IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 195
EMPC 188/2024

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for an order that the Employment Relations Authority investigate the matter which is before the Employment Court
BETWEEN	JAMES SMALLEY Plaintiff
AND	HAMILTON HINDIN GREENE LIMITED Defendant

Hearing: 19 August 2024

Appearances: S Brookes and E Mishra, counsel for plaintiff
T Mackenzie, counsel for defendant

Judgment: 9 October 2024

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for an order that the Employment Relations Authority investigate the matter which is before the Employment Court)

Introduction

[1] Due to difficulties in investigating an employment relationship problem about entitlements under the Holidays Act 2003 (HA), the Employment Relations Authority removed that problem to the Court.[1] The Authority found that there were "exceptional

[1] *Smalley v Hamilton Hindin Green Ltd* [2024] NZERA 315 (Member Beck).

grounds" for removing the entire matter under s 178(2)(d) of the Employment Relations Act 2000 (the Act).

[2] Now, Mr Smalley, the former employee who raised the problem against his former employer, Hamilton Hindin Greene Ltd (HHG), has applied for an order declaring the matter was not properly removed, and that the Authority should now be directed to investigate his claims.

Mr Smalley's employment relationship problem

[3] Mr Smalley says his employment relationship problem relates to underpaid HA entitlements and to unpaid wages.

[4] Mr Smalley was an employee of HHG from 2006 until 2018. He says that, until June 2017 he was also a director and shareholder of the company. Upon resigning as a director, he was required to sell his 30 per cent shareholding. During the process of valuation of his shares, Mr Smalley says he became aware that he had been underpaid HA entitlements as an employee, as well as contractual salary or wage entitlements.

[5] In June 2021, Mr Smalley filed a statement of problem in the Authority raising his claims. He filed an amended statement of problem on 20 July 2022. In it he pleaded that during his employment, he had been remunerated at 40 per cent of revenue he generated in each month. However, issues had arisen as to whether his entitlements under the HA had either been correctly calculated and/or allowed for in the payments made to him.

[6] The amended statement of problem went on to seek a range of orders, being relevant entitlements, interest thereon, penalties and costs. Significantly, these claims were not quantified. Indeed, Mr Smalley takes the position, even at the hearing before the Court on the removal issue, that he is not yet able to quantify his claims, some three years after filing his original statement of problem.

[7] Initially, there was an issue concerning certain settlement agreements which had been reached between the parties in 2017 and 2018. Mr Smalley asserted that due

to certain misrepresentations, these were voidable. The Authority determined that the settlement agreements did not prevent him from pursuing his claims.[2]

HHG's challenge

[8] HHG brought a challenge to the determination, relating to the effect of one of the settlement agreements – that of 2017.

[9] The challenge was the subject of a directions conference in February 2023, which led to the filing of evidence. However, in May 2023, HHG discontinued its challenge. Costs were fixed by the Court in July 2023.[3] That brought the issues relating to the settlement agreements to an end.

Resumption of the investigation process in mid-2023

[10] The Authority's investigation resumed. It is necessary to set out the parties' interactions. The details of the matters which the Authority was called on to deal with became increasingly complex and ultimately resulted in the Authority considering removal of the entire matter to the Court.

[11] On 8 June 2023, a case management conference was convened by the Authority. A detailed claim for disclosure of documents, which Mr Smalley said were relevant to the matter before the Authority, was filed that day. After hearing counsel, the Authority directed the parties to attend mediation in an attempt to resolve the matter, and that by 30 June 2023, HHG was to disclose all relevant documentation held by it pertaining to the matters in dispute.

[12] On 4 July 2023, HHG disclosed documents which it said it had gathered in response to the disclosure request.

[13] An issue then arose between the parties as to the adequacy of the disclosure which had been provided. Mr Smalley said that because disclosure was inadequate, mediation should not proceed in the meantime.

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2 *Smalley v Hamilton Hindin Green Ltd* [2022] NZERA 525 (Member Beck).
3 *Hamilton Hindin Greene Ltd v Smalley* [2023] NZEmpC 110.

[14] For its part, HHG responded in detail via its lawyer, Mr Mackenzie, on 19 July 2023. Amongst a number of issues, he referred to civil litigation in the senior courts involving Mr Smalley and the ongoing shareholders of HHG. He said Mr Smalley had an appetite for litigation "at any cost". Mr Mackenzie said there had initially been proceedings in the High Court,[4] and then in the Court of Appeal.[5] At the time of Mr Mackenzie's memorandum, Mr Smalley had sought leave to appeal to the Supreme Court.[6]

[15] Mr Mackenzie cited a passage from one of the High Court judgments which stated it was clear Mr Smalley harboured deep resentment towards the continuing shareholders, that he had maintained positions which were unreasonable throughout the process involving valuation of shares, and that he was primarily responsible for the delays that occurred in completing it, which added significantly to the other shareholders' costs.[7]

[16] Mr Mackenzie went on to comment in detail on the disclosure requests that had been made, pointing out that the issue as to the scope of documentation to be provided for the purposes of the investigation could only relate to documents which would assist the Authority in resolving the issues between the parties. He said the disclosure process was not one which should be controlled by Mr Smalley. HHG was happy to discuss with the Authority what further information it would like provided. Counsel went on to make comments about the documents which had been disclosed.

[17] Mr Brookes, counsel for Mr Smalley, responded with a detailed critique of these comments, and set out a formulation of the documents which he said were now required. He also said the obiter comments made by the High Court in separate litigation were irrelevant.

[18] On 16 August 2023, the Authority issued a memorandum relating to the issues raised by counsel. The Member stated that the first and perhaps only issue was whether the material sought would assist him in his investigation of Mr Smalley's

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4 *Williamson v Smalley* [2022] NZHC 1452; and *Williamson v Smalley* [2022] NZHC 1789.
5 *Smalley v Williamson* [2023] NZCA 174.
6 Leave was declined: *Smalley v Williamson* [2023] NZSC 101.
7 *Williamson v Smalley* [2022] NZHC 1789 at [47].

claims to recover allegedly unpaid statutory holiday entitlements. He was persuaded that the case for disclosure was made out, apart from a privileged exception, and directed the filing of documents as listed by Mr Brookes by 28 August 2023. Other directions to advance the proceeding were also made.

[19] On 25 August 2023, Mr Mackenzie told the Authority that HHG was concerned that this direction had been made without the company being heard in reply to Mr Brookes's memorandum on which the Authority had relied. In particular, concern was raised about a request for "all emails to and from Mr Smalley's email account between 1 and 31 August 2017". Previously, a request made by Mr Smalley had been put on a more limited basis. It was suggested that the Authority should recall the directions it had made, and that there should be a discussion as to the extent of disclosure which had been given to that point. These points were supported by affidavit evidence from Ian Perry, executive officer of HHG, and a current shareholder.

[20] This request resulted in the Authority convening a case management conference call on 1 September 2023.

[21] At about the time of the conference, Mr Brookes filed a detailed response to Mr Mackenzie's memorandum of 25 August 2023, and on 6 September 2023 applied for a compliance order in respect of the disclosure of documents which, on 16 August 2023, the Authority had directed should be provided.

[22] In the course of the case management conference (according to a subsequent memorandum filed by Mr Mackenzie on 19 September 2023) the Authority made it clear that both parties were overestimating the Authority's jurisdiction, powers and resources to deal with ongoing disclosure arguments. According to counsel's memorandum, the Authority had made it clear it would leave HHG to make relevant disclosure, and expected it to do so, and would otherwise wait until the investigation meeting.

[23] By this time, a date for the investigation meeting to resolve Mr Smalley's claim had been established for 21 and 22 November 2023. His evidence had been timetabled to be filed by 15 September 2023.

[24] On 19 September 2023, Mr Mackenzie filed a memorandum in response to Mr Smalley's application for a compliance order. It outlined the steps as to disclosure which had been taken to that point, and recorded that the company was opposed to the making of a compliance order. He submitted this issue would need formal resolution if the application was to be advanced.

[25] On 21 September 2023, the Authority advised that a further case management conference would be convened on 25 September 2023.

[26] That conference duly took place and resulted in the Authority issuing directions stating the disclosure issues would be resolved at a preliminary investigation meeting. The dates for the originally scheduled substantive investigation would be subsumed to a one-day investigation meeting on preliminary issues, to be held on 22 November 2023. The parties were directed to file statements of evidence for that purpose in advance.

[27] Both sides complied with this direction, setting out the history of disclosure to that point in some detail.

[28] The evidence is that the hearing on 22 November 2023 became something of a "round table discussion" led by the Member. With the Authority's assistance, the parties were able to reach agreement on a number of matters which the Authority confirmed in oral directions.

[29] A few days later, there was an exchange between counsel and the Authority as to whether a record of the oral directions made by the Authority needed to be issued. It was agreed this was unnecessary as there was a sufficient record as to the disclosure that was to occur by Mr Smalley on the one hand,[8] and HHG on the other.[9]

[30] On 5 December 2023, Mr Perry filed an affidavit, updating the Authority as to the steps which had been taken to satisfy the disclosure understandings. An issue was raised shortly thereafter between counsel as to whether certain documents which Mr

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8 As confirmed in an email of 1 December 2023 from Mr Brookes to Mr Mackenzie.

9 As confirmed in a second email of Mr Smalley, as forwarded by Mr Brookes to Mr Mackenzie on 4 December 2023.

Smalley was to provide were to be provided in their entirety, which was HHG's position; alternatively, whether this would be limited to relevant payroll information only, since not all of the information that had been provided by a third party as a result of a request under the Privacy Act 2020 was relevant to the present proceedings, being Mr Smalley's position. After exchanges on this point, copied to the Authority, it was indicated that the Member was unavailable to discuss the matter until the week of 18 December 2023, with an extension being granted to Mr Smalley to provide the documents in question.

[31] On 12 December 2023, notice was given of an investigation meeting which would commence on 8 April 2024, later amended to 7 April 2024. It appears there was no formal timetable at that stage for the filing of evidence in advance.

[32] On 16 February 2024, a dispute arose as to whether Mr Smalley had complied adequately with disclosure of the documents he had agreed to provide. HHG sought an adjournment of the investigation and a compliance order. HHG's contentions were resisted in a memorandum filed for Mr Smalley on 23 February 2024.

[33] By email sent on 28 February 2024, an Authority officer advised that the Member had reviewed the parties' memoranda and that he concurred with an evidence timetable proposed by Mr Brookes. This included Mr Smalley filing his evidence by 8 March 2024. The Authority "did not consent to an adjournment of the investigation meeting."

[34] On 8 March 2024, Mr Brookes filed and served a memorandum describing documents which he said should have been disclosed by HHG but had not been. Those were particularised in some detail. Disclosure was sought within 10 working days, as well as a direction that Mr Smalley's obligation to file and serve briefs of evidence would be extended to a date which was five working days after the provision of those documents. The request was supported by an affidavit from Mr Smalley.

[35] A detailed memorandum in response was filed and served on behalf of HHG on 15 March 2024. One of the responses related to an assertion that had been made by Mr Smalley in his recent affidavit that the company had created new payslips, after

the Authority's 2023 direction to disclose those, by adding information favourable to the company, and that those modified payslips had been produced to the Authority as if they were the original payslips. It was said that Mr Smalley was now asserting that HHG had deliberately misled the Authority.

[36] Mr Mackenzie also objected to what were described as ongoing and excessive requests for documentation. He pointed out that discovery was to be framed and informed by pleadings. However, the pleadings were insufficient and vague, suggesting only that all types of payment were wrong. There was still no quantification of Mr Smalley's claims, nor were certain incorrect payments identified, including the time period to which they related. Natural justice required the advancing of a clear claim, following which the company needed to be given a full opportunity to respond.

[37] It was suggested that it may be most practical to attend the Authority in person, as had occurred previously, so as to work through the issues. Alternatively, the Authority might consider that the ongoing applications were exhausting its disclosure regime and that the proceeding might best be transferred to the Court, where there is a more regulated and formal pleading and discovery regime which could lead to a better resolution of the applicant's concerns.

[38] On 18 March 2024, counsel were advised that the Member had reviewed the memoranda lodged by them, that he was conscious of the lateness of the request for further information, and considered that the only way forward would involve an adjournment. The Authority accordingly directed that HHG provide the documents sought in counsel's memorandum of 8 March 2024, within 20 working days. Fourteen days thereafter, Mr Smalley was to file and serve briefs of evidence which were to state what payments were alleged to be wrong, when those payments occurred, and on what basis they were incorrect. Upon receipt of those briefs, HHG was to have a further 14 days to provide its briefs. An in-person investigation meeting would then take place on 9 and 10 July 2024, subject to the parties' availability.

[39] The same day, Mr Mackenzie emailed the Authority, stating that there was a problem with the provision of unredacted board reports to Mr Smalley, as had been

sought. The company favoured the provision of a summary of relevant information in board reports in the form which had been provided to the Authority on 15 March 2024. If original board reports with redactions were in fact to be disclosed, then it would be necessary for the Authority to review the material which HHG said should be redacted. Mr Mackenzie said there would be various legal implications for the disclosure of unrelated information if board reports were to be provided. Secondly, the timeframe for the filing of HHG's briefs of evidence was inadequate. Thirdly, counsel was unavailable on the proposed dates of hearing. The Court was advised that no further response was received from the Authority regarding these points.

[40] In his evidence to the Court, Mr Perry said that the company then attempted to prepare further disclosure in accordance with the directions that had been given, in an attempt to keep the July hearing on track. However, in the course of doing so, a number of anomalies were revealed. These included the issue as to how board reports should be disclosed.

[41] On 17 April 2024, Mr Mackenzie filed a detailed memorandum raising concerns as to how the disclosure issue should be dealt with in light of the Authority's recent directions. One of those concerned the possibility that the Authority should review certain areas of information before disclosure occurred. The other was to deal with a concern that what was now sought had evolved from earlier requests and directions. Mr Mackenzie submitted the Authority may not have been aware of the extent of them when making directions on 18 March 2024. Nor did HHG have a fair opportunity to be heard before those directions were made. Clarification or recall was sought.

[42] Affidavit evidence in support of these problems was filed by Mr Perry, and from of a third party payroll provider.

[43] In a second memorandum dated 18 April 2024, Mr Mackenzie said that extended discovery had also been sought in respect of revenue transaction reports. Originally, these had been sought for each pay period from January 2013 to March 2015. Mr Smalley's formulation of further documents, as approved by the Authority

on 18 March 2024, had extended the request back to May 2012. The same issue was raised in respect of the requested payslips.

[44] In summary, the company's position was that it was willing to provide the board documents for the Authority to check against the summary document that had been prepared. Clarification was also required as to whether the Authority had intended to order disclosure for documents on a more extended basis than had originally been sought. There was also an issue as to whether the additional documents that were now sought were relevant to Mr Smalley's claims. HHG said it would accordingly be necessary for the last direction to be recalled so it could be heard on the issue of relevance.

[45] On 22 April 2024, the parties were advised by the Authority that the Member had reviewed the respective memoranda and resolved to refer the matter of disputed disclosure to the Court under s 178(1) of the Act, on its own motion. Submissions were requested on this possibility by 3 May 2024.

Submissions as to removal

[46] On 2 May 2024, Mr Mackenzie filed submissions suggesting that there were six reasons for removing the entire proceeding, and not just the disclosure issue, to the Court. These were:

(a) The more formal pleadings requirements would ensure that Mr Smalley was required to fully and fairly set out his claim, in turn assisting with his discovery concerns and any response to them.

(b) The formal discovery regime in the Court would assist in distilling what was actually relevant and required.

(c) The requirement for sworn evidence, and evidence being given in a court of record, is important where allegations of creating false records had been made and needed to be determined.

(d) The regime of predictable interlocutory costs awards may encourage Mr Smalley's disclosure applications to be more considered.

(e) The company was confident that Mr Smalley would challenge the ultimate decision of the Authority, regardless of result.

(f) A judicial settlement conference may be convened, after a particular claim is directed and produced, which in combination may have more chances of resolving the matter than previously attempted mediation conducted by the Ministry of Business, Innovation and Employment.

[47] The submissions went on to develop some of these points. With regard to the inevitability of challenge by Mr Smalley, it was submitted he had already demonstrated his willingness for litigation in the civil proceedings, to which reference had been made previously. Mr Mackenzie also said there had been "endless requests for disclosure" which demonstrated that the "maximum litigation attainable" would be sought.

[48] Mr Mackenzie submitted that costs had been incurred which were already likely well out of proportion. Moreover, costs would be increased due to significant duplication in the Court.

[49] Relevant authorities were also cited.

[50] On the same day, Mr Brookes emailed the Authority stating that Mr Smalley intended to oppose the possibility of removal. It was noted that since HHG had now applied for complete removal, further time would be needed for Mr Smalley to respond to the Authority's proposed removal as to disclosure only, and the respondent's application for entire removal.

[51] On 9 May 2024, submissions for Mr Smalley were filed. In summary, his opposition to removal of disclosure only was:

(a) There could be no dispute about the disclosure directions which had been made on 18 March 2024. They had not been challenged by HHG. The company was now outside of the statutory timeframe to do so (if indeed there was a right of challenge given the restrictions in s 179(5) of the Act). There was no application to consider such a challenge out of time and nor was there any basis for doing so.

(b) It would circumvent the procedure specified under s 179 of the Act to have the directions being relitigated in the Employment Court.

(c) Re-litigating the directions would result in unnecessary delay and cost to Mr Smalley.

[52] Entire removal was opposed because:

(a) the Authority already had a good understanding of the issues and was best placed to determine this matter;

(b) none of the grounds specified in section 178(2)(a)–(c) of the Act applied;

(c) removal would significantly increase Mr Smalley's costs and result in further delay;

(d) removal would be contrary to the objects of the Act and would be inconsistent with case law; and

(e) removal would extinguish Mr Smalley's ability to challenge any finding of fact, as would otherwise be the case were the matter to remain before the Authority.

[53] Authorities were also cited to support the submissions made on Mr Smalley's behalf.

The Authority's determination

[54] In its removal determination, the Authority summarised the procedural history. I do not repeat the details because the chronology which I have outlined to this point was appropriately summarised by the Member who obviously had close knowledge of the events given the numerous directions he had made from time to time.

[55] The Authority went on to refer to the submissions. Reference was made to the six grounds advanced by Mr Mackenzie, as well as his observations as to costs and the fact that the Court's "structured process" of document disclosure would better serve the parties, and that the case was more suited to a purely adversarial process.

[56] The Authority recorded the submission made for Mr Smalley that the disclosure matter had been settled in its direction of 18 March 2024 and that this had not been challenged. It had been submitted that removal of the entire matter to the Court had been opposed on the basis that the Authority was best placed to determine the matter, that removal would increase Mr Smalley's costs, and that further delay would ensue. It was noted that Mr Brookes has suggested that removal would be contrary to the objectives of the Act, inconsistent with case law, and would prevent Mr Smalley from challenging any findings of fact.[10]

[57] The Authority then analysed the various points made. It noted that removal applications were governed by s 178 of the Act, and that in doing so, it was necessary for it to consider the provisions of s 178(2), but also the objects described in s 3 of the Act, including that a key part of the Act's purpose was to reduce the need for judicial intervention.[11] It was noted that s 143 also stipulated objects relating to the establishment of procedures and institutions, one of which was that the Act recognises that while employment relationships are ideally best resolved promptly by the parties, there will "always be some cases that require judicial intervention".[12]

[58] The Authority said that its "first stop" role as an adjudicative body having exclusive jurisdiction for employment relationship disputes, had been affirmed by the

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10 *Smalley v Hamilton Hindin Green Ltd*, above n 1, at [19].
11 Employment Relations Act 2000, s 3(a)(vi).
12 Section 143(e).

Supreme Court in *Gill Pizza Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)*[13] and *FMV v TZB.*[14]

[59] The Authority acknowledged that the Court of Appeal in *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* had suggested that removal to the Court before investigation should be "contemplated in relatively limited circumstances".[15]

[60] Then the Authority said:

> [24] In applying the Authority's essentially residual discretion under s 178(d) of the Act, I consider the lengthy attempts by the parties to resolve disclosure matters and the contextual factors I have identified in the history of this employment relationship problem make it objectively reasonable to find intractable and unique features in this matter. While the Authority has made several attempts to encourage agreement on the disclosure of documentation and I acknowledge that our directions have not been formally challenged, it has proven so far impossible to get agreement on a way forward in a timely manner. Mr Smalley perceives HHG is being tactically obstructive and HHG perceive Mr Smalley is unnecessarily pursuing irrelevant disclosure items to put them to cost in furtherance of a bitter employment relationship breakup.
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> [25] Although the central feature of this matter is Mr Smalley seeking to recover statutory holiday entitlements, the context of his employment with HHG and how he was remunerated and had holidays allocated was not straightforward but he could not be described as someone being in a vulnerable position. Unfortunately, I observe that the obdurate stance of both parties to this matter has prolonged any chance of what should have been, and could still be, resolved easily by compromise and agreement.
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> [26] In such unique circumstances, I find that an exception has been made out to remove the whole matter to the Employment Court so that discovery issues can be resolved and the substantive matter consequently dealt with.
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> [27] I have had regard to timing issues and further delay but nothing pertaining to Mr Smalley's personal circumstances has been identified that would persuade me that removing this matter would not best serve Mr Smalley's apparent desire to litigate this matter further and HHG's view that disclosure be dealt with by the court.

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13 *Gill Pizza Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)* [2021] NZSC 184, [2021] ERNZ 1362 [*Gill Pizza (SC)*].

14 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.

15 *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192, [2021] ERNZ 237 at [48].

[61] Accordingly, the Authority found that "exceptional grounds" existed for removing the entire matter to the Court. The matter was so removed. The investigation meeting scheduled for 23–24 July 2024 was vacated.

[62] Costs were reserved, with the Authority indicating its view that consideration should be given to costs lying where they fall.[16]

Application for an order that the Authority investigate the matter

[63] On 25 June 2024, Mr Smalley applied to the Court for an order that the Authority be directed to investigate and determine his claims, and that the Court should stay the requirement that he file a statement of claim in respect of the removed proceeding.

[64] At a telephone directions conference on 16 July 2024, Judge Smith discussed with counsel how best to deal with the application. He determined that it would not be appropriate to deal with the application on the papers for two reasons. First, the sheer volume of documents which would likely be relied on would make the task of considering them too onerous for a presiding judge to work through without the assistance of counsel. Secondly, the application was rare, and one which would benefit from the interchange between the judge and counsel possible during oral argument.

[65] Suitable directions were made. As a result, both parties filed evidence with regard to the history of the matter, as well as submissions. An in-person hearing was convened, which allowed the extensive material to be fully discussed.

Legal framework

[66] It will be necessary to discuss various aspects of s 178 of the Act, which provides as follows:

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16 *Smalley v Hamilton Hindin Green Ltd*, above n 1, at [29].

178 Removal to court generally

(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.

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

(4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.

(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.

(6) This section does not apply—

(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

[67] In *Air New Zealand Ltd v Kerr*,[17] Chief Judge Colgan referred to the fact that, on the basis of previous authorities, a right of challenge to a decision to remove a matter under s 179 would potentially be available.[18] Having identified this alternative pathway, however, he went on to state:[19]

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17 *Air New Zealand Ltd v Kerr* [2013] NZEmpC 114.

18 Relying on dicta in *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 (EmpC); and *New Zealand Baking Trades Etc Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305 (EmpC).

19 *Air New Zealand Ltd v Kerr*, above n 17, at [8].

> … [section] 178(5) does allow a party to apply to the Court to exercise its discretion to remit a matter to the Authority and … there is no statutory restriction upon when such an application can be made and/or decided. That said, however, Parliament must have intended that the Court's power to make an order under s 178(5) would be exercised on a potentially narrower basis than in the circumstances applicable to a challenge under s 179. A more general right of challenge under s 179 (especially by hearing de novo) permits new evidence or issues to be considered by the Court whereas an application under s 178(5) focuses on the correctness of the Authority's determination which, in turn, will encompass the potentially narrower range of evidence or issues that were then before it.

[68] He then observed that the Court must focus on the correctness of the Authority's determination at the time it was given. Thus, it would not be possible for a party relying solely on an application under s 178(5) to adduce updated relevant information or material that may have, for any reason, not been considered by the Authority.[20]

[69] I also note that the words "not properly" in s 178(5) have been interpreted to mean that the Court must be satisfied that the Authority was wrong to order removal.[21]

[70] In this case the Authority relied on s 178(2)(d) when making its order for removal. This subsection was discussed by Chief Judge Inglis in *Johnston v The Fletcher Construction Co Ltd* as follows:[22]

> [39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a)-(c), which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose. The overarching point will be whether a particular case is best suited for resolution by the Authority's investigative processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[71] I proceed on the basis of the foregoing principles.

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20 At [9].

21 *Vice-Chancellor of Lincoln University v Stewart*, above n 18, at [16].

22 *Johnston v The Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 (footnotes omitted). See also *Jackson v Aorere College Board of Trustees* [2021] NZEmpC 109 at [6].

Analysis

Preliminary point

[72] Mr Brookes submitted that the requirements of s 174E(a) of the Act were not observed. That section states that in a written determination, the Authority must state relevant findings of fact, state and explain its findings on relevant issues of law, express its conclusions on the matters or issues it considers require determination in order to dispose of the matter, and specify what orders, if any, it is making. Counsel submitted that the Authority's determination in this case does not clearly express the relevant findings of fact, or state or explain its findings on the relevant issues of law.

[73] I remind myself that s 174E(a) must be read with other provisions and within the broader context of the Act, including the way in which Parliament intended the Authority to operate.[23] Thus, a sense of realism is necessary and a state of perfection is not required.

[74] I am satisfied that the determination outlined the history of the matter in sufficient detail to remind the parties of the details. This was followed by appropriate references to the legal framework. Factual findings were then made in reliance on the background and the relevant law. On the Authority's reasoning, it is apparent why the Authority considered there were grounds justifying removal. I am not persuaded that the Authority failed to meet the requirements of s 174E(a).

Length of dispute and contextual matters

[75] Mr Brookes first pointed to two factors, the length of the dispute regarding the extent of disclosure and the context of the difficult relationship between the parties, as not warranting removal under s 178(2)(d).

[76] On the first issue as to longevity, Mr Brookes submitted that in the extract cited earlier from *Johnston*,[24] the Court had referred to the possibility of a case that might consume weeks of hearing time being removed. He said this was in effect a reference

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[23] *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12, [2019] ERNZ 1 at [54].
[24] *Johnston v The Fletcher Construction Co Ltd*, above n 22; and see above at [70].

to a case which would involve considerable complexity and therefore significant hearing time. He submitted this was not such a case.

[77] However, in the present case, the issue of longevity was a reference to the extensive attempts which had been made by the Authority over months in an attempt to advance disclosure issues. These issues had not been satisfactorily resolved.

[78] It is plain from the chronology set out earlier that this was a correct observation. On two occasions, the investigation meeting had been deferred because the parties were still debating disclosure issues. Notwithstanding the Authority's best endeavours to resolve these problems with the powers it possessed to do so, issues remained which threatened to derail a third set of dates which had been established for the substantive investigation. At the stage when briefs of evidence were supposed to be filed, yet further issues had arisen on the basis of alleged enlarged discovery being required, as well as allegations of falsification of documents. Additionally, there was an issue as to how confidential board documents should be dealt with.

[79] Finally, I note that reference to a long hearing in *Johnston* was simply an example of a factor which might warrant removal. In the end, the Authority has to exercise its discretion under s 178(2)(d) by considering all relevant factors.

[80] I refer next to the Authority's reference to contextual factors by reference to the problems which had arisen in the context of the particular history of the employment relationship problem. Early in the determination, the Authority touched on the memorandum which Mr Mackenzie had filed on 21 July 2023. Counsel had recorded HHG's perspective that Mr Smalley was unnecessarily litigious and that this was evident from the proceedings in the High Court and Court of Appeal concerning disputed share transfers. He had suggested that this context was a relevant consideration when assessing the scope, extent and relevance of documentation Mr Smalley was seeking in the Authority.

[81] This theme recurred in subsequent memoranda from both counsel. On 8 August 2023, Mr Brookes responded to the references to civil litigation. He

submitted that Judge Smith had found this material was irrelevant and unhelpful for the purposes of a costs judgment.[25]

[82] Mr Mackenzie returned to this theme in his removal submissions of 2 May 2024 when he stated that the High Court had made adverse findings to the effect that Mr Smalley was "highly antagonistic" towards HHG, "harbours a deep resentment" towards the shareholders and maintained unreasonable positions.

[83] The Authority noted in its summary of the matter that "the parties have been engaged in continuous disputation",[26] and that the issues raised by HHG on 17 and 18 April 2024 constituted "further disputation over disclosure".[27]

[84] It is evident that it was these considerations which led the Authority, when discussing contextual factors, to conclude that it was objectively reasonable to find "intractable and unique features". Such conclusions were well open to the Authority; it was not incorrect for it to have characterised the problems in this way.

[85] I also note that Judge Smith's findings as to the relevance of this information was in a wholly different context where he was required to resolve a costs issue following discontinuation of a challenge.

[86] Mr Brookes then submitted that the disclosure issues were all but concluded and that it was wrong in those circumstances to find that the matter should be removed. He again emphasised that no challenge had been brought to the direction made by the Authority on 18 March 2024 when HHG was directed to provide documentation that had been identified by Mr Brookes in his memorandum of 8 March 2024.

[87] Those submissions, however, do not have sufficient regard to the various problems that were identified for HHG by Mr Mackenzie in his memoranda of 17 and 18 April 2024, supported by Mr Perry's affidavit of 17 April 2024, as well as evidence from a third-party provider. Given the existence of those issues, it could not be said that disclosure was virtually completed. Whether the problems that were raised at that

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25 *Hamilton Hindin Greene Ltd v* Smalley, above n 3.
26 *Smalley v Hamilton Hindin Green Ltd*, above n 1, at [4].
27 At [14].

stage were resolved by the Authority under its more informal regime for the provision of information, or by the Court under its formal rules as to disclosure as set out in the Employment Court Regulations 2000 (the Regulations), there were undoubtedly a range of issues that required resolution. They were not straightforward. The problems were compounded by the absence of adequate pleadings which led to difficulties in determining relevance.

[88] The Authority had, on several occasions, attempted to encourage the parties to resolve these issues by consensus. That, however, had not proved possible. The conclusion that it had proved impossible to obtain agreement on a way forward in a timely manner was not erroneous.

[89] Next, I refer to the point that the Authority did not take sufficient account of the fact that no challenge had been brought to its direction of 18 March 2024. This issue was expressly identified.[28] It is reasonably clear, for the reasons I have just identified as to the complexity of the issues being raised by both parties, that the absence of a formal challenge – which may have been controversial given s 179(5) of the Act – was not considered determinative. I infer that the Authority was aware of the procedural options. It clearly favoured removal of the entire proceeding as providing a fair way forward. It is also apparent that the Authority considered that the issues were broader than the issues as to disclosure.

[90] Mr Brookes also referred to an observation made by Member Beck subsequently in *Pilgrim v The Overseeing Shepherd*, when he said: "to simply remove a matter because it is perceived as intractable or difficult runs contrary to the object of the Act".[29] He argued that if this subsequent reasoning were to have been applied in the present case, then removal should not have occurred.

[91] There are two points to make regarding this submission. The first is to note that an issue of potential difficulty and/or complexity of a proceeding is clearly one of fact and degree. It is reasonable to conclude that the Member regarded the circumstances of the present case as being in a different category to the circumstances

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28 At [18].

29 *Pilgrim v The Overseeing Shepherd* [2024] NZERA 197 (Member Beck) at [40].

of *Pilgrim*, particularly because of the "obdurate stance of both parties to this matter". He said the present circumstances were "unique".

[92] Secondly, the Member referred to dicta of the Court of Appeal in *A Labour Inspector v Gill Pizza Ltd*. As has since been explained by this Court in *Pilgrim v The Overseeing Shepherd*, these observations have become unduly elevated.[30] There must be a focus on the provisions of s 178(2). The obiter observations which were made by the Court of Appeal in *Gill Pizza* should not be interpreted as applying an additional gloss to the section.

[93] The decision of this Court in *Pilgrim* was, of course, issued after the observations of the Member in both the removal determination in this proceeding, and in his own determination in *Pilgrim*. At the time, he took a more stringent view as to when removal would be appropriate. Even from that stringent standpoint, the Member considered it was nonetheless appropriate to remove the case.

[94] Accordingly statements made in another determination as to when removal might occur are not relevant for present purposes.

[95] On the Authority's assessment, it was evident that Mr Smalley perceived HHG to be tactically obstructive, whilst HHG perceived Mr Smalley to be pursuing irrelevant disclosure so as to increase cost in furtherance of a "bitter employment relationship breakup". Again, it was open to the Authority to record these perceptions on the material before it.

Suitability of Court procedure

[96] In related submissions, Mr Brookes referred to HHG's view, as recorded by the Authority, that the disclosure regime of the Court was more suited to the difficulties which had arisen in this instance. He submitted that this point was incorrect in the present case. He said Mr Smalley did not anticipate the need for further applications unless compliance by HHG remained an issue.

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[30] *Pilgrim v The Overseeing Shepherd, Howard Temple, alternatively Stephen Steadfast* [2024] NZEmpC 146 at [7]–[11].

[97] This characterisation of the disclosure problems has insufficient regard to the particular issues which HHG had most recently raised.[31]

[98] The disclosure regime provided for in the Regulations is tightly prescribed and suitable for resolving problems of the kind that have arisen here.[32] Thus, if the matter were to remain in the Court, it would be open to Mr Smalley to serve a notice requiring disclosure under reg 42 which sets a timetable for responses, and reg 44 which provides an opportunity for objections to be raised which can then be formally resolved by the Court.

[99] I conclude that the Court is better placed to resolve that particular problem.

Cost concerns

[100] The Authority made a passing reference to a point about costs raised by Mr Mackenzie in HHG's submissions. It said Mr Mackenzie had "… made an objectively salient point that costs already expended in the Authority proceedings were disproportionate and likely to result in significant duplication in the court if not removed before the Authority proceeds with a substantive investigation".[33]

[101] However, this particular topic received no further consideration. The key terms of the decision to remove are as set out earlier.[34]

[102] Mr Brookes submitted that the process of the Court would be "more formal and expensive",[35] that the Authority was already familiar with the background, and that there would be increased costs in providing that background to the Court. He also submitted it would be necessary for the parties to relitigate matters relating to the directions given by the Authority, when these could be more appropriately addressed by it as a compliance issue. These concerns were said to weigh against removal.

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31 See above at [87].
32 Employment Court Regulations 2000, regs 37–52.
33 *Smalley v Hamilton Hindin Green Ltd*, above n 1, at [17].
34 See above at [60]–[61].
35 Relying upon *Gill Pizza (SC)*, above n 13, at [65].

[103] It is evident that cost is a live issue on both sides. This is unsurprising. A great deal of legal resource has been devoted to dealing with disclosure in the Authority. Although no specific quantification of costs was provided to the Authority or to the Court, the procedural history, as summarised, suggests that costs in the Authority are likely to have been significant on both sides.

[104] The parties are at odds as to which outcome is more likely to contain costs. However, the Authority was entitled to conclude that HHG's submission as to costs was "objectively salient".

Concerns regarding inevitability of challenge

[105] The Authority recorded a submission made for HHG, as contained in the six reasons summarised earlier, to the effect that the company was confident Mr Smalley would challenge the ultimate decision of the Authority regardless of result.[36]

[106] The Authority made no further comment about this observation. This point was not part of the central passage that contains the key conclusions that led to the entire proceeding being removed.[37]

[107] This is not a factor, therefore, that is relevant to consideration as to whether the proceeding was properly removed. In any event, such an issue could not be limited to assessing whether Mr Smalley might bring a challenge; the possibility of the company doing so could not be ruled out. While noting that the prospect of a challenge being inevitable requires cautious consideration,[38] on the material placed before the Court, the prospect appears to me to be more than a mere assertion such as might be made in the context of a relatively straightforward case.[39]

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36 *Smalley v Hamilton Hindin Green Ltd*, above n 1, at [16].
37 See above at [60].
38 See *Vice-Chancellor of Lincoln University v Stewart*, above n 18, at 257.
39 See *Megan Jaffe Real Estate Ltd v Kelland* [2018] NZEmpC 28 at [33]. I note that case was concerned with the more limited criteria referred to in s 178(3).

Issue under s 178(6) of the Act

[108] Mr Brookes submitted that removal was barred by s 178(6) because the Authority's direction as to disclosure was a matter of procedure.

[109] He relied on authorities relating to a similar, though not identical, provision relating to the bringing of challenges.[40]

[110] The point was directly addressed by Judge Colgan in *Clerk of the House of Representatives v Witcombe*.[41]

[111] After traversing the legislative history of the subsection, the Court stated:[42]

> I do not agree that either of the questions of law identified by the Clerk can be said to be matters about the Authority's procedure. Most obviously, they are questions that will arise if the case is heard in the Employment Court as much as if it remains in the Authority for investigation at first instance. So on that simple test alone they cannot be matters relating to the Authority's procedure. But also, they affect rights, privileges and liabilities of the parties and, in one case, of others.

[112] This approach is perhaps not dissimilar to the approach which has been developed in relation to s 179(5) that if a determination has an irreversible and substantive effect, then it is not procedural.[43]

[113] Mr Brookes submitted that the conclusion reached by the Court in *Witcombe* should be confined to a case where consideration arises under s 178(2)(a) as to a point of law, being the issue that arose in that instance. I disagree. Section 178(6) is a jurisdictional gate to s 178 as a whole, and I am satisfied that the relevant conclusions in *Witcombe* are appropriate when considering removal under s 178(2)(d).

[114] In any event, there is a further reason which suggests that s 178(6) is not engaged. It relates to the fact that the entire proceeding was removed. Following such

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40 Employment Relations Act, s 179(5).
41 *Clerk of the House of Representatives v Witcombe* [2006] ERNZ 196 (EmpC).
42 At 205. One of the questions of law related to a long struggle for disclosure, and it was said that the outcome of the case may turn on the admission of the evidence in question.
43 See *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [26] and [28].

removal, the Court has to resolve all prehearing matters (not only disclosure), as well as substantive issues at a hearing.

[115] Obvious examples of potential prehearing issues arise from the fact that Mr Smalley's claims have yet to be quantified; the Court can manage this issue formally in light of the requirements of reg 11(1)(d) of the Regulations if need be. It may also be necessary to resolve other objections to disclosure.

[116] In short, although the Authority's initial inclination was to remove only the matter of disclosure, ultimately it concluded that the entire matter should be removed given the significant problems that had arisen between two intractable parties. Section 178(6) does not bar that removal.

[117] That conclusion means it is unnecessary to consider an alternative submission made by Mr Brookes, to the effect that the decision to remove was based upon directions as to disclosure which, if they were not a procedural matter, needed to be challenged within the statutory timeframe and could not be avoided by the company having the whole matter considered again by the Court. I have already concluded the removal was based upon the broader issues that had arisen, including disclosure.

Authority relied on incorrect submissions

[118] Mr Brookes submitted that the Authority's statement that it was not persuaded that removal "would not best serve Mr Smalley's apparent desire to litigate this matter further"[44] was connected to an earlier reference in the determination to the civil proceedings in the senior courts, as raised by Mr Mackenzie. Mr Brookes submitted that the Authority in effect erred by conflating the conduct of the unrelated civil proceedings with the present proceeding, and that this was an error of fact. He emphasised that the parties to the civil proceedings were Mr Smalley and ongoing shareholders of HHG (and a related company), whereas, the parties in the present case were Mr Smalley and HHG, not its shareholders.

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44 *Smalley v Hamilton Hindin Green Ltd*, above n 1, at [27].

[119] Whilst of course it is correct to make that distinction, I find that it was appropriate to consider context and that it was open for the Authority to conclude that there was a "bitter employment relationship breakup", as had been commented on in the context of the difficulties concerning share valuations.

Compliance with reg 12 of the Employment Relations Authority Regulations 2000 and natural justice

[120] Mr Brookes submitted that the manner in which the application for removal developed was irregular because the Authority effectively dealt with an application to remove the entire matter,[45] and not just its own motion proposal to remove part of the matter as to disclosure.

[121] Counsel submitted that the requisite form under reg 12 of the Employment Relations Authority Regulations 2000 had not been lodged by the company; nor had the appropriate fee been paid.

[122] Mr Mackenzie said that the suggestion that the entire matter be removed was in response to the Authority's own motion proposal to remove part of the employment relationship problem. He went on to submit that, in effect, the Authority accepted the company's response. In those circumstances, a separate application and payment of a fee were not required.

[123] That is one characterisation as to what occurred. However, from an abundance of caution, HHG could have filed a separate application and paid the appropriate fee.

[124] Relevant is cl 13 of sch 2 of the Act, which provides that there is no invalidity by reason of informality or error of form.

[125] This is a situation where substance, not form, should be the focus, along with a consideration of the interests of justice. Given these factors, it is not appropriate for the Court to conclude that the Authority removed the matter improperly in light of a possible procedural issue.

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[45] However, no formal application was ever made by HHG.

[126] For completeness, I refer to natural justice considerations.[46] On his behalf, Mr Smalley was well aware of the fact that the matter was being considered on a broad basis. Mr Brookes sought extra time to address the removal issue because of the nature of HHG's response which sought outright removal.

[127] The submissions which he then filed addressed that possibility, and it was these submissions which the Authority considered. Natural justice was observed.

[128] I am not satisfied that there was any error in the approach adopted which could lead to a conclusion that the matter was incorrectly removed.

Appropriateness of removal generally

[129] Finally, Mr Brookes made two related submissions pertaining to s 143 of the Act, and that removal would extinguish Mr Smalley's ability to challenge any finding of fact or any error of law as of right.

[130] Mr Brookes submitted that s 178 must be read in light of s 143. It was submitted that while some cases will require judicial intervention, the intervention envisaged was usually by the Authority in the first instance.[47] It was said there are no difficult issues of law which may change that position.[48]

[131] As to appeal rights, Mr Brookes submitted that Mr Smalley would be significantly disadvantaged in that regard by removal, particularly because factual findings will be important to the outcome of the matter.

[132] I accept that s 143 may inform the interpretation of s 178. However, I do not consider that s 143 cuts across the conclusion that the proceedings were properly removed under s 178. Both s 143(fa), and the inclusion of the word "generally", and s 143(g) reflect that some level of flexibility is required as to the appropriate forum.[49]

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46 Employment Relations Act, ss 157 and 173.
47 Citing s 143(f) and (fa).
48 Citing s 143(g).
49 See also *Johnston v The Fletcher Construction Co Ltd*, above n 22, at [21].

I do not consider that the submission as to appeal rights takes Mr Smalley's position further given s 178, once satisfied, explicitly envisages a limit to challenge rights.[50]

Result

[133] I am satisfied the removal order was made properly.

[134] The application for return of the matter to the Authority is accordingly dismissed.

[135] The application to stay the Court's order that a statement of claim be filed within 30 days is also dismissed. The plaintiff is to file and serve a statement of claim within 30 days of the date of this judgment.

[136] HHG is entitled to costs in respect of this application, which should be resolved at this stage. My provisional view is that these should be determined on a 2B basis. Counsel are to attempt to resolve this matter in the first instance. If that does not prove possible, HHG is to file submissions within 14 days of the date of this judgment, with Mr Smalley to respond within 14 days thereafter.

B A Corkill
Judge

Judgment signed at 12.30 pm on 9 October 2024

[50] At [33]–[34]. See also *Bowen v Bank of New Zealand* [2021] NZEmpC 71 at [31].