IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 184
5552663

	BETWEEN	ROSS WEYMOUTH Applicant
	A N D	HAWKINS CONSTRUCTION LIMITED Respondent
	AND	5581267
	BETWEEN	HAWKINS CONSTRUCTION LIMITED Applicant
	A N D	LYNDA MATHIESON Respondent

Member of Authority:	David Appleton
Representatives:	Peter McDonald, Advocate for Mr Weymouth and Ms Mathieson Andrew Schirnack, Counsel for Hawkins Construction Limited
Investigation Meeting:	Determined by consideration of the papers by consent
Submissions Received:	10 November 2015 from Mr Schirnack 18 November 2015 from Mr McDonald
Date of Determination:	25 November 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

A. I decline to strike out the proceedings against Ms Mathieson.

B. The matters lodged under file numbers 5552663 and 5581267 are to be consolidated, so that they will be investigated together.

C. Costs are reserved.

Employment relationship problem

[1] Mr Weymouth claims unjustified constructive dismissal and unjustified disadvantage in his employment, as well as a breach of contract by Hawkins Construction Limited (Hawkins) in respect of an alleged failure to pay a loyalty bonus of $10,000 in the financial years 2014 and 2015. He seeks a penalty, compensation, payment of loyalty bonuses for two consecutive years, lost wages and the loss of an opportunity to earn a discretionary retention bonus.

[2] Hawkins denies that there was any entitlement to an annual loyalty bonus and denies that Mr Weymouth was constructively dismissed or subject to unjustified disadvantage in his employment.

[3] Approximately three weeks after Mr Weymouth's statement of problem was lodged with the Authority, Hawkins lodged a statement of problem against its former employee, Ms Mathieson, claiming that she breached the terms of her employment agreement by disclosing details of another employee's terms and conditions to Mr Weymouth, and by telling Mr Weymouth that he was entitled to receive payments of a loyalty bonus. It claims, in addition, that Ms Mathieson has breached her duty of fidelity.

[4] Ms Mathieson argues that the claim against her is frivolous and vexatious, and should be struck-out. Hawkins resists this, and also argues that the two matters should be consolidated.

[5] This determination examines the question of whether the claim against Ms Mathieson is frivolous and vexatious, and should be struck-out, and also considers an application by Hawkins that its claim against Ms Mathieson be consolidated with the claim by Mr Weymouth against it so that the matters can be heard together.

[6] I address, first, the application to strike-out the claim of Hawkins against Ms Mathieson.

Is Hawkins' claim against Ms Mathieson frivolous and vexatious, and should it be struck-out?

[7] The Authority's jurisdiction to strike-out an applicant's claim derives from s.12A of Schedule 2 of the Employment Relations Act 2000 (the Act). This provides that the Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers is frivolous or vexatious.

[8] The question of how the Authority should address a claim for strike-out on the basis that proceedings are frivolous or vexatious was examined by the Employment Court in the case of *Rosaurao Gapuzan v. Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre*[1]. His Honour Judge Corkill examined the question in two parts; first, whether the claim was frivolous and then whether it was vexatious. I shall adopt the same approach.

Is Hawkins' claim against Ms Mathieson frivolous?

[9] At paragraph [52] of *Gapuzan*, the Court held that it was clear from established case law that there must be extraordinary circumstances before the Court should conclude that a case is frivolous. His Honour Judge Corkill cited Chief Judge Goddard in *New Zealand (with exceptions) Shipwrights Union v. New Zealand Amalgamated Engineering IUOW* [2]:

> *Frivolous cases are more than just cases which disclose no course of action. A frivolous case is one, to use the words of Lush J in* Norman v. Matthews:
>
> > *..which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court.*
>
> *It is one which is impossible to take seriously.*

[10] His Honour Judge Corkill also cited Chief Judge Goddard in *Cresser v. Tourist Hotel Corp of New Zealand*[3]:

> *… to characterise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff was trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and*

[1] [2014] NZEmpC 206
[2] [1988] 3 NZILR 284 (LC) at 289 [citations omitted]
[3] [1990] 1 NZILR 1055 (LC) at 1069

> *glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.*

[11] His Honour Judge Corkill also cited *Deliu v. Hong*[4], in which the High Court found that the following definition of *frivolous* from the New Shorter Oxford English Dictionary[5] to be of assistance:

> *(1) Of little or no value or importance, paltry, (of a claim, charge, etc), and for a claim or charge having no reasonable grounds.*
> *(2) Lacking seriousness or sense; silly.*

[12] At paragraph [22], the Court in *Deliu* held:

> *This proceeding is not being used to uphold interests which the law of torts sets out to protect. In the eyes of the law, the matters in issue in this proceeding are trivial. This proceeding lacks the seriousness required of matters for the Court's determination.*

[13] His Honour Judge Corkill also cited Black's Law Dictionary[6] as defining *frivolous* as:

> *Lacking a legal basis or legal merit; not serious; not reasonably purposeful.*

[14] His Honour Judge Corkill stated, at paragraph [58] of *Gapuzan* that the underlying theme of the judicial statements cited is that there must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously.

[15] Hawkins claims that Ms Mathieson breached her employment agreement by incorrectly informing Mr Weymouth that he was entitled to an annual loyalty bonus of $10,000 when she knew that he was only entitled to a one-off loyalty bonus of that sum. It says that Ms Mathieson breached a confidentiality clause in her employment agreement dated 22 October 2010 by disclosing details of another employee's terms and conditions to Mr Weymouth.

[16] Hawkins also asserts that Ms Mathieson breached her duty of fidelity by giving an assurance to Mr Weymouth that he was entitled to further loyalty bonuses when she was aware that it was the applicant's intention to only provide a one-off loyalty bonus.

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[4] [2011] NZAR 681 (HC) at [21]
[5] Leslie Brown (ed) New Shorter Oxford English Dictionary (4th ed) Oxford University Press, 1993
[6] Bryan A, Garner R (ed) Black's Law Dictionary (9th ed) Thomson Reuters, St Paul (MN), 2009 (at 739)

[17] In his submissions to the Authority, Mr McDonald asserts that Ms Mathieson's role included the provision of advice and clarification on relevant human resource matters. He says that Ms Mathieson acted responsibly and within her authority with regard to ordinary advice and comments that she provided to Mr Weymouth in the course of her employment.

[18] Mr McDonald also states that, *provided the respondent was acting within her authority when giving Mr Weymouth the confirmation advice regarding the applicable terms of the 'bonus payment', then the applicant's claim cannot possibly succeed*. He goes on to say: *it is inconceivable that the respondent did not have the authority to provide the advice in question*.

[19] Mr McDonald goes on to say that a confirmation of employment facts cannot possibly constitute a breach of confidentiality.

[20] However, these submissions and assertions all relate to matters which not only lend themselves squarely to investigation by the Authority, but which require such enquiry, as they cannot simply be accepted on face value. Whilst I make no finding at this stage as to the merits of the claims against Ms Mathieson it is certainly not the case that the claims against Ms Mathieson contain any patent and glaring error of law, nor are they ones which no reasonable person could properly treat as bona fide. They are not claims which it is impossible to take seriously.

[21] In conclusion, it cannot be said that the claims against Ms Mathieson are such that they so significantly lack legal merit as to make it impossible for the claim to be taken seriously. This is a high threshold and I do not accept that the matters claimed against Ms Mathieson amount to exceptional circumstances so as to enable the Authority to conclude that it is frivolous.

[22] Accordingly, I do not accept that the claims against Ms Mathieson are frivolous.

Are the claims against Ms Mathieson vexatious?

[23] In *Gapuzan*, His Honour Judge Corkill again refers to Black's Law Dictionary, which defines the term *vexatious* as conduct *without reasonable or probable cause or excuse; harassing; annoying*[7].

[24] His Honour Judge Corkill also refers to the Court of Appeal decision in *Heenan v. Attorney-General*[8]. This case approved previous points made about s.88B of the Judicature Act 1908 which Judge Corkill considered to be of assistance when assessing whether a proceeding was vexatious under Rule 15.1(1)(c) of the High Court Rules, which allows the High Court to strike-out a pleading if it is frivolous or vexatious. I consider that these points are also of assistance to the Authority considering the same question. The points referred to in *Heenan*, and relied upon by the Employment Court in *Gapuzan* are as follows:

> *(a) Recognition of the fundamental constitutional importance of the right of access to the Courts must be balanced against the desirability of freeing a defendant from the burden of groundless litigation.*
> *(b) Relevant is the character of the proceeding. Did the proceeding have a reasonable basis and how has it been conducted; have such proceedings been issued persistently?*
> *(c) Whether attempts have been made to re-litigate issues already determined, containing scandalous and unjustified allegations.*
> *(d) A factor may well be whether the litigant is found to have an improper purpose in commencing proceedings.*

[25] It is Mr McDonald's submission that the purpose behind the claim against Ms Mathieson is to intimidate her and to undermine and preclude her from giving genuine supporting evidence for the grievance claim submitted by Mr Weymouth. Mr McDonald says that the mere fact of Ms Mathieson being named as a respondent has the effect of, at least impliedly, compromising her. He states that:

> *To "label" the respondent* [Ms Mathieson] *in this way would be unfair, unnecessary and of no assistance to the Authority in resolving outstanding matters. The applicant's only possible rationale can be an attempt to somehow marginalise the respondent and pre-empt her evidence in an attempt to undermine her credibility.*

[26] Mr McDonald also submits that Ms Mathieson wishes to provide the Authority with open and unfettered evidence without the inevitable *hangover* that would exist if

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[7] At 1701
[8] [2011] NZCA 9, 200 at [22]-[25]

the claim against her was allowed. He says that, if the claim were struck-out, Hawkins would have every opportunity to question Ms Mathieson and she could provide her responses without there being any chance of a preconceived view having been formed.

[27] Whilst it may be tempting to conclude that the motivation for Hawkins issuing the claim against Ms Mathieson is to put pressure on her as a witness, or to put pressure on Mr Weymouth, it is not appropriate to speculate as to what may lie behind the claim in the absence of any cogent evidence. In any event, Mr McDonald already accepts that Ms Mathieson will give evidence. Whether she is facing a claim against herself personally or not, she is bound to be truthful and accurate in her evidence to the Authority.

[28] It is not clear, in any event, that the fact that Ms Mathieson would be defending a claim against herself in relation to her actions will have the effect of compromising her or undermining her credibility. Unless Ms Mathieson were to deny that she advised Mr Weymouth that he was entitled to further bonuses, and that she confirmed that the terms and conditions of a third party employee were the same as his, the evidence she is likely to give on behalf of Mr Weymouth is not likely to be any different to the evidence she would give in defending the claims against her.

[29] It would be surprising if Ms Mathieson were to deny that she told Mr Weymouth that he was entitled to further loyalty bonuses or confirmed the terms of a third party employee given the assertions that are made in the statement in reply. If anything, the claim brought against Ms Mathieson by Hawkins is more likely to ensure that she turns up and gives evidence.

[30] Stepping back, and reviewing the claim against Ms Mathieson, I am unable to find that there is any cogent evidence that it is vexatious. Referring to the factors referred to in *Heenan*, I cannot accept that the claim against Ms Mathieson is groundless, that the proceedings have an unreasonable basis or have so far been conducted unreasonably, or that there has been an attempt to re-litigate issues already determined. I have already found that there is no cogent evidence of an improper purpose in connection with the proceedings.

[31] I also give consideration to the criteria set out by the Employment Court in *Newick v. Working In Ltd*[9] which, at [2], were summarised as follows:

> *(a) It is assumed that facts pleaded are true;*
> *(b) The cause of action must be so clearly untenable that it cannot possibly succeed;*
> *(c) The jurisdiction is to be exercised sparingly;*
> *(d) The jurisdiction to strike-out is not excluded where the claim includes difficult questions of law requiring extensive argument; and*
> *(e) The Court should be slow to strike-out a claim in a developing area of law.*

[32] At [3], the Court held in *Newick* that a claim should not be summarily struck-out unless the Court can be certain that it cannot succeed.

[33] Whilst it is certainly not the case that Hawkins' claim against Ms Mathieson has a prima facie strong chance of success, there is clearly a case that is arguable and it would be inappropriate for the Authority to exercise its jurisdiction under s.12A of Schedule 2 of the Act to deprive Hawkins of the chance to argue that case.

[34] I am not satisfied that the tests for striking-out Hawkins' claim against Ms Mathieson on grounds either that it is frivolous or vexatious are made out. Accordingly, I dismiss that application.

Should the matters under 5552633 and 5581267 be consolidated?

[35] Hawkins seeks consolidation of the two matters on the following grounds:

(a) The evidence to be considered in both cases will cover the same documents, the Authority will hear from the same witnesses, and in particular, in each case, the Authority will need to consider:

(i) Mr Weymouth's contractual documentation with Hawkins;

(ii) What Ms Mathieson said to Mr Weymouth at the time of his recruitment;

(iii) The basis on which Ms Mathieson made any such statements to Mr Weymouth;

[9] [2012] ERNZ 510

(iv) Ms Mathieson's authority for making any statements she made to Mr Weymouth; and

(v) Ms Mathieson's and Mr Weymouth's understanding of the offer Hawkins made to Mr Weymouth.

(b) Due to the overlap in evidence, there would be considerable time and cost savings in the matters being consolidated and, if the matters were not consolidated, a number of witnesses including Ms Mathieson and Mr Weymouth would need to attend two investigation meetings to cover the same points.

(c) If the matters were not consolidated, the Authority is likely to make findings of fact in the Weymouth matter which could prejudicially affect Ms Mathieson in the Mathieson matter, without her having had the opportunity to cross-examine any witnesses on those facts and make submissions in respect of their evidence. This would be contrary to the principles of natural justice with which the Authority must comply under s.173(1)(a) of the Act. It could also lead to the facts being decided differently in each case.

[36] Mr McDonald's response to Mr Schirnack's submissions on consolidation essentially repeated arguments made in the statement in reply lodged on behalf of Ms Mathieson and foreshadowed his submissions in relation to Ms Mathieson's strike-out application. However, Mr McDonald also stated that, should the Authority not exercise its discretion to strike-out the claim against Ms Mathieson, then she would agree to the claim against her being consolidated with the matter 5552663 between Mr Weymouth and Hawkins.

[37] I have declined to strike-out that application against Ms Mathieson and I accept all of the arguments made by Mr Schirnack for consolidation. I therefore direct that the matters be consolidated.

[38] Time has already been allocated on 23 and 24 February 2016 to hear Mr Weymouth's claim against Hawkins and I anticipate that that will give sufficient time for Hawkins' claim against Ms Mathieson to be heard as well. Accordingly, the notice of direction from the Authority under file No 5552663, dated 21 September 2015, will continue to apply.

Costs

[39] Costs are reserved. I will deal with the matter of costs in relation to this preliminary matter after the conclusion of the substantive investigation into matters 5552663 and 5581267.

David Appleton
Member of the Employment Relations Authority