certain breaches of the duty of good faith, thereby precluding the possibility of damages.⁶

[26] The Court in *Hally Labels* went on to state:⁷

While damages for breach of the duty may have been in contemplation prior to the amendments, that can no longer be the position. Certainly Ms Stewart's attempts in her submissions to rely by analogy upon public law remedies of damages for breach of statutory duty cannot have application in a private law case such as this.

A breach of statutory duty is a recognised tort in New Zealand. ... The Employment Court does not have jurisdiction to hear claims in tort except as related to strikes or lockouts and within the limited scope provided in the Act.

[27] The law in relation to the availability of damages for breach of good faith has been settled with the decision from the Court in *Hally Labels*. Ms Stewart referred me to paragraph [137] of the judgment submitting that the Court stated that a claim for damages based on a contractual breach of implied good faith duties may succeed in the case of an "egregious breach". I do not agree with Ms Stewart's reading of paragraph [137]. The Court was referring to the imposition of penalties not damages when referring to egregious breaches.

[28] There is clear authority on this question and therefore it does not require the intervention of the Court. If I was wrong about that, I am not satisfied the question would arise other than incidentally. Ms Lata must establish ADHB breached its statutory duty of good faith. That question can only be answered after an investigation to establish the facts. The question of remedies will be determined if it is necessary and only after I have determined the substantive issues. The question of remedies is not decisive of the matter or strongly influential in determining the substance of the case.

[29] I am satisfied there is no important question of law that arises other than incidentally with respect to whether damages are available for a breach of good faith.

Should the Authority otherwise remove the matter

[30] The Court has stated that the scheme of the Act is clear that personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the grounds in section 178(2) are established.⁸

⁶ Ibid at [127].

⁷ Ibid at [129] – [130].

⁸ Vice-Chancellor of Lincoln University v Stewart (No 2) [2008] ERNZ 249 at [43].

[31] The parties' opportunity to have the matter dealt with at what is likely to be a lower cost in the Authority and to preserve their statutory right of challenge should not be lightly put aside. The issues for determination will depend on factual findings and the application of settled law.

[32] There is no inevitability to either party challenging the Authority's eventual determination.

Outcome

[33] I have not found any of the grounds for removal in section 178(2) of the Act established. This is the sort of case that Parliament intended the Authority to investigate and determine.

[34] The application is declined. The Authority will now proceed with the steps necessary to carry out its investigation, unless Ms Lata decides to first exercise her right to directly ask the Court for special leave to remove her case there.

Direction to mediation

[35] Ms Lata has made an application to the Authority for a direction to further mediation. The application for a direction was opposed by ADHB. Mediation between the parties has been attempted, however that was before Ms Lata resigned from her employment in June 2016.

[36] Under section 159 of the Act the Authority has the discretion not to direct parties to mediation if it considers mediation will not contribute constructively to resolving the matter. Given that mediation has not been attempted since Ms Lata resigned from her employment, I am satisfied mediation is likely to contribute constructively to resolving the matter.

[37] The parties are directed to attend mediation prior to the Authority investigating Ms Lata's claims. Mediation should take place between the date of this determination and 2 June 2017.

Costs

[38] Costs in respect of this application are reserved until after the substantive determination.

Vicki Campbell
Member of the Employment Relations Authority