

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 688
3171822
3190479

BETWEEN TE MANAWA O TUHOE
 TRUST
 Applicant

AND TANIA McDONNELL
 First Respondent

 STAN AUSTIN
 Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Scott McKenna, counsel for the Applicant
 Tania McDonnell, Respondent in person

Investigation Meeting: On the papers

Submissions and/or 18 and 29 November 2022 from the Applicant
further evidence 17 November 2022 from the Respondent

Determination: 21 December 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Te Manawa O Tuhoe Trust (TMOT), claims that the First Respondent, Ms Tania McDonnell, has acted in breach of a record of settlement pursuant to s149 of the Employment Relations Act 2000 (ROS), and is seeking compliance and penalties in respect of that breach (3171822).

[2] TMOT also claims that the Second Respondent, Mr Stan Austin, has aided and abetted the breach by Ms McDonnell.

[3] The Second Respondent, Mr Austin, filed a Statement in Reply stating that the Application by the Applicant is ill conceived and applying to have it struck out.

[4] The First Respondent, Ms McDonnell, subsequently filed an application claiming a breach of the ROS by TMOT, and also by Mr Mike Cristini, General Manager of TMOT, and Mr McKenna (3190479).

The Authority's investigation

[5] The parties agreed to the Authority determining this issue based on the Statements of Problem and the Statements in Reply, documents submitted by the parties, and on submissions from the parties.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[7] The issues requiring investigation are whether or not:

- Application (3171822) should be struck out?
- the following persons should be joined as parties to the matters before the Authority:
 - a) Mr Austin as Second Respondent in 3171822?
 - b) Mr Cristini as Second Respondent in 3190479?
 - c) Mr McKenna as Third Respondent in 3190479?

Brief Background

[8] Ms McDonnell commenced employment with the Trust on or about 4 March 2019 as a Board Administrator on a part-time basis working 20 hours per week.

[9] On 14 May 2021 Ms McDonnell's role as Board Administrator was made redundant.

[10] On 3 June 2021 Ms McDonnell filed proceedings with the Authority claiming that she had been unjustifiably dismissed as a result of the redundancy decision by the TMOT and was seeking both permanent and interim reinstatement in addition to other monetary remedies.

[11] TMOT opposed the application in regard to both interim and permanent reinstatement and was successful in the Authority in regard to the interim reinstatement application.

[12] That determination was challenged to the Employment Court by Ms McDonnell and in a judgment dated 2 December 2021 Ms McDonnell was granted interim reinstatement.

[13] TMOT sought to appeal the judgment to the Court of Appeal, filing an application for leave to appeal on 23 December 2021.

[14] Before the application for leave to appeal by TMOT was heard by the Court of Appeal, a settlement was reached by the parties following settlement negotiations which involved counter- and revised offers.

[15] The parties to the ROS are 'Tania McDonnell' and the 'Board of Trustees of Te Manawa O Tuhoe Trust'. The ROS was signed on 28 January 2022 by Ms McDonnell and by the Chairperson of TMOT as the authorised signatory on behalf of TMOT.

[16] The ROS provided the following relevant terms at clauses 2, 3 and 5:

2. Within 7 days of this agreement the Respondent will pay:
 - a. The Applicant the compensatory sum of \$25,000 under section 123(1)(c)(i) of the Employment Relations Act 2000;
 - b. Stan Austin upon receipt of an invoice the sum of \$10,000 (inclusive of GST if any), being contribution the applicant's costs of representation in the employment Relations Authority and Court
 - c. SBM Legal upon receipt an invoice the sum of \$3.500 (plus GST) being contribution to the Applicant's costs of representation in the court of Appeal.

3. Neither party will make disparaging remarks against each other.

5. This is the full and final settlement of all matters between Tania McDonnell and Te Manawa o Tuhoe Trust arising out of their employment relationship.

[17] On 2 February 2022 TMOT paid the settlement sum specified in the ROS to Ms McDonnell.

[18] That same date, Mr Austin emailed the Authority in relation to file number 3141861 in which Ms McDonnell claimed unjustifiable dismissal and sought the remedies of interim and permanent reinstatement. Mr Austin advised that the matter had been resolved and: “The application should be discontinued.”

[19] The application for leave to the Court of Appeal was also discontinued on 2 September 2022.

[20] Although Ms McDonnell received the payments specified under the ROS, she has maintained that she was still an employee of TMOT and continues to demand payment in respect of unpaid wages.

[21] Ms McDonnell has also refused to return property belonging to TMOT.

[22] On 6 May 2022 TMOT filed a Statement of Problem seeking a compliance order against Ms McDonnell as First Respondent, and Mr Austin as Second Respondent on the basis that he had aided and abetted Ms McDonnell to extort further monies from TMOT by dishonestly or negligently misstating the effects of the ROS (3171822) .

[23] On 31 August 2022 Ms McDonnell filed a Statement of Problem alleging a breach of the ROS against TMOT as First Respondent, Mr Cristini as Second Respondent and Mr McKenna as Third Respondent (3190479).

[24] The claims against Ms McDonnell by TMOT is that she breached the terms of her employment agreement with TMOT by failing to return property belonging to TMOT upon termination of the employment relationship pursuant to clause 11.3 of the Employment Agreement; and that she breached the statutory obligation of good faith.

[25] It is claimed that Mr Austin has aided and abetted her in the breaches, and a penalty is sought against him on that basis.

[26] The claim by Ms McDonnell against TMOT is that TMOT breached the ROS clause 3 disparagement when it made a complaint to the Police regarding the non-return of its property by her after 2 September 2021.

[27] It is claimed that Mr Cristini and Mr McKenna aided and abetted the breach by TMOT.

Should application 3171822 be stuck out?

[28] The Authority has the power under clause 12A, Schedule 2 of the Act to dismiss frivolous or vexatious proceedings, and may do so at any time in a proceeding where the Authority considers that matter to be frivolous or vexatious:

12A Power to dismiss frivolous or vexatious proceedings

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
- (2) In such a case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[29] In *New Zealand (with exceptions) Shipwrights etc Union v New Zealand Amalgamated Engineering etc IUOW & Ors*, the then Chief Judge Goddard cited with approval the words of Lush J in *Norman v Mathews* in which the English Judge said that a frivolous case was one which: “no reasonable person could properly treat as bona fide”¹

[30] Chief Judge Inglis stated in *Lumsden v Skycity Management Ltd* that:

[37] ... the scope of cl 12A is usefully informed by the judicial discussion I have referred to. It seems to me that a matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority’s processes, lacking the degree of seriousness required to engage the attention of the Authority in the sense referred to in the Shipwrights case. A matter may be said to trifle with the Authority’s

¹ *New Zealand (with exceptions) Shipwrights etc Union v New Zealand Amalgamated Engineering etc IUOW & Ors* 23 November 1989. WLC111/89.

process where it is, to use Chief Judge Goddard's terminology, impossible to take seriously.

...

[39] I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases...²

[31] In *AFT v BCM* former Chief Judge Colgan, agreeing with the analysis of Judge Inglis in *Lumsden*, considered the meaning of a 'frivolous' case as being one in which there was a significant lack of legal merit so that it is impossible for the claim to be taken seriously. Vexatious meant conduct without reasonable or probable cause or excuse; harassing; or annoying. His Honour stated in paragraph {78):

... cl 12A of sch 2 contains quite specific powers to be exercised in unusual circumstances and, in particular, should not be used by the Authority to dismiss, without consideration of their merits, proceedings which impress the Authority as having low or no expectations of success.³

[32] I observe that the judgments cited above have set the threshold very high to justify dismissing an applicant's claims on the basis that they are frivolous and vexatious. I note by way of illustration the phrases: "clearly untenable ... cannot possibly succeed", "futile", no reasonable person could treat as bona fide".

[33] In a strike out application, I must assume that the facts as pleaded are true; it will be for TMOT to establish them at the substantive hearing in order to succeed on this claim.

[34] A claim should not be summarily struck out unless I can be certain it cannot succeed. Whilst at this preliminary stage I can have no certainty as to the strength of TMOT's claims because there has been no testing of witness or documentary evidence, I cannot be certain that it will not succeed.

[35] Nor do I find that the claims are futile, or that no reasonable person could treat them as bona fide. I find that the issues raised by TMOT are issues to be explored at the substantive investigation meeting and not a reason to strike out on the basis that they are as frivolous or vexatious.

² *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225.

³ *AFT v BCM* [2015] NZEmpC 234.

[36] I determine that the claims by TMOT are not frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act and should not be dismissed.

Joinder of Non-parties

[37] Mr Austin, Mr Cristini and Mr McKenna are not parties to the ROS which is between Ms McDonnell and TMOT. However, a non-party can be joined as a party and be liable for penalties in circumstances in which he or she knew the fact of the settlement having been achieved and the relevant terms of it, and then breached those terms.⁴

Should Mr Austin be joined as Second Respondent in 3171822?

[38] It is submitted that Mr Austin should be joined to 3171822 because he knew of the terms of the ROS and aided and abetted Ms McDonnell to breach those terms.

[39] Mr Austin is an advocate and as such deemed to be acting in a professional capacity when advising Ms McDonnell pursuant to s 236 of the Act. Such advice is privileged and cannot be brought before the Authority unless Mr Austin waived privilege.

[40] Unless evidence of waiver is brought before the Authority, I determine that Mr Austin should not be joined as a party in 3171822.

Should Mr Cristini be joined as Second Respondent in 3190479?

[41] The parties to the Settlement are TMOT and Ms McDonnell. Mr Cristini is not a party to the ROS. He is not a Trustee of TMOT but as General Manager is considered to be an officer of that company acting upon delegated authority as an agent of TMOT.

[42] There are only two parties to the Settlement. Mr Cristini is associated with one of the parties, in this case TMOT.

[43] Provided that Mr Cristini acted within his delegated powers and in good faith during the performance of his duties as General Manager I find that he would be acting on behalf of TMOT which would be vicariously responsible for his actions, including any alleged breach of the Settlement.

⁴ *Musa v Whanganui District Health Board* [2010] NZEmpC 120.

[44] I consider that in order that Mr Cristini be properly joined as a respondent in this matter he must have been acting in a personal rather than a professional capacity acting on behalf of TMOT, or evidence provided that he aided and abetted TMOT to breach the ROS. There is no evidence to support either as the case in this action.

[45] I determine that Mr Cristini should not be joined as the Second Respondent in 3190479.

Should Mr McKenna be joined as Third Respondent in 3190479?

[46] Mr McKenna is a lawyer acting upon instructions of TMOT.

[47] Any advice he provided to TMOT will accordingly be subject to professional legal privilege.

[48] Unless evidence of waiver is brought before the Authority, I determine that Mr McKenna should not be joined as a party in 3190479.

Costs

[49] Costs are reserved pending the substantive determination.

Eleanor Robinson
Member of the Employment Relations Authority