IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 36
5628381

	BETWEEN	SUSETTE BROWN Applicant
	A N D	YOUR SUCCESS LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Graeme Downing, Counsel for Applicant Kay Chapman, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions Received:	24 January and 15 February 2017, from Respondent 7 February 2017, from Applicant
Date of Determination:	20 March 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. I decline the respondent's application to dismiss this matter.

B. Costs are reserved.

Employment relationship problem

[1] The applicant, Susette Brown, claims that the respondent, Your Success Limited (Your Success), acted unjustifiably to cause disadvantage to a term or condition of her employment, on two occasions and that these actions amount to a breach of the duty of good faith.

[2] Ms Brown's claims relate to an alleged underpayment of holiday pay and an alleged failure by Your Success to review her salary in line with its obligations under her employment agreement.

[3] Your Success says that it did not act in an unjustified manner:

(a) In relation to the alleged unpaid holiday pay, it says that Ms Brown has incorrectly calculated the amount of holiday pay owing at the termination of her employment because she has incorrectly applied a flexi time arrangement to days she took off rather than taking such days as holiday.

(b) It did review Ms Brown's salary in line with its obligation under her employment agreement.

(c) And, as it did not act unjustifiably as alleged, there can be no breach of the duty of good faith, and, in any event, if the Authority determines that there has been a breach of the duty of good faith, then such breach does not reach the high threshold necessary for the Authority to award a penalty as claimed.

[4] Your Success also says that it has overpaid Ms Brown her accrued but un-taken holiday pay in her final payment. It seeks to have this overpayment repaid and in its reply to the statement of problem sets this out as a counterclaim. Your Success says Ms Brown owes it $1,311.51.

[5] Your Success has applied to have Ms Brown's claim dismissed pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act). Ms Brown opposes that application.

[6] Having received submissions on the application from both parties, I will determine the application as a preliminary matter.

Application to dismiss

[7] Clause 12A of Schedule 2 of the Act provides:

> 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 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.

[8] In *Lumsden v Sky City Management Ltd*[1], Judge Inglis considered the power of the Employment Relations Authority to dismiss a matter pursuant to clause 12A. After reviewing the relevant case law, Judge Inglis drew the following conclusions:

> [21] I conclude that the Authority has no power under cl 12A to dismiss part of a matter before it. ….
>
> …
>
> [37] The present matter falls for determination under clause 12A, not r15.1. However, the scope of clause 12A is usefully informed by the judicial decisions 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 process where it is, to use Chief Goddard's terminology, impossible to take seriously.
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> [38] Relevantly, Parliament has chosen to limit the circumstances in which the Authority may dismiss a proceeding without investigating it under clause 12A, to matters which are either frivolous or vexatious. There is, for example, no reference to dismissal of a matter which discloses no reasonably arguable cause of action or defence. While the dismissal of cases with little or no merit appears to have been contemplated at a relatively early stage of the legislative process, the wording did not find its way into the section or clauses as enacted. The rationale for limiting the scope for dismissal may well reflect the special characteristics of this jurisdiction and the underlying policy thrust of the Act, empowering employees to pursue claims and have them determined on their substantive merits, without undue regard for legalities, and in an efficient, non-technical manner. Dismissing claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.
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> [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 the purpose of the legislation, it is reserved for clear cut cases. This is not one of them.

[9] Judge Inglis' decision in *Lumsden* is instructive on three aspects of the Authority's power to dismiss pursuant to clause 12A:

(a) The Authority has no power under clause 12A to dismiss part of a matter before it.

[1] [2015] NZEmpC 225

(b) Whether a matter is frivolous is to be determined objectively. A matter is not simply frivolous because it has no reasonable prospect of success. The matter must trifle with the Authority's processes and be impossible to take seriously.

(c) The Authority's power to dismiss is limited and the threshold is high.

[10] In *Rabson v Judicial Conduct Commissioner (No 2)*[2] the High Court expressed its views on "vexatious" as:

> [29] … A vexatious proceeding is one that vexes the defendant beyond what is usual in most proceedings. There must be some element of impropriety in the claim. In *Reekie v Attorney-General* the Supreme Court noted:
>
> > Vexatiousness might be manifested, for instance, by the unreasonable and tendentious conduct of litigation, extreme claims made against other people involved in the case or perhaps a history of unsuccessful proceedings and unmet orders.
>
> [Footnotes omitted]

[11] In *Gapuzan v Pratt & Whitney Air New Zealand Services*[3] Judge Corkill deals with the issue of what constitutes vexatious. Judge Corkill starts with the definition of vexatious in Black's Law Dictionary, being: *without reasonable or probable cause or excuse; harassing; annoying*.[4] Judge Corkill then goes on to refer to *Hendon v. Attorney-General*[5] where the Court of Appeal approves previous points made about the application of vexatious. These points include the character of proceeding is relevant, that is did it have a reasonable basis and how was it conducted, or whether attempts have been made to re-litigate issues already determined containing scandalous and unjustified allegations, and whether there is an improper purpose in commencing the proceeding.

[12] Applying these cases, in my view, vexatious requires there to be an improper purpose to a claim. The claim must be extreme and without proper cause or reasonable basis. The claim will be harassing or annoying, vexing a respondent beyond what is normal in a claim or it might contain scandalous or unjustified allegations.

[13] In summary, the case law indicates that my application of clause 12A requires the following:

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[2] [2016] NZHC 2539
[3] [2014] NZEmpC 206
[4] Bryan A. Garner (ed) *Black's Law Dictionary* (9th ed, Thompson Reuters, St Paul (NN), 2009) at 1701
[5] [2011] NZCA 9

(a) All parts of the matter, that is all heads of claim or causes of action, must be either frivolous or vexatious in order for me to dismiss a matter.

(b) For the claims to be frivolous they must be impossible to take seriously and must trifle with the Authority's processes.

(c) For the claims to be vexatious they must be extreme claims made without reasonable or probable cause or excuse, they are harassing or annoying, vexing a respondent beyond what is normal in a claim or they might contain scandalous or unjustified allegations and they have an improper purpose.

(d) There is a high threshold and I should not take the step of dismissing a matter lightly as it is a draconian action.

Discussion

[14] Ms Brown's personal grievance for unjustified action causing disadvantage arising out of an alleged underpayment of holiday, concerns the following:

(a) Ms Brown's employment was transferred from an accounting firm to Your Success in February 2015 when two accounting firms merged to form Your Success.

(b) Ms Brown says that her employment transferred to Your Success on the basis that existing benefits and unpaid leave would transfer over to Your Success.

(c) Ms Brown says that she had a leave balance of $2,437.66 that should have transferred with her employment to Your Success.

(d) In addition to leave entitlements, Ms Brown also had, what appears to me to be, a flexi time arrangement. This is described in her employment agreement as "unders" and "overs". It provides that extra work outside of the required working hours was not remunerated but rather recognised by way of an ability to take time off to attend to personal matters during work hours if required.

(e) Ms Brown believes the flexi time arrangement was akin to a time in lieu arrangement where additional hours were banked and could be taken as a complete day as leave.

(f) Ms Brown calculated her annual leave taken and therefore the amount owed to her at the end of her employment, by using banked "overs" hours in lieu of annual leave for complete days taken off work. Using this approach Ms Brown calculated the amount of holiday pay owing as $9,847.53.

[15] Your Success says that the flexi time arrangement that it put in the employment agreement with Ms Brown was not intended to operate on a time in lieu basis as alleged. It says that even if it operated that way with Ms Brown's previous employer, those terms and conditions did not transfer and the flexi time arrangement was to be applied as set out in the employment agreement, that is, on an informal hourly basis.

[16] Your Success says, on an ordinary interpretation of the "unders" and "overs" clause in the employment agreement, there is no basis to conclude that it amounted to a time in lieu arrangement as alleged by Ms Brown and therefore Ms Brown's calculation of annual leave using time in lieu for leave rather than taking annual leave, is incorrect.

[17] Ms Brown's personal grievance for unjustified action pertaining to the failure of Your Success to review her remuneration during the term of employment relies on clause 4(b) of her employment agreement. This clause provides:

> Your remuneration will be reviewed annually no later than your anniversary date. The review will take into account the following but will not necessarily result in an increase:
>
> National and local competitive pay rates for similar positions.
> External economic factors, such as the rate of inflation.
> Our financial and trading situation.
> Your performance.
> Changes in responsibility or employment conditions.

[18] Ms Brown's grievance is simply that this clause obliged Your Success to review her salary on the anniversary of her employment and it failed to do so. That failure was an action which caused disadvantage to a term or condition of her employment and it was unjustified.

[19] Your Success says that it reviewed Ms Brown's remuneration in November 2015 and it has therefore complied with its obligations. Ms Brown says that there was no such review and therefore Your Success has failed to meet its obligation.

[20] Ms Brown's claim for a penalty to be imposed for a breach of good faith relies on the actions that support the two unjustified disadvantage grievances. In order for a penalty to be imposed, the Authority needs to be satisfied that those actions were not only a breach of the

duty of good faith, but were also "deliberate, serious and sustained" or "intended to undermine an individual employment agreement".[6]

[21] Your Success says Ms Brown's claims are misconceived and futile, with little or no merit. It says the claims disregard the natural and ordinary interpretation of the relevant clauses and no ordinary person could treat the grievances as bona fide. The inflated remedies, which amount to $90,000.00 compensation, are so extraordinary it is impossible to take the claims seriously.

[22] Dealing first with the amount of the remedies claimed, Ms Brown originally sought compensation pursuant to s123(1)(c)(i) of the Act in the amount of $30,000.00 for each grievance and also for the breach of the duty of good faith. Her amended statement of problem has changed the claim in connection with the breach of duty to seek a penalty. So, in fact the remedies she is seeking total $60,000.00 and that is for two unrelated grievances. Whilst $30,000.00 compensation for a personal grievance is at the high end of what might be awarded it is not impossible and without evidence of the actual impact of the alleged actions on Ms Brown I cannot say if the amounts are credible or not. I cannot accept that the amount claimed is so extraordinary that it is impossible to take her claims seriously.

[23] Next, it may be correct that the two grievances lack merit based on Your Success's interpretation of the relevant clauses in the employment agreement and it's version of the facts as they relate to the salary review. But on the face of the pleadings and the documents I have reviewed I cannot accept that the claims are futile.

[24] The claim relating to the salary review turns on a factual dispute – did the salary review take place and if so did that review meet the requirements of the employment agreement? That is not a futile claim and in fact, such factual disputes are commonly resolved in the Authority.

[25] The claim relating to underpaid holiday pay turns on the interpretation of the relevant clauses. Whilst Your Success says the interpretation is clear, I accept there is some ambiguity and it may be possible to apply the interpretation to the "unders" and "overs" provision in a manner that supports Ms Brown's application and subsequent calculation.

[6] Sections 4A(a) and 4A(b) of the Act

[26] At the very least Your Success disputes the amount of accrued holiday pay owed to Ms Brown, which indicates there is a disputed calculation that needs to be investigated and resolved.

[27] Again, it cannot be said that the holiday pay claim is futile.

[28] Finally, in order to dismiss all of the claims more is required than simply showing the claims lack merit or have little chance of success. As I summarised earlier the claims must be impossible to take seriously and must trifle with the Authority's processes. That is not the case here. Alternatively, the claims must be extreme claims made without reasonable or probable cause, they must be harassing or annoying, vexing a respondent beyond what is expected from a normal claim and they must have an improper motive. That is not the case here.

[29] Considering the high threshold that must be overcome before I dismiss a matter, and bearing in mind I should not exercise the power lightly, but rather reserve it for clear-cut cases, I am not satisfied that this matter should be dismissed without further investigation.

Determination

[30] I decline Your Success Limited's application to dismiss this matter.

Costs

[31] Costs are reserved and will be considered, if required, after determination of the substantive matter.

Peter van Keulen
Member of the Employment Relations Authority