IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 209
EMPC 251/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out part of the pleadings
BETWEEN	DAVID OSBORNE Plaintiff
AND	CALLAGHAN INNOVATION Defendant

Hearing:	25 October 2023 (Heard at Auckland via Audio Visual Link)
Appearances:	Plaintiff in person P Chemis and E von Veh, counsel for defendant
Judgment:	22 November 2023

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application to strike out part of the pleadings)

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[1] On 14 July 2022, the Employment Relations Authority issued a determination ostensibly dealing with one aspect of claims David Osborne made against his former employer Callaghan Innovation: its jurisdiction over an alleged breach of the Protected Disclosures Act 2000.[1]

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[1] *Osborne v Callaghan Innovation* [2022] NZERA 323 (Member O'Sullivan). The Act has now been repealed and replaced by the Protected Disclosures (Protection of Whistleblowers) Act 2022.

[2] Mr Osborne's remaining claims, which include allegations of an unjustified disadvantage, breaches of the duty of good faith, failure to act as a good employer, breaches of the employment agreement and unjustified dismissal were not dealt with by the Authority in the determination. They were reserved for a future decision.

[3] Callaghan Innovation has applied to strike out aspects of Mr Osborne's latest statement of claim. To put that application, and Mr Osborne's response to it, into context it is necessary to make brief comments about the litigation. The following review is taken from the Authority's determination and undisputed facts referred to in the pleadings.

[4] Mr Osborne worked for Callaghan Innovation from September 2014 until August 2018.[2] In 2018, Callaghan Innovation restructured its business resulting in Mr Osborne's redundancy. Consequently, he was given notice of termination of his employment on 15 July 2018 and his last day of employment was 10 August 2018.[3]

[5] On 25 July 2018, Mr Osborne made a protected disclosure to the Chair of the Board of Callaghan Innovation.[4] Eventually, Callaghan Innovation declined to investigate the matter Mr Osborne raised. Following that decision, on 28 August 2018, the Chair to whom the disclosure was made forwarded its contents to the Chief Executive Officer (CEO).[5]

[6] Mr Osborne considered that the Chair's act of sending the information to the CEO breached the confidentiality to which he was entitled. It is this alleged breach and its aftermath that gives rise to the present litigation.

[7] The Authority identified two issues that arose:

(a) that the alleged breach of the Protected Disclosures Act occurred after Mr Osborne's employment ended; and

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2 At [6].
3 At [6].
4 At [7]; the second amended statement of claim is not specific about the date beyond referring to July 2018.
5 At [8].

(b) that Mr Osborne was alleging breaches which would only come under its jurisdiction in circumstances set out in s 17(1) of the Protected Disclosures Act, namely that there was retaliation because of the disclosure.[6]

[8] The Authority held that there was no claim that Callaghan Innovation retaliated against Mr Osborne, so s 17 does not apply. While the Authority concluded that the alleged breaches were not within its jurisdiction, it commented that there was no reason why relevant information about what happened could not form part of the "factual matrix" for the remaining claims.

The challenge

[9] Mr Osborne challenged the determination and sought to set it aside. He did so in a comprehensive manner. His second amended statement of claim contained five distinct causes of action.

[10] The first cause of action pleaded an intentional breach of confidentiality arising from the Chair's action in forwarding information to the CEO.

[11] The second cause of action pleaded that he raised a personal grievance within 90 days.[7]

[12] The third cause of action pleaded that Mr Osborne was lied to by the Chair when being informed by him that no breach of confidentiality had taken place. The allegation was that the Chair intentionally attempted to deceive him, breaching the employer's duty of good faith in the Employment Relations Act 2000 (the Act).

[13] The fourth cause of action arises from a complaint to the Ombudsman's office. The allegations, which do not need to be described in any detail, are about statements alleged to have been made by the CEO to the Ombudsman during an investigation by that office.

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6 At [11].
7 Employment Relations Act 2000, s 114(7)(b).

[14] The fifth cause of action was a claim that Callaghan Innovation used the processes of the Authority to prevent certain of Mr Osborne's claims from being heard.

The strike out application

[15] Callaghan Innovation applied to strike out all five causes of action. However, it accepted that there was a potential claim in paragraph [3] in the second amended statement of claim that it could not seek to strike out. The passage reads:

> This election relates to the whole of that, namely, that my complaint cannot be heard by the Employment [Relations] Authority.

[16] It appears that this pleading was interpreted by Callaghan Innovation as a challenge to the Authority's analysis of its jurisdiction.

[17] Mr Osborne opposed the application.

Strike out principles

[18] There is no dispute about the principles to apply. The Court may strike out all or part of a pleading if it:

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading;[8]

(b) is likely to cause prejudice or delay;

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the Court.

[19] The criteria to be applied are:[9]

(a) The pleaded facts, whether admitted or not, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

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8 High Court Rules 2016, r 15.1 applied by Employment Court Regulations 2000, reg 6.

9 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; as endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31]–[33].

(b) To strike out a proceeding the cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim unless the Court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly, and only in clear cases, reflecting the Court's reluctance to terminate a claim or defence short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be slow to strike out a claim in a developing area of the law.

[20] The threshold to reach before an application to strike out can succeed is a high one.

Defendant's submissions

[21] Mr Chemis made three broad submissions:

(a) under s 187(1) of the Act, the Court is confined to hearing elections to challenge determinations made under s 179;

(b) the five causes of action were not about matters determined by the Authority and, therefore, the Court has no jurisdiction to consider them; and

(c) the only jurisdiction the Court has is to hear that part of the challenge in paragraph [3] of the second amended statement of claim.

[22] Implicit in these submissions was that the subject matter of each of Mr Osborne's five causes of action was not encompassed in some way by the alleged breach or breaches relating to the protected disclosure.[10]

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[10] Mr Osborne did not argue that the Authority had omitted to make a decision on a matter that was properly before it for consideration.

Plaintiff's submissions

[23] Mr Osborne submissions generally maintained that the Court has jurisdiction to hear his challenge and included arguments that:

(a) Callaghan Innovation's application lacked merit and failed to address the substance of his allegations;

(b) its submissions depended on a narrow interpretation of the Act and did not consider the Court's inherent jurisdiction;

(c) the Court has jurisdiction to determine all issues raised in the second amended statement of claim irrespective of whether or not they were raised in or determined by the Authority;

(d) section 187 of the Act confers a broader jurisdiction available to determine disputes;

(e) the personal grievance was raised within 90 days;

(f) Callaghan Innovation's position goes against the principle of fairness and access to justice; and

(g) the Court should not at this stage determine the ultimate merits of the claim which should be tested at trial.

[24] There is some overlap in these submissions, but the general thrust of them was that Mr Osborne was entitled to pursue his claims as pleaded and the Court had the necessary jurisdiction to consider all of them.

Analysis

[25] Mr Chemis' argument is the straightforward proposition that the subject matter of each cause of action in the second amended statement of claim was not dealt with by the Authority and, consequently, could not give rise to a challenge under s 179(1) of the Act. That submission took with it the further proposition that the Court has no original jurisdiction to entertain claims arising as part of a challenge when the subject

matter of them was not before the Authority. If those propositions are accepted, it follows that there is nothing capable of being challenged.

[26] I agree that the Court's jurisdiction to consider a challenge is grounded in the subject matter having been before the Authority for determination. That means an analysis is required of what was before the Authority and how the subject was addressed in the statement of claim in this Court.

[27] Mr Osborne's second amended statement of claim set out its general nature in eight introductory paragraphs. That introduction was followed by other pleadings describing when his employment began and ended and alleging the Chair disclosed information to the CEO, who was the subject of the protected disclosure.

[28] The first cause of action was entitled "Intentional breach of confidentiality". The first pleading under this heading was that, under Callaghan Innovation's protected disclosure policy, Mr Osborne was entitled to confidentiality when he made his disclosure to the Chair. That was followed by a further pleading that no investigation was undertaken and, therefore, the Chair had no reason to forward the disclosure to the CEO.

[29] From the combination of the remaining paragraphs in this cause of action it would appear that the alleged breach of confidence of concern to Mr Osborne was claimed to have arisen at the point in time when the disclosure was passed to the CEO, combined with an assertion that Callaghan Innovation's policy should have been followed. Additionally, the act of revealing the disclosure was pleaded as being a breach of good faith.

[30] A point to be made at this stage is that while the Authority's determination referred to the problem as it was then framed, as being about the protected disclosure and Protected Disclosures Act, Mr Osborne explained that he was more concerned about the breach of confidence wrapped up in his pleading.

[31] Mr Chemis submitted that the Authority was not concerned with the pleaded breach because the determination looked at the applicability of the Protected Disclosures Act.

[32] An obvious part of this evaluation is to consider the scope of the problem that was before the Authority. The statement of problem in the Authority was not before the Court, but there are aspects of the determination that shed light on what was being investigated and touch on confidentiality in a way suggesting the scope of the investigation was broader than seeking remedies under the Protected Disclosures Act.

[33] The determination listed six matters to be addressed. The first five of them were put aside for subsequent investigation. The sixth matter was described in the following way:[11]

> [1] In February 2021 David Osborne filed a statement of problem alleging:
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> (a) …
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> (f) breaches of how the Respondent managed and responded to the Applicant's disclosures he made as a protected disclosure.

[34] Subsequently, at the point in the determination where it provided background information to inform the decision, there was a discussion of emails about the protected disclosure. Following some clarification, which was not specified in the determination, the Authority held that the Chair declined to investigate and forwarded the content of the disclosure made to him, either in full or in part, to the CEO. That finding was followed by this comment:[12]

> … Mr Osborne's view was that the disclosure of his identity breached the confidentiality requirements of the Protected Disclosures Act.

[35] While Mr Osborne did not present his submissions in quite this way, the scope of the alleged breach of confidence encompassed his concerns about the Protected Disclosures Act but its breadth as signalled by paragraph [1](f) of the determination suggests he placed in issue matters arguably broader than an attempt to seek protection from that Act. Mr Osborne was at least attempting to place in issue Callaghan Innovation's compliance with its own policy (by reference to how it managed and responded to his disclosure) and the act of disclosing information to the CEO.

[36] Of course, that raises as an issue whether, in a conventional sense, the cause of action could be said to have arisen only at the point in time where the disclosure was

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11 *Osborne*, above n 1, at [1](f).
12 At [8].

made to the CEO. On Mr Osborne's pleading that occurred after his employment ended. There are two potential responses. The first is that the complaint of a breach of policy may have emerged prior to the employment ending although the information available about that is scant at best. The second response lies in the ambit of s 161(1)(r) and the extent to which the Authority has jurisdiction because of any other action "arising from or related to the employment relationship".

[37] Under s 161 of the Act the Authority has a broad jurisdiction to investigate and resolve employment relationship problems. The breadth of that jurisdiction was recently considered by the Supreme Court in *FMV v TZB*.[13] The jurisdiction is deliberately based on a non-technical term: "problem". So long as the problem relates to or arises from an employment relationship it is within the jurisdiction of the Authority.[14] The question is then one of fact. If the controversy arose during the course of the employment relationship, and in a work context, it will be an employment relationship problem and therefore could be pursued in the Authority. The Supreme Court noted there will sometimes be questions of judgment about the jurisdiction but that was unavoidable.[15]

[38] At the heart of Mr Osborne's complaint was that the information he disclosed to the Chair was not handled properly. The information was held by the Chair because of the employment relationship and if there was a breach in how it was handled when considered by him, or in the act of passing the information to the CEO, it is at least reasonably arguable that s 161(1)(r) applies. Certainly, at this threshold stage, there is no information from which it could be concluded that there is no reasonably arguable cause of action.

[39] I am not persuaded that the first cause of action should be struck out.

[40] The second cause of action is about the timeliness of Mr Osborne's actions in raising a personal grievance. The difficulty with this pleading is that the timeliness of the grievance was not before the Authority. It follows that there is nothing to challenge.

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13 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.
14 At [92]; see Employment Relations Act 2000, s 161(1)(r).
15 At [93].

[41] Some difficulty is encountered in assessing the third cause of action because, beyond pleading that Mr Osborne was lied to by the Chair, no other particulars were provided. The pleading does not describe when the alleged lie was said to have been made and provides no other context to explain it. However, it is possible that this pleading is intended to supplement the first cause of action because it touches on the alleged breach of confidence. Consequently, taking a cautious approach, I am not persuaded that Callaghan Innovation has met the threshold to strike out this cause of action.

[42] The fourth cause of action does not arise from the determination and therefore is not a matter that can be advanced in this challenge. There is an additional problem. The pleading was an allegation that, in response to the Ombudsman's inquiry, either it became apparent the Chair lied to Mr Osborne about whether an investigation had started or the CEO lied to the Ombudsman. There was a further pleading to the effect that a statement by the CEO made to the Ombudsman about the removal of confidentiality under the company policy was false and meant to deceive the Ombudsman.

[43] It follows that the cause of action is about what happened during the Ombudsman's investigation. Even using a very generous reading of s 161 of the Act the claim is too remote to be considered to have arisen from an employment relationship; it arose from and is connected to the Ombudsman's inquiry.

[44] The fifth cause of action was about an alleged abuse of the Authority's procedures. This matter was not before the Authority for consideration as part of its determination. In any event the pleading is misconceived. Even if there were such difficulties (which were not particularised), a challenge on that basis is precluded by s 179(5) of the Act. Furthermore, any challenge to a substantive determination could be pursued by seeking a full rehearing, which would cure any procedural deficiencies that may have arisen.

Other considerations

[45] For completeness, it is necessary to address Mr Osborne's submissions to the effect that the Court has jurisdiction to entertain matters even if they were not before

the Authority. He based that proposition on what he described as the Court's inherent jurisdiction or the Court having broad powers sufficient to deal with his claims. The submission is misplaced. The only Court with inherent jurisdiction is the High Court. This Court, as a creature of statute, has only those powers conferred on it and those necessary powers to enable it to discharge the jurisdiction conferred by the Act.[16]

[46] Nothing arising in the five causes of action in the second amended statement of claim calls on the Court to consider exercising its inherent powers.

Conclusion

[47] The Court does not have jurisdiction to consider the second, fourth and fifth causes of action inclusive and they are struck off.

[48] The Registrar is requested to arrange a telephone directions conference with the parties to deal with the remaining issues.

[49] Costs are reserved. If they cannot be agreed memorandum may be filed.

K G Smith
Judge

Judgment signed at 3 pm on 22 November 2023

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16 See *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 (SC); *Hynds Pipes Systems Ltd v Forsyth* [2017] NZEmpC 89, [2017] ERNZ 484.