

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 224  
5608099

BETWEEN	DAVID WRIGHT Applicant
AND	WEST AUCKLAND AQUATICS INCORPORATED First Respondent
AND	SUSAN TURNER Second Respondent

Member of Authority: Vicki Campbell

Representatives: Mr Max Whitehead for Applicant  
No appearance for First Respondent  
Renika Siciliano for Second Respondent

Investigation Meeting: On the papers

Determination: 5 July 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Wright's claims under file number 5608099 are removed to the Employment Court pursuant to section 178(2)(c) of the Employment Relations Act 2000.**
- B. Costs are reserved.**

**Removal Application**

[1] This is an application by Mr Wright to remove this matter to the Employment Court without prior investigation by the Authority. The application is made in reliance on the ground that the Employment Court currently has before it proceedings between the same parties and which involve the same or similar or inter-related issues.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000 section 178(2).

[2] The Second Respondent, Ms Susan Turner, has consented to the application for removal but no response has been received from the First Respondent, West Auckland Aquatics Incorporated (WAI).

[3] Mr Wright and Ms Turner have agreed that this matter be dealt with on the papers.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the submissions received from Mr Wright and Ms Turner but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Procedural history**

[5] Mr Wright lodged proceedings in the Authority on 27 February 2015 claiming one or more conditions of his employment were affected to his disadvantage by the unjustified actions of WAI and sought payment of arrears of wages.

[6] WAI and Mr Wright signed a settlement agreement in settlement of a personal grievance raised by Mr Wright on 7 August 2015. As part of the settlement the parties requested a mediator from “Department of Labour” which I have taken to mean the Ministry of Business Innovation and Employment (MBIE) to sign the settlement terms under section 149 of the Act. The settlement agreement was not signed off by a mediator because the agreement ostensibly sought to have the holiday pay arrears treated as a donation. Pursuant to section 148A of the Act, the mediator was not permitted to sign off the agreed terms of settlement in which Mr Wright agreed to forego all or part of his minimum entitlement.

[7] On 19 August 2015 WAI and Mr Wright signed a second settlement agreement which was signed by a mediator from MBIE on 4 September 2015. This settlement agreement included a clause which provided for this document to supersede any previous terms of settlement signed by WAI and Mr Wright.

[8] Mr Wright commenced proceedings in the Authority on 4 December 2015 seeking urgent compliance with the 4 September 2015 settlement agreement together with an application for the imposition of penalties against WAI for the alleged breach

of the settlement agreement. In its determination dated 9 February 2016<sup>2</sup> the Authority declined Mr Wright's applications and awarded costs against Mr Wright.

[9] On 15 February 2016 Mr Wright lodged further proceedings in the Authority against WAI and this time included Ms Turner, the past Chair of WAI, claiming one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of the respondents, unjustified dismissal and a claim for arrears of wages for unpaid KiwiSaver contributions.

[10] On 2 March 2016 Mr Wright lodged an application in the Employment Court challenging the Authority's 9 February 2016 determination.<sup>3</sup>

[11] WAI was struck off the Incorporated Society's Register on 6 April 2016. The Authority experienced difficulties in serving both respondents with the proceedings and directed Mr Wright to effect personal service on both WAI and Ms Turner. Following an application by Mr Wright, WAI was reinstated to the register on 9 June 2016.

[12] Ms Turner lodged a statement in reply on 5 May 2016 disputing the existence of an employment relationship between her and Mr Wright. I had previously indicated to Mr Wright and Ms Turner, through their respective representatives, that this would be a matter for preliminary determination.

[13] In a memorandum to the Authority dated 5 May 2016 Mr Wright has alleged that Ms Turner has aided and abetted WAI's unjustified actions which have led both to his disadvantage and his dismissal. It is not appropriate to include claims in memorandum that have not been raised in the statement of problem. Ms Turner has not had the opportunity through her statement in reply to address such claims.

[14] On 24 May 2016 Mr Wright applied to the Authority to have his proceedings removed to the Employment Court.

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<sup>2</sup> [2016] NZERA Auckland 36.

<sup>3</sup> EMPC 58/2016.

[15] Following notification that WAI had been reinstated to the Incorporated Society's Register, the statement of problem lodged on 15 February 2016 was served on the registered office of WAI on 20 June 2016 and the application for removal was served on 15 June 2016. No response has been received from WAI.

#### Issues and determination

[16] The issue for this determination is whether the proceedings lodged on 15 February 2016 should be removed to the Employment Court for determination in the first instance.

[17] A decision as to whether the Authority should remove a matter to the Employment Court is discretionary. Section 178. Mr Wright applies for removal of this matter on the grounds that the Employment Court already has before it proceedings which are between the same parties and which will involve similar and inter-related issues. The related issue involve allegations by Mr Wright that arose out of the employment relationship.

[18] I am satisfied that this is an appropriate matter for the Authority to exercise its discretion to remove this matter in its entirety to the Employment Court for hearing and disposition without the necessity for the Authority to investigate the matter.

#### **Costs**

[19] Costs are reserved. Because this matter was dealt with on the papers and no actual appearances have been required I am of a mind to let costs lie where they fall.

[20] However, the parties are invited to resolve the matter between them. If they are unable to do so Mr Wright shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. WAI and Ms Turner shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell

Member of the Employment Relations Authority