IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 4
5521910

	BETWEEN	JONATHAN AMES Applicant
	AND	WEST COAST PRIMARY HEALTH ORGANISATION Respondent

Member of Authority:	Christine Hickey
Representatives:	Mr Ames in person Peter Churchman QC, counsel for Respondent
Investigation:	On the papers, received on 17 and 20 November 2014, 8, 14 and 15 December 2014 and oral submissions made via a teleconference on 19 December 2014.
Determination:	13 January 2015

DETERMINATION OF THE AUTHORITY ON STRIKE OUT APPLICATION

A. Mr Ames' claims are not struck out. However, his claims are limited to matters not linked to the fact of his dismissal or the process by which he was dismissed.

Employment relationship problem

[1] Jonathan Ames was employed as a primary mental health practitioner/counsellor with the West Coast Primary Health Organisation (the PHO) and began work on 4 August 2014. There was a 90-day trial period provision in his individual employment agreement (IEA). Mr Ames was dismissed on 24 September 2014 under the valid 90-day trial period provision. Mr Ames is prevented from bringing a personal grievance claim of unjustified dismissal by virtue of ss.67A and 67B of the Employment Relations Act 2000 (the Act).

[2] Mr Ames lodged a statement of problem with the Authority on 8 October 2014. He claimed to have been *unfairly disadvantaged* and to have received *unfairly prejudicial treatment in my employment*. Mr Ames did not specify what remedy or remedies he sought.

[3] On 21 October 2014 the PHO through its counsel lodged a statement in reply stating:

- The claims of unfair disadvantage and unfair prejudice are denied and in any event Mr Ames' employment was terminated within the 90 day trial period.

- Mr Ames' claims of justified disadvantage or prejudice appear purposely designed to fall within the limited exceptions under s.67B of the Employment Relations Act 2000 (the Act), and have no merit.

[4] After a teleconference with the Authority on 28 October 2014 Mr Ames was directed to file an amended statement of problem which:

> *…clearly specifies what actions by the respondent he says caused him disadvantage or were a breach of good faith and what, if any, remedies he is seeking…*

[5] The Authority suggested that Mr Ames may wish to seek legal assistance to redraft the statement of problem. As a result of hearing from both parties about their respective attitudes to mediation the Authority decided that it was not going to be productive at that time for them to attend mediation.

[6] On 30 October 2014 Mr Ames wrote to the Authority that he could not obtain legal representation and included some advice he had received from solicitors at Community Law Canterbury which advised him that it could not represent him in a claim for unjustified dismissal.

[7] On 12 November 2014 Mr Ames lodged an amended statement of problem in which he specified actions or events he considered were disadvantageous to him in his employment and which he relied on for his claims. He claimed remedies including:

- Mediation,
- Compensation for loss of income from date of dismissal until he obtains further employment,
- Payment of the remainder of his six-month lease obligation in Greymouth,
- Payment of storage fees for goods stored in Christchurch which he cannot now move to Greymouth,
- Punitive damages for suffering,
- *Full documentation acknowledging the mistaken and inappropriate application of the 90 day law by the PHO*,
- Payment for professional assistance in *resuscitating my career and accomplishing my recovery from this whole traumatic experience*,
- Payment for relocation to any part of New Zealand in which he gains employment, and
- That the Authority considers the *suitability of the 90 day terminate at will law for any professional employee who is engaged with vulnerable members of the community as a provider of professional services*.

[8] On 17 November 2014 Mr Churchman, counsel for the PHO, filed an application to strike out Mr Ames' application under clause 12A of Schedule 2 of the Act. The application summarised what Mr Churchman understood Mr Ames' claims for unjustified disadvantage to be and submitted:

- Despite the amended statement of problem there was no pleading as to how Mr Ames was disadvantaged in his employment and nor was there any identified relief in connection with any of the specific allegations.
- Mr Ames fails to grasp or has ignored the distinction between a grievance of unjustified disadvantage and a grievance of unjustified dismissal.
- The kinds of relief claimed by Mr Ames bear no relationship to the claimed unjustified disadvantages but go beyond the Authority's jurisdiction.
- Mr Ames' pleadings are an abuse of the Authority's processes.
- Mr Ames' claims should be struck out on the basis that his essential concern is to obtain an amendment to the current legislation so he could challenge his dismissal.

[9] Mr Churchman submitted that the respondent is a publicly funded body which has been put to needless expense in defending Mr Ames' claims. Mr Churchman also sought costs in relation to the strike out application.

[10] On 17 November 2014 Mr Ames filed a response to the strikeout application responding to a number of Mr Churchman's submissions, and for current purposes it is sufficient to record that Mr Ames wrote of his disagreement with the application to strike out his claims.

[11] On 20 November 2014 Mr Ames wrote to the Authority, with a copy to Mr Churchman, explaining that he considered the Act specified that good faith was required:

> *… even toward Trial employees, the use of the 90 Day Act, which requires no explanation, as a response to an expressed grievance essentially renders such specifications mute*.

[12] On 8 December 2014 Mr Ames emailed the Authority asking that it delay its consideration of the strike out application because he had an appointment with a lawyer on 17 December 2014.

[13] On 14 December 2014 Mr Ames wrote to clarify his intentions after a consultation with an employment lawyer. He wrote that he wished to reframe his grievance as *a complaint for fundamental Breach of Contract* based on his assertion that the PHO breached its duty of good faith to him set out in his IEA. Clause 38.1 of Mr Ames' IEA essentially restates the obligation of good faith which s.4 of the Act imposes on employees and employers.

[14] In that document Mr Ames wrote that while mediation with the clinical manager and executive officer with whom he worked and who dismissed him *would not be conclusive* he suggested that a role for him as a psychologist within either the Canterbury or West Coast District Health Boards (DHBs) could be found and offered to him so sought to involve the Canterbury DHB in mediation.

[15] The remedies he seeks are:

> *… restoration of lost salary up until the resolution of this matter, funding for specialized clinical attention (beyond the capacity of ACC), and so on.*

> *Additionally, I would like the Authority … to consider another dimension of where the 90 day trial termination provision is inappropriate (utilizing the same breadth of concern as was evident the Smith v Stokes Valley case). Specifically, I submit that it would be in the general interest to comment on the appropriateness of the 90 day provision for employees who, in their professional capacity, engage and develop clinical relationships with vulnerable populations—specifically, people experiencing mental health difficulties.*

[16] Mr Ames also asked if he needed to pay a new application fee for having reframed his application. Mr Ames referred to *my two '90 day termination' cases* being the one in issue here and another with the Midland PHO, which he asked to be consolidated or that the other claim be continued *pending the outcome of the West Coast case*.

[17] I do not consider it appropriate for two applications involving different employers and different factual circumstances to be consolidated. If Mr Ames wishes his claim against the Midland PHO to be dealt with only after this matter is resolved he should ask the Authority member dealing with that claim.

[18] Mr Churchman replied to Mr Ames' reframed claims by email of 15 December 2014 stating he considered that Mr Ames had repackaged his personal grievance claim as a breach of contract claim and appeared to be seeking the same relief much of which could only be available in a case of unjustified dismissal. Therefore he submitted that the claim was *fundamentally inconsistent with the 90 day rule and the proceedings cannot succeed*.

[19] Mr Churchman submitted that the Authority should proceed to determine the strike out application.

[20] I held a teleconference on 19 December 2014 to hear from Mr Churchman and Mr Ames in relation to the strike out application.

[21] At the teleconference I explained to Mr Ames that he would not have to pay a further filing fee for his reframed application.

Determination

[22] I need to establish whether there are any grounds to strike out Mr Ames' claims, which the PHO asks that I do. Clause 12A of Schedule 2 of the Act, which says:

> *(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 any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.*

[23] Mr Ames' claim/s would need to be *frivolous* or *vexatious* before they could be dismissed without being heard. The purpose of dismissing claims which are frivolous has been set out in *Shaskey v Chief Executive of Manukau Polytechnic Institute of Technology*[1]:

> *… the law recognises that in some cases there is simply no legal foundation for proceedings and it is plain they cannot succeed. In the wider interests of justice those cases ought to be ended once that is able to be clearly seen.*

[24] In order for proceedings to be classified as frivolous they must be such that no reasonable person can properly treat them as bona fide. In *Creser v Tourist Hotel Corporation of New Zealand*[2] Chief Judge Goddard wrote:

> *I would add only this: to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is 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 glaring error of law, the plaintiff, or applicant, has brought a case which is entirely misconceived.*

[25] Brooker's Employment Law sets out principles applying to a consideration of whether proceedings are *vexatious* or not. The power to dismiss proceedings should not be lightly exercised because it prevents access to justice and can only be:

> *…justified only in extraordinary circumstances and where there is a properly established evidential basis for doing so.*
> *(b) A decision to dismiss proceedings may only be made after a fair and open hearing on the point, in particular giving the person against whom the dismissal is being sought or considered the opportunity to be heard.*[3]

[1] [2011] NZERA Auckland 86.
[2] 1 NZILR 1055 (LC)
[3] Volume 1, ERSch3.15.01(3)

[26] Mr Ames is representing himself and genuinely believes that he has been wrongly treated. He is aware that, although he disagrees with the law, he cannot challenge his dismissal as being unjustified because of the provisions of the Act prohibiting that.

[27] Mr Ames is not bringing a personal grievance claim of unjustified dismissal although he clearly considers that he was unjustifiably dismissed. He believes passionately that what has become known as the 90-day trial period law (ss67A and 67B of the Act) is unfair generally and more specifically is unsuited to professional employees who have vulnerable clients, such as he worked with at the PHO.

[28] Although perhaps drafted in a prolix and somewhat confusing way for legally trained minds I do not consider Mr Ames claims are so entirely misconceived as to be frivolous and I could not dismiss them at this stage as vexatious either, especially having heard no evidence. Therefore, the strike out application fails.

What will happen next?

[29] For Mr Ames' sake I clarify who the parties to this matter are, as defined by the Act, and therefore over whom the Authority has jurisdiction for the limited purpose, in this case, of investigating and determining the employment relationship problem.

[30] Under s.157 of the Act the Authority is mandated to:

> *…act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with-*
> *(a) this Act; or*
> *(b) any regulations made under this Act; or*
> *(c) the relevant employment agreement.*

[31] In acting consistently with the Act the Authority must restrict itself to the jurisdiction conferred under the Act.

[32] Section 4(2) of the Act sets out the employment relationships in respect of which the Act applies. For the purposes of Mr Ames' application the employment relationship problem he and the PHO have is covered by, s.4(2)(a):

an employer and an employee employed by the employer

[33] Mr Ames was not employed subject to a multi-employer collective employment agreement, but an individual employment agreement. The only parties to this employment relationship problem are Mr Ames and the West Coast PHO.

[34] The Authority's jurisdiction is set out in s.161 of the Act and does not extend to assessing or critiquing employment law or health policy decisions made by the NZ government, its ministries or departments or DHBs or PHOs.

[35] Section 159 imposes a duty on the Authority to consider mediation. Section 159A imposes a duty on the Authority to give priority to investigation and determination of matters that have been to mediation over those which have not unless it considers that mediation will not contribute constructively to resolving the matter, is not in the public interest or would otherwise be impractical in the circumstances.

[36] In all the circumstances I do not consider that mediation will contribute constructively to resolving the matter and consider it is impractical in the circumstances. An Authority officer will contact both parties soon to arrange a teleconference to set a date for an investigation meeting in Greymouth.

How will the investigation proceed?

[37] I provide a few comments below for the parties' information about how the matter will proceed.

[38] Mr Ames claims breach of contract and/or unjustified disadvantage. I have at this point assumed that the breach of contract claim is in relation to a claimed breach of clause 38.1 of Mr Ames' IEA.

[39] In order to prove that the PHO breached its duty of good faith by breaching clause 38.1 Mr Ames will have to adduce evidence that while he was employed the PHO failed to be active and constructive in establishing and maintaining a productive

employment relationship in which it was responsive, communicative, supportive, co-operative, transparent and honest.

[40] Whether or not a breach or breaches of good faith can be proved is one thing. However, the next issue will be what remedy could be available for such a failure? No remedies that flow from the loss of Mr Ames' job can be awarded.

[41] Mr Ames lists the same aspects of concern in relation to his breach of good faith claims as he does for his claims of unjustified disadvantage.

[42] The first aspect complained of is that he was told during negotiations about the IEA he was offered that he should not worry about the 90 day trial period. In the statement in reply that is denied. There are two points to be made here. The first is that if Mr Ames is claiming a breach of contract for advice given during the pre-employment stage then his claim is unsustainable as he had not entered into a contract with the PHO while they were negotiating with him during the interview process.

[43] Secondly, Mr Ames should be aware of the Employment Court case *Hayden v Wellington Free Ambulance Service*[4], in which it was found that good faith obligations under the Act only apply to those already in an employment relationship, and not to applicants for a job and which was applied in a recent Authority decision: *Castle v Luxottica Retail NZ Limited* [5].

[44] If Mr Ames claims are to be categorised as claims for unjustified disadvantage then he needs to set out and prove by providing evidence for each instance of claimed unjustified disadvantage:

- the employer's action/omission,
- what term or condition of his employment it affected, and
- how that term or condition was affected to his disadvantage.

[45] For disadvantage to be proved it is not sufficient that an employee is subjectively dissatisfied with their working circumstances. There must have been an act or omission by the employer leading to disadvantageous consequences for the employee.

[4] [2002] 1 ERNZ 399
[5] [2014] NZERA Auckland 17

[46] However, and this is a key point in these proceedings, if that disadvantage was intrinsically linked to the dismissal the claim of unjustified disadvantage could not succeed because there can be no personal grievance of unjustified dismissal in Mr Ames' case as the Authority has no jurisdiction in that respect.

[47] A number of the remedies claimed by Mr Ames are not within the Authority's jurisdiction to award either at all or because Mr Ames cannot bring a claim for unjustified dismissal. Remedies claimed such as payment for professional assistance in resuscitating his career, or payment for relocation to anywhere in New Zealand he obtains a new job, or payment of his lease or storage fees, or *full documentation acknowledging the mistaken and inappropriate application of the 90 day law by the PHO* or that the Authority consider the suitability of the 90 day *termination at will law for any professional employee who is engaged with vulnerable members of the community* either cannot be awarded at all or would be unlikely in a successful unjustified disadvantage or breach of contract claim such as this one.

[48] In addition, the remedy of lost wages is one usually associated with an unjustified dismissal because the employee has to prove loss of remuneration as a result of the personal grievance or loss of a benefit which they might reasonably have been expected to obtain if the personal grievance had not arisen[6].

[49] Compensation for humiliation, loss of dignity and injury may be awarded only on proof of a successful personal grievance, and proof of such humiliation etc. being as a result of the personal grievance. Awards in the Authority typically average around $5,000 for an unjustified dismissal, depending on the effect of the dismissal on an employee and the evidence that supports that. Awards are usually lower for an unjustified disadvantage.

[50] Mr Ames is advised that the issues and the evidence must be confined to issues of good faith/breach of contract and unjustified disadvantage claims and I will not entertain any claims or evidence about the effects of the dismissal on him or about the process by which he was dismissed if the effect of that is to allow criticism of the dismissal "by the back door". Any consideration of the dismissal as being unjustified is outside of my jurisdiction.

[6] Sections 123(1)(b) and 128 of the Act.

[51] Nor will I allow any personal or political criticism of the law as it stands to form part of the Authority's proceedings. That is irrelevant to my investigation and determination and it is inappropriate to ask the Authority to decide or comment on such an aspect of Mr Ames' views.

[52] It is also irrelevant for the Authority to receive letters of criticism of the 90 day trial period law procured by Mr Ames, including letters from a Member of Parliament. Such letters do not constitute evidence or submissions on the relevant issues and therefore are excluded from my consideration of Mr Ames' claims.

[53] The constitutional separation of powers means that Parliament makes the law and statutory bodies such as the Authority apply and interpret the law; that is what I will do.

[54] Mr Ames is already aware that an unsuccessful party is likely to face an order that it pay the successful party's reasonable legal costs. The starting point for a consideration of what costs are payable in the Authority is a daily tariff of $3,500 per day of investigation meeting.

Christine Hickey
Member of the Employment Relations Authority