



New Zealand Employment Relations Authority Decisions

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Thow v Canterbury District Health Board (Christchurch) [2016] NZERA 608; [2016] NZERA Christchurch 219 (9 December 2016)

Last Updated: 12 January 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 219
5582941

BETWEEN RONALD JAMES THOW Applicant

A N D CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority: Helen Doyle

Representatives: Linda Ryder, Counsel for Applicant

Penny Shaw, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 29 November 2016, from the Applicant

6 December 2016, from the Respondent

Date of Determination: 9 December 2016

DETERMINATION OF THE AUTHORITY ON APPLICATION FOR REMOVAL OF MATTER TO EMPLOYMENT COURT

A The application for removal to the Employment Court is granted.

B. The disadvantage personal grievance contained in the statement of problem dated 26 October 2016 and lodged in the Authority on

27 October 2016 as part of File 5582941 is removed to the

Employment Court for hearing and determination. C Costs are reserved.

[1] The determination of the Authority of the applicant's claim of a breach of contract by the respondent has been challenged.¹ The Employment Court is to hear that matter on 22–24 May 2017.

[2] The applicant applies for the removal of an unjustified disadvantage personal grievance subsequently lodged, for hearing and determination by the Employment Court without the Authority investigating it. The applicant relies on the ground set out in [s 178\(2\)\(c\)](#) of the [Employment Relations Act 2000](#) (the Act) that the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[3] The respondent opposes the application for removal under [s 178\(2\)\(c\)](#) of the Act and says that the personal grievance claim is not the same, similar or a related issue to the proceedings which the Employment Court has before it.

[4] The Authority has received written submissions from both the applicant and the respondent and by agreement is to

determine the matter on the papers.

The applicant's submissions

[5] Ms Ryder on behalf of the applicant submits that the first issue for determination is whether there are currently proceedings between the parties which involve the same or similar or related issues. Ms Ryder submits that in both proceedings the question is whether or not the respondent was required to apply the Health Safety and Wellbeing Policy (the Policy) and the Health Safety and Wellbeing System (the System) to the applicant's situation for his benefit. Ms Ryder submits that if the answer to that question is yes then the next question is whether the respondent applied the Policy and System to the applicant's situation and if not does that give rise to a breach of contract or an unjustified disadvantage claim. Remedies fall for consideration if there is found to be a breach of contract or an unjustified disadvantage.

[6] Ms Ryder submits that the personal grievance claim will involve consideration of the same factual disputes between the parties as in the breach of

contract challenge. She submits that even if it is found the issues were not the same

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or similar, the Authority personal grievance proceedings are related to the

Employment Court proceedings in that they are linked or connected.

[7] Ms Ryder submits that if the proceedings are not removed and consolidated then it is possible the applicant could obtain a duplication of remedies giving rise to further challenge from the respondent and delay and expense.

[8] Ms Ryder also submits that the Authority should exercise its residual discretion under [s 178\(2\)\(d\)](#) of the Act and remove the matter to the Employment Court. She submits there will be significant cost savings for both parties by having one hearing to determine both matters because parties and their witnesses will not be required to prepare for and attend two hearings and will avoid multiple proceedings, and that the total number of hearing days will be reduced.

[9] Ms Ryder seeks costs of \$750 on the application.

The respondent's submissions

[10] Ms Shaw, on behalf of the respondent, opposes the application to remove the proceedings to the Employment Court. She does not accept, in her submissions, that the consideration of a personal grievance involves the same or similar issues to the matter in the Employment Court.

[11] She submits that the factual and legal disputes between the parties are likely to be different in the personal grievance proceedings because the Authority considered a breach of contract claim as opposed to a personal grievance.

[12] Ms Shaw submits that the Authority should exercise its discretion and not remove the matter to the Employment Court.

[13] She submits that the new factual and legal issues are ones that can be dealt with by the Authority quickly, as it is well aware of the background to the case and that the evidence can be focused and the cost of having the facts and issues dealt with are less than having them dealt with by the Court.

[14] Ms Shaw submits that a level of appeal is removed if the personal grievance is removed to the Court and that the respondent should not be disadvantaged by a mistake or choice in not including the personal grievance in the original statement of problem. She submits that to remove the matter to the Employment Court for

determination allows the applicant to bypass the Authority to the disadvantage of the respondent.

Determination

Proceedings between the same parties involving the same, similar or related issues –

[s 178 \(2\)\(c\)](#)

[15] The starting point is to consider the statement of problem and statement in reply lodged in this matter and whether the matter involves the same or similar or related issues to the proceedings before the Employment Court.

[16] I accept Ms Shaw's submission that the legal issues to be considered with a breach of contract claim and a personal grievance claim are different and the factual issues may also not be the same. I am however satisfied from my assessment of the statement of problem and statement in reply that there are similar or related factual issues with the proceedings before the Court. The evidence for both proceedings will be similar and will require an assessment of the interactions during the period 18 May

2015 and 19 October 2015 between the parties.

[17] I find that the ground in [s 178\(2\)\(c\)](#) of the Act that the Court already has before it proceedings which are between the applicant and respondent and involve similar or related issues is made out.

Residual discretion – [s 178 \(2\)\(d\)](#)

[18] I have then considered under [s 178\(2\)\(d\)](#) of the Act whether there are any relevant factors against removal. Ms Shaw submits that the personal grievance can be more properly and quickly disposed of by the Authority. Against that there is a risk of witnesses having to attend and give evidence at two hearings about a similar factual background and potentially if the point was reached as Ms Ryder submits there could be a duplication of remedies.

[19] Ms Shaw submits that the respondent could be disadvantaged because the personal grievance was not pursued at the time the matter was being investigated by the Authority. As a result she submits the respondent is now denied access to the Authority with a level of appeal removed. I acknowledge those concerns. I am not persuaded however in the circumstances of this case that would be a factor against

removal. One of the circumstances in this matter is that there are similar or related issues in both proceedings. It would be unsatisfactory for there to be separate proceedings in those circumstances in both the Authority and the Court.

[20] I do not find that there are persuasive factors against removal in this matter.

Determination

[21] I order the removal of the personal grievance to the Employment Court for the Court to hear and determine the matter.

Costs

[22] Ms Ryder has asked for costs of \$750. I consider it appropriate to reserve the issue of costs which will no doubt be dealt with by the Employment Court at a suitable time.

Helen Doyle

Member of the Employment Relations Authority