

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

**[2019] NZERA 187  
3051941**

BETWEEN

MARILYN WHALE  
Applicant

AND

RANGIURA TRUST BOARD  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, Advocate for Applicant  
Samuel Hood, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 11 March 2019 from Applicant  
21 March 2019 from Respondent

Determination: 29 March 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Marilyn Whale, claimed in a Statement of Problem that she had been unjustifiably disadvantaged as a result of the Respondent, Rangiura Trust Board (Rangiura) failing to investigate complaints of bullying by and against her.

[2] Rangiura denied that Ms Whale had been unjustifiably disadvantaged and further raised a preliminary matter that the statement of problem included claims which were outside the 90 day statutory period for raising a personal grievance.

[3] Upon receipt of the statement of problem and statement in reply a Member of the Authority directed the matter to mediation on 25 September 2018. The Applicant did not attend mediation and I confirmed in a Minute dated 2 October 2018 that the direction to mediation issued by the Member remained in place.

[4] Ms Whale has now applied for an order for removal of the matter to the Employment Court.

[5] Rangiuira opposes removal on the grounds that the requirements of s178 (2) (a) – (d) of the Act which set out the basis for removal of a matter to the Employment Court have not been met in this case.

### **Issues**

[6] The issue for determination is whether or not the Authority should remove this matter to the Employment Court.

### **Removal Applications**

[7] The Authority may, pursuant to s 178 of the Act, order removal of a matter to the Employment Court without the Authority hearing it provided that the Authority is satisfied that one of the grounds of s 178(2) of the Employment Relations Act 2000 (the Act) have been met. The grounds as set in s 178(2) of the Act are

- (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.

### *Submissions of the Applicant*

[8] The Applicant submits as a ground for removal which is not the grounds as set out in s 178 (2) of the Act, but that the Authority's processes are incapable of providing Ms Whale with a safe process and access to justice.

### *Submissions of the Respondent*

[9] The Respondent submits

- (a) The application does not disclose any important question of law to be tried;
- (b) The application does not disclose any particular urgency such as that it is in the public interest for this to be considered by the Court;

(c) The court does not have any proceedings between the parties before it; and

(d) There are no other reasons which would justify removal. Rather the application appears to be founded upon: “the Applicant’s advocate’s vitriolic personal opinion about the Authority, rather than any legitimate reason necessitating intervention by the Court.”

[10] The Respondent further submits that the application for removal appears to have been simply brought because of the Applicant’s advocate’s disagreement with the procedure the Authority would follow in this matter, which s 178(6) of the Act states is not a proper reason for removal.

### **Removal Application and discussion**

#### *General Principles of Removal*

[11] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[12] In the event that the party or parties applying for removal satisfy the tests set out in s.178 (2) of the Act, the Authority has a residual discretion to determine whether or not the matter should be removed to the Employment Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Employment Court<sup>1</sup>.

[13] The Applicant submits that the Authority is not the appropriate body to be addressing this matter. However that opinion does not fall under any of the grounds for removal set out in s178(2) of the Act. I therefore turn to the grounds for removal and consider each.

#### *Important question of law*

[14] There is no important question of law raised or apparent in the Applicant’s claim of unjustifiably disadvantage. I find accordingly no basis for removal pursuant to s 178(2)(a) of the Act.

#### *In the public interest to remove*

[15] I do not find that this case is of such a nature and urgency that it is in the public interest that it be removed immediately to the Court. The subject matter is not a novel area of

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<sup>1</sup> *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at [83]

law. Lack of compliance with the direction to mediation made in September last year undermines any urgency basis to the proceeding.

*Same, similar or related matters are already before the Court*

[16] There are no current proceedings before the Court involving the same parties and similar or related issues.

*The Authority considers that the matter should be removed*

[17] In exercising my discretion whether or not to remove pursuant to s 178(2)(d) of the Act, I note the view of the Applicant that the Authority is not the appropriate area of jurisdiction to investigate the Applicant's claims against the Respondent.

[18] I do not accept that view. The claims arose within an employment relationship. The Act establishes that the Authority is an investigative body with exclusive jurisdiction to make determinations about employment relationship problems.<sup>2</sup>

[19] When an application is received, the Authority must direct mediation be used before investigating the matter. This occurred in this case.<sup>3</sup> The Applicant has not complied with the direction to mediation. Non-compliance with the Authority's directions is not a ground for removal although it may give rise to delay in the matter being either resolved or addressed in a further timely manner by the Authority.

[20] Mediation was instigated as a means of enabling the parties to resolve their issues in a low level confidential intervention without escalating the issues to a more formal arena, A direction for parties to attend mediation in the first instance if they have not already done so, is an appropriate exercise of the Authority's procedure.

[21] Accordingly I consider that the Authority acted in compliance with a statutory imperative and appropriately directed the parties to mediation.

[22] I also take into consideration the Applicant's submission that the Authority process is not a safe one.

[23] The Authority is investigative in nature rather than adversarial. It can adapt the manner of its investigation meetings to the needs of a party, whether physical or mental, upon evidence that such steps are necessary, and pertinent information provided in order to address them.

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<sup>2</sup> S 161(1) of the Act

<sup>3</sup> S159 (1)(b) of the Act

[24] I find that the Authority is the appropriate body for investigating the Applicant's claims in the first instance.

[25] In summary having carefully considered the application for removal, I decline to order the removal of this matter to the Employment Court.

[26] I observe that in paragraph 2.8 of the application for removal, the Applicant states that her advocate has applied to the Court for intervention in this matter. I therefore highlight the fact that s178(3) of the Act permits a party to an unsuccessful application for leave to remove to seek the special leave of the Court for an order for removal.

[27] Additionally, it is open to either the Applicant or the Respondent to challenge this determination declining removal to the Employment Court.

#### **Next steps**

[28] The Authority will contact the parties shortly regarding the progress of this matter.

#### **Costs**

[29] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**