IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 109
EMPC 404/2020

IN THE MATTER OF	an application for special leave to remove proceedings to the Employment Court
BETWEEN	MICHAEL ROBERT JACKSON Applicant
AND	THE AORERE COLLEGE BOARD OF TRUSTEES Respondent

Hearing: On the papers

Appearances: B S Eda, advocate for applicant
R M Harrison, counsel for respondent

Judgment: 15 July 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] The applicant filed a statement of problem in the Employment Relations Authority over two years ago, on 28 May 2019. The matter has yet to be investigated. The applicant sought an order from the Authority to remove the matter to the Court for hearing. That application was based on ongoing delays in the Authority which were said to be prejudicing Mr Jackson. The Authority declined the application.[1] Mr Jackson has now applied for special leave to remove the proceedings to the Court. That application is opposed by the Board of Trustees. The parties agreed that the application should be dealt with on the papers.

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1 *Jackson v The Aorere College Board of Trustees* [2021] NZERA 220 (Member O'Sullivan).

[2] The Employment Relations Act 2000 (the Act) generally requires proceedings to be filed in the Authority, and for matters to be dealt in that forum with rights of challenge to the Court. While that is the usual process, the statute recognises that there will be instances where matters are appropriately removed to the Court. In this regard the Authority may, on its own motion, order removal or one or both parties may apply for removal under s 178. That provision states that:

> **178 Removal to court**
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> (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.
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> …

[3] The basis on which removal may be ordered by the Authority is set out in s 178(2). The grounds are listed as alternatives:

> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> (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
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> (c) the Court already has before it proceedings which are between the same parties and which involve the same or related issues; or
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> (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[4] Where an application for removal is declined the unsuccessful party may apply to the Court for special leave to remove under s 178(3). In exercising its discretion, the Court must have regard to s 178(2) of the Act and (to the extent relevant) the factors contained within it. It is notable that the factors that the Authority is to apply on a removal application are broader than those that the Court must apply on an application for special

leave, although the reasons for this are unclear.[2] And the Court has a discretion to refuse special leave, even where one or more of the factors listed in s 178(2)(a)-(c) are made out.

[5] I note one further point. The Court of Appeal recently touched on the scope of s 178 in *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza*. There the Court observed that:[3]

> removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.

[6] Mr Jackson's claim has not been fully investigated by the Authority. Does that mean, following *Gill Pizza*, that the application for leave to remove the proceedings must be approached with particular caution? I do not think that this sensibly follows from the Court of Appeal's reference to the powers of removal in s 178(2), given that s 178(1) provides that removal is limited to cases which have *not* been investigated by the Authority – removal obviates the need for the usual process of investigation at first instance. Rather I read *Gill Pizza* as simply reinforcing what s 178(2) makes clear, namely that Parliament has specified a range of (limited) circumstances in which removal may be considered appropriate; the catch-all in s 178(2)(d) is to be read in that light.

[7] Mr Jackson has set out the reasons why he wishes to have his proceedings removed to the Court in an affidavit. The following is a summary of the points which emerge. Mr Jackson is a teacher with international experience. He came to New Zealand about five years ago and later took up a role at Aorere College. Issues subsequently arose which ultimately led to Mr Jackson's dismissal. He later filed a statement of problem with the Authority. Mr Jackson describes ongoing delays in progressing his matter in the Authority, and difficulties he says he experienced with Mediation Services. He says that there were further delays when he sought to have the matter removed to the Court. In essence Mr Jackson says that the delays are having a severely prejudicial impact on him,

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2 See the discussion in *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894, at [50].

3 *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192 at [48].

that he is destitute and that he has been unable to secure work within his professional field since his dismissal. He appears to lay much of the blame for difficulties finding alternative work at the feet of the delays. Three particular points are identified in support of the application for special leave:

(a) his destitution is a matter of public interest (s 178(2)(b));

(b) there is a public interest in the allegedly unprofessional behaviour by the respondent's representative and a public interest in that behaviour being subject to a review (s 178(2)(b));

(c) the mechanism for making the current application through s 178 of the Act is unnecessarily cumbersome and time consuming and is a matter of law directly relating to the case (s 178(2)(a)).

[8] Mr Jackson acknowledges that, in declining to remove the matter, the Authority observed that it was now in a position to deal with his grievance but says that he lacks confidence in its ability to deal with his claim in a just manner.

[9] Mr Jackson is clearly frustrated with the way in which the Authority has dealt with his case to date. Counsel for the respondent submits that Mr Jackson and his representative must bear some responsibility for difficulties with case management. I am not in a position to make any assessment of that. What is however clear is that the grievance has been on foot for a considerable period of time and that this is significantly impacting on Mr Jackson.

[10] In determining whether Mr Jackson's proceedings should be removed to the Court for hearing, I must apply the statutory considerations set out in s 178(2)(a)-(c). I deal with the points made on Mr Jackson's behalf in reverse order.

[11] I do not consider that the perceived limitations of the process provided for under s 178 amount to an important question of law. They are matters for Parliament, if deemed appropriate. They are not questions that the Court is able to consider when deciding whether an application for special leave should be granted.

[12] In my view it is seriously arguable that significant delays in progressing a case to determination in the Authority may amount to a reason for removal under s 178(2)(b). In this regard it may be said that there comes a point in time in which resolution of an employment relationship problem or dispute becomes so pressing that the identity and attributes of the institution which decides it are of less relevance than the desirability (in the broader interests of justice, and therefore the public interest) of a decision being made.

[13] The point is likely to be particularly acute in cases involving ongoing employment relationships, and have particular relevance in light of what appears to be the ongoing impact of COVID-19 in the Authority.[4] As the Act makes clear, there is a strong statutory imperative of dealing with problems at an early stage, supporting successful employment relationships where possible.[5] The further along the time continuum an employment problem or dispute is permitted to travel, the less likely the statutory objective will be met.

[14] It will be apparent that I do not see s 178(2)(b) as necessarily limited to matters which are urgent from the outset. Rather, urgency can build over time, requiring intervention at some point along the continuum. But whether or not the urgency threshold in s 178(2)(b) has been met in any particular case would require an assessment of the particular circumstances – to put it another way, delay may not, of itself, give rise to urgency.

[15] In this case the Authority member who now appears to be handling the matter has made it clear that the case will be given priority with an investigation meeting set down for 15 and 16 September 2021.[6] In these circumstances, even if I had been persuaded that the case was of such a nature (an employment relationship problem that needs to be resolved to (for example) enable Mr Jackson to move on) and of such urgency (because of the impact of ongoing delays) that s 178(2)(b) was satisfied, I would nevertheless have exercised my discretion against granting special leave in the particular circumstances.

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4 Such issues have not, to date, manifested in the Court.
5 Employment Relations Act 2000, ss 101(ab) and 143.
6 *Jackson v The Aorere College Board of Trustees* NZERA Auckland 3060512, 22 June 2021 (notice of direction).

[16] The application for special leave is declined. If any issue of costs arises I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 3.15 pm on 15 July 2021