

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURĀU ROHE**

[2023] NZERA 436  
3240339

BETWEEN VIRAF TODYWALLA  
Applicant

AND THE WAREHOUSE GROUP  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, advocate for the Applicant  
David France, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further evidence 7 June 2023 Application and submissions regarding removal  
20 June 2023 Statement in Reply and opposition submissions to removal from the Respondent

Date of Determination: 11 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Viraf Todywalla, filed a claim with the Authority on 21 April 2022 which raised a number of unjustified disadvantage grievances Mr Todywalla wanted the Authority to address.

[2] On 16 January 2023 the Authority issued a preliminary determination (Determination [2023] NZERA 16) which addressed a preliminary issue regarding whether or not Mr Todywalla had raised any or all of his unjustifiable disadvantage grievances within the statutory 90 day time limit pursuant to s 114 of the Employment Relations Act 2000 (the Act).

[3] The Authority found that a number of Mr Todywalla's unjustifiable disadvantage claims were raised outside of the 90 day time limit for doing so, and did not grant leave for Mr Todywalla to raise those issues out of time.

[4] The Authority identified the two disadvantage grievances which had been raised within time:

- i. The alleged failure by the Respondent to “properly investigate” Mr Todywalla’s 30 November 2021 complaint of bullying, harassment and discrimination; and
- ii. The processing of Mr Todywalla’s ACC issue in respect of TWG’s processing of Mr Todywalla’s claim such that he was unjustifiably disadvantaged.

[5] The preliminary determination concluded by advising that the two matters remaining for determination would be investigated in an investigation meeting scheduled to be held in the period from 9 to 12 May 2023.

[6] On 25 January 2023 Mr Todywalla lodged an Amended Statement of Problem in the Authority seeking to raise disadvantage grievances which he claimed had arisen since the Statement of Problem had been lodged. The additional unjustifiable disadvantage claims included:

- a) TWG’s investigation into Mr Todywalla’s bullying claim on 27 April 2022;
- b) Alleged unilateral changes to Mr Todywalla’s individual employment agreement on 24 April 2022;
- c) An alleged incident between Mr Todywalla and his manager on 22 September 2022;
- d) TWG’s letter to Mr Todywalla dated 9 November 2022; and
- e) An alleged refusal by TWG to provide appropriate discovery of evidence by 23 November 2022.

[7] That same day, 25 January 2023, Mr Halse advised the Authority that Mr Todywalla would be challenging the Authority’s preliminary determination to the Employment Court.

[8] On the basis that the preliminary determination was now before the Court, I advised that no further steps would be taken to progress the matter until the Court’s judgment on the preliminary determination had been issued.

[9] Accordingly no Amended Statement in Reply has been filed by TWG in response to the new issues raised by Mr Todywalla.

[10] On 15 February 2023 Mr Todywalla served TWG with a Statement of Claim challenging the Authority's preliminary determination in the Court.

[11] On 8 May 2023, the parties attended a directions conference in relation to Mr Todywalla's proceedings. As recorded in the Court's subsequent minute dated 8 May 2023, the directions conference was adjourned to provide Mr Todywalla with an opportunity to apply to remove the matter to the court pursuant to s 178(1) of the Act. The Court directed Mr Halse to provide a report to the Court about the progress of the application to the Authority.

[12] On 3 June 2023 Mr Todywalla was suspended from his employment following an incident in the workplace.

[13] On 4 June 2023 Mr Halse lodged a personal grievance with TWG for unjustifiable suspension.

### **Issue**

[14] The issue requiring investigation is whether or not the Authority proceedings should be removed to the Court.

### **The Authority's Investigation**

[15] The Authority has determined this matter on the papers, that is based upon the application and submissions therein received from the Applicant and on submissions from the Respondent.

[16] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Removal**

[17] Section 178(1) and (2) of the Act state:

#### **178 Removal to court:**

- (1) The Authority may, on its own motion, or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

2) 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.

*S 178(2)(a): An important question of law?*

[18] It is submitted for Mr Todywalla that TWG’s action in suspending him appears to raise important questions of law concerning whether or not TWG breached s 4(1A) of the Act, (the duty of good faith), or s103A (3)(c) of the Act (whether Mr Todywalla was given a reasonable opportunity to respond to TWG’s concerns before it took action against him).

[19] It is submitted for TWG that no important question of law is likely to arise in the matter other than incidentally. The matter before the Authority alleges personal grievances claiming unjustifiable disadvantage. These are matters of fact to be determined in light of the provisions of the Act and well-established case law. In regard to the unjustifiable suspension, that is not a matter before the Authority for determination.

[20] A question of law is held to be important if: “its resolution can affect large numbers of employers or employees or both, or if the consequences of the question are of major significance to employment law generally.”<sup>1</sup> However in this case these circumstances do not apply.

[21] Mr Todywalla’s claims before the Authority are of unjustifiable disadvantage. Consideration and determination of justification for disadvantage grievances are not a unique occurrence in the Authority which regularly investigates such matters and I find these do not represent important questions of law.

[22] I am not satisfied that there is an important question of law that is likely to arise in this case.

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<sup>1</sup> *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 at pg [8]

[23] Mr Todywalla's personal grievance for suspension is not before the Authority for determination, and therefore cannot be removed to the Court.

*S 178(2)(b): The case is of such urgency and importance*

[24] It is submitted for Mr Todywalla that the employment relationship problems have had such a serious impact on his mental health that the matter requires urgency in resolving the dispute. Further that TWG's actions in suspending Mr Todywalla warrant the matter being given urgency.

[25] It is submitted for TWG that the case is not of such a nature and of such urgency that it is in the public interest for it to be removed immediately to the Court. The nature of the case concerns claims of unjustifiable disadvantage. Such claims are fact-dependent and are regularly and appropriately decided by the Authority.

[26] It is further submitted that, to date, Mr Todywalla has not progressed his claims with urgency.

[27] I am not persuaded that the matter is of such urgency and importance that it needs to be removed the Court.

[28] Firstly, Mr Todywalla's claims of unjustifiable disadvantage are not unique, nor are they of such importance that it is in the public interest that they be removed to the Court, such matters being regularly addressed by the Authority.

[29] Mr Todywalla's claim of unjustifiable disadvantage similarly is of a nature that is regularly addressed by the Authority. However I note again that it is not currently a matter before the Authority.

[30] Secondly in regard to urgency, a date for the Authority to address and determine Mr Todywalla's unjustifiable disadvantage claims was set in May 2023. However the Authority's investigation and determination of those claims was occasioned and delayed by Mr Todywalla's challenge to the Court.

[31] Finally, I note that in the submissions for Mr Todywalla on the application for removal, it is intimated that any determinations which do not resolve Mr Todywalla's claims in his favour: "are likely to be challenged in the Employment Court".

[32] It is not unusual for a party, dissatisfied with a finding in a determination of the Authority, to exercise its right to challenge that determination. I consider that it is in the interests of justice that that right is preserved for factual as well as legal questions.

[33] Moreover it is possible that neither party disagrees with the outcome of the Authority's investigation. Further it is not inevitable that Mr Todywalla would choose to exercise his right to challenge should the findings of a determination be adverse to him.

[34] Should Mr Todywalla choose to challenge however, inevitably such a challenge would necessarily contribute to a delay in his disadvantage claims being determined by the Authority, but I do not find that the possibility of a challenge is a ground supporting removal under s 178 of the Act.

*s 178(c): the Court already has before it proceedings*

[35] There are no submissions on this ground on behalf of Mr Todywalla.

[36] It is submitted for TWG that the Court does not already have proceedings before it: "which are between the same parties and which involve the same or similar or related issues" because what the Court has before it is a challenge to the preliminary determination deriving from the current matter before the Authority for investigation.

[37] I accept the submission that the ground under s 178(2)(c) is to address the situation where there are separate proceedings of a substantive nature between the same parties where the separate proceedings include the same or similar or related issues. That is not the case here.

*s 178(d): Residual Discretion to remove*

[38] In summary it is my view that the Authority is a cost-effective and experienced forum properly equipped to resolve employment relationship problems including unjustifiable disadvantages. Indeed it has extensive experience in determining claims of that nature.

[39] Having carefully considered the application for removal, and the parties' submissions, I do not find that the grounds for removing a matter to the Employment Court pursuant to s 178(1) of the Act have been satisfied. Accordingly I decline to order the removal of this matter to the Employment Court.

## **Costs**

[40] Costs are reserved pending the outcome of the substantive investigation.

Eleanor Robinson  
Member of the Employment Relations Authority