

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 279  
3251919

BETWEEN	ROBERTS NZ LIMITED (IN LIQUIDATION) Applicant
AND	GAVIN PAYNE Respondent

Member of Authority:	Marija Urlich
Representatives:	Digna Toresen, advocate for the Applicant Colin Roberts, representative for the Respondent
Investigation Meeting:	On the papers
Submissions and information received:	12 March 2024, from the Applicant 9 April 2024, from Respondent
Determination:	13 May 2024

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Payne applies to have claim brought by Roberts NZ Limited (In liq) (Roberts) dismissed as vexatious or frivolous and challenges Colin Roberts authority to represent Roberts in this matter.<sup>1</sup> Roberts opposes the application.

**The Authority's investigation**

[2] By consent this preliminary issue is determined on the papers. The parties have filed relevant information including affidavit evidence in accordance with the Authority timetable. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings, expressed conclusions on issues necessary to dispose

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<sup>1</sup> Clause 12A, schedule 2 Employment Relations Act 2000.

of the matter and specified orders made. It has not recorded all evidence and submissions received.

## Issues

- [3] The preliminary issues identified for investigation and determination are:
- (i) Should the application be dismissed under schedule 2, cl 12A of the Employment Relations Act 2000?
  - (ii) Does Mr Roberts have authority to represent the applicant under s 236 of the Act?

### **Should be dismissed on the grounds it is frivolous and/or vexatious?**

[4] Clause 12A of Schedule 2 of the Act gives the Authority power to dismiss frivolous or vexatious proceedings. Dismissing a claim is a serious step, not one to be taken lightly. The Employment Court in *Lumsden v Sky City Management Limited* recognised that the Authority's power to dismiss proceedings on the grounds that they are frivolous or vexatious is limited and the threshold for establishing that is high.<sup>2</sup>

[5] The Authority's jurisdiction comes from s 161 of the Act. This provides the Authority has "exclusive jurisdiction to make determinations about employment relationship problems generally". Section 4(2) identifies the employment relationships that are covered by the Act. Section 5 of the Act defines an employment relationship problem. Section 6 of the Act sets out the meaning of an employee.

[6] The Supreme Court considered the jurisdiction of the Authority arising out of s 161 in the recent judgment of *FMV v TZB*.<sup>3</sup> The Supreme Court stated that s 161 of the Act:

[...] reflects the relational framework of the Act and drives the fact-based, problem-solving approach of the Authority. The Authority has exclusive jurisdiction to make determinations about "problems generally", not specific causes of action. **The only requirement is that the problem must be an "employment relationship" one; that is, it must relate to or arise from the "employment relationship"** in its entire sense [...] (emphasis added.)<sup>4</sup>

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<sup>2</sup> *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.

<sup>3</sup> *FMV v TZB* [2021] NZSC 102.

<sup>4</sup> Above at [60].

[7] The basis of Mr Payne's application for dismissal are his concerns as to Roberts' motivation for the action brought against him and the continuation of the action despite the liquidation. He describes it as a personal vendetta, that it is causing him significant stress in his work and personal life, impacting negatively on his well being and is financially disadvantageous. He asks that appropriate steps are put in place for any investigation meeting.

[8] Roberts claim that Mr Payne breached the parties' employment agreement causing it loss cannot be said to frivolous and/or vexatious to the extent that they warrant dismissal at this stage. Roberts' claim will turn on the application of the law to the facts as they are established at the investigation meeting. Relevant matters about the nature of the employment relationship and issues as to motivation for the claim Roberts brings may be canvassed at the investigation meeting.

[9] Mr Payne's invitation to the Authority to conclude Roberts' claims are brought vexatiously and with an improper purpose is not supported by sufficient evidence at this stage to establish to the high standard required for a dismissal of the claim on the grounds the claim is brought for an improper motivation.

[10] A consideration of a dismissal on the grounds sought involves an exercise of a discretion. Having considered the issues raised by the parties I decline to exercise the discretion to dismiss Roberts' claims at this stage of the proceedings.

### **Does Mr Roberts have authority to represent the applicant under s 236 of the Act?**

[11] Section 236 of the Employment Relations Act 2000 (the Act) provides:

#### **236 Representation**

(1) Where any Act to which this section applies confers on any employee the right to do anything or take any action—

(a) in respect of an employer; or

(b) in the Authority or the court,—

that employee may choose any other person to represent the employee for the purpose.

(2) Where any Act to which this section applies confers on an employer the right to do anything or take any action—

(a) in respect of an employee; or

(b) in the Authority or the court,—

that employer may choose any other person to represent that employer for the purpose.

(3) Any person purporting to represent any employee or employer must establish that person's authority for that representation.

[12] On a plain reading it is a mandatory requirement of section 236 that a representative establish their authority to do so – “must establish”.

[13] Clause 2 of the second schedule of the Act provides:

**2 Representation of parties**

(1) Any party or person involved in a matter before the Authority, or called upon to appear before the Authority, may—

(a) appear personally; or

(b) be represented—

(i) by an officer or member of a union; or

(ii) by an agent; or

(iii) by a barrister or solicitor.

(2) The Authority may order any person to appear before it or be represented before it.

[14] On 18 January 2024 Ms Toresen advised of Mr Payne’s intention to challenge Mr Roberts authorisation to represent Roberts in these proceedings. On 25 January Grant Roberts, the liquidator appointed by special resolution of the shareholders on 27 October 2023:<sup>5</sup>

Following your email of 18 January 2024, to confirm, Mr Roberts has the authority to act as the agent for Roberts NZ Limited (In Liquidation) (the Company) in terms of the matter before the ERA, the case management conference of 18 January 2024 was adjourned as Ms Toresen had not received a copy of my email of 4 December 2023. Mr Roberts is the best person to represent the Company and is the person who dealt with most of the issues between the Company and Mr Payne.

[15] Mr Payne’s challenge to Mr Roberts’ authority to act in these proceedings is his disquiet that the liquidated entity is continuing the proceedings and has appointed Mr Roberts as its agent given his proximity to the claim and his (Mr Payne’s) concerns about the motivation for the claim. These are not sufficient grounds to invalidate Mr Roberts authority. It is not unusual for parties to be self-represented in matters before the Authority, which is effectively the situation here. Further, Grant Roberts’, the liquidator, has exercised a statutory power to authorise extant proceedings to continue

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<sup>5</sup> For completeness the liquidator wrote to the Authority on 4 December 2023 consenting to these proceedings, lodged prior to the liquidation, continuing with Mr Roberts as agent.

and to authorise an agent to do so.<sup>6</sup> There is no suggestion this power has been improperly exercised. The challenge to Mr Roberts authority to act as Roberts' agent in these proceedings is unsuccessful.

### **Costs**

[16] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority

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<sup>6</sup> Companies Act 1993, s 260(2), schedule 6 clause (a), (n).