

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 559  
3121632

BETWEEN                      JODEE DYBALL and STEVIE  
   DRAPER  
   Applicants

AND                              GLADSTONE RETAIL  
   LIMITED  
   Respondent

Member of Authority:      Geoff O’Sullivan

Representatives:            Allan Halse, advocate for the Applicants  
   Samuel Hood, counsel for the Respondent

Investigation Meeting:      On the papers

Submissions [and further    1 October 2021 and 1 November 2021 from the  
Information] Received:      Applicant  
   8 October 2021 from the Respondent

Date of Determination:      15 December 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Jodee Dyball and Stevie Draper have commenced proceedings by way of a statement of problem against Gladstone Retail Limited (Gladstone). Mr Hood represents Gladstone and Mr Halse at the material time represents Ms Dyball and Ms Draper. Ms Draper says that Gladstone and Mr Hood have disrupted the Authority’s proceedings and are in contempt. They have applied to the Authority for such an order.

[2]      The grounds for the application are that on 24 September 2021 Mr Hood, on behalf of Gladstone, wrote a letter of demand to Ms Draper:

- (a) threatening to sue her under the Defamation Act 1992 for comments made in the course of her personal grievance and proceedings;
- (b) demanding an apology for and retraction of comments made in the course of the personal grievance process; and
- (c) sought punitive damages.

[3] Mr Halse has correctly pointed out that s 121 of the Employment Relations Act 2000 provides that statements made, or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance or in the course of any matter relating to a personal grievance are absolutely privileged.

[4] Mr Hood has responded that the application is a cynical attempt to deprive Gladstone of its chosen legal representative in order to dissuade other affected parties from seeking recourse to the High Court. He says that the sworn evidence is not directly applicable to the personal grievances therefore is not caught by s 121 of the Act. He also says the application is without merit.

### **Discussion**

[5] The parties have agreed that this matter be dealt with on the papers. I disagree that the application is a cynical attempt as described by Mr Hood. Section 121 of the Act must catch Ms Draper's affidavit. It has been provided in support of her personal grievance and accordingly is absolutely privileged for the purposes of that section.

[6] Section 196 of the Act provides for the application of Contempt of Court Act 2019 to the Employment Relations Authority. 196(3)(c) makes it clear it can be contempt to disrupt proceedings of the Authority. This includes a disruption of an investigation meeting held by the Authority.

[7] Mr Hood's client has instructed him to commence defamation proceedings against Ms Draper. He is entitled to do that. However, it appears he has also asked Ms Draper to withdraw statements made in an affidavit prepared for the purposes of her personal grievance. Gladstone says that should she not do that, she will face litigation. Any sworn statements prepared for the purposes of the Authority's investigation meeting are covered by s 121 of the Employment Relations Act and in the normal of events would be absolutely privileged.

[8] Under these circumstances, asking a witness to withdraw evidence placed before the Authority under the threat of litigation in another forum is fraught. At the very least it is unwise.

[9] As a finding of fact, I find that Gladstone and Mr Hood have not disrupted the proceedings currently before the Authority and nor are they in contempt. This is because the documentation complained of has not been withdrawn from the Authority, nor has Ms Draper been dissuaded from giving evidence.

[10] I accept Mr Halse has a genuine concern on behalf of his client regarding this matter and note that although Gladstone may not have obstructed or delayed the Authority's investigation, it may well have increased the applicants' costs. Mr Halse and his clients are entitled to file whatever evidence they deem appropriate before the Authority. It is not for an opposing party to decide what may or may not be relevant or to ascribe motives at this stage of a proceeding. That is the role of the Authority

### **Conclusion**

[11] I decline to make the orders sought as I have been found there has been no breach of s 196 of the Act.

### **Costs**

[12] Costs are reserved and will be dealt with once the substantive matters are disposed of.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**