

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 132  
5534152

BETWEEN

CHRISTOPHE FLORE  
Applicant

A N D

PACIFIC GATE LOGISTICS  
LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: M Smyth, Counsel for the Applicant  
I M Gibson, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 17 April and 1 May 2015 from the Applicant  
21 April 2015 from the Respondent

Date of Determination: 8 May 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. The application to dismiss the counterclaim on the basis it is frivolous and vexatious pursuant to clause 12A, Schedule 2 of the Employment Relations Act 2000 (the Act) is dismissed;**
- B. The application for further particularisation of the counterclaim is dismissed;**
- C. The application for further disclosure is dismissed**
- D. The application for severance of the counterclaim is dismissed.**
- E. Costs are reserved.**

**Employment relationship problem**

[1] The applicant applies pursuant to clause 12A Schedule 2 of the Employment Relations Act 2000 (the Act) for an order that all or part of the respondent's

counterclaim be dismissed on the grounds it is frivolous or vexatious. Alternatively, he applies for further and better particulars and disclosure. He also makes an application for severance of the counterclaim asking that it be heard separately and after the applicant's personal grievance.

### **The Counterclaim**

[2] The counterclaim alleges the applicant employee:

- (a) breached a fiduciary duty of trust and confidence owed to the respondent employer;
- (b) breached a common law duty to use proper care and skill owed to the respondent employer; and
- (c) acted negligently causing reasonably foreseeable loss to the respondent employer.

### **The Applicants position**

[3] The applicant submits an employee does not owe a fiduciary duty to an employer. He refers to *Franklin Veterinary Service (1997) Ltd v. Jerram*<sup>1</sup>. The applicant submits the respondent is pleading a tortious claim for breach of fiduciary duty which does not exist and therefore the claim is frivolous or vexatious. He refers to s.161(r) of the Act which states that the Authority has no jurisdiction to investigate claims founded in tort. He submits that para.3 is pleaded as a common law tortious claim and para. 4 is a claim in negligence. Both claims fall outside of the jurisdiction of the Authority.

[4] The applicant also refers to the losses claimed in paragraph 5 alleging joint and several liability between the applicant and Patrick Lupin. He submits there is no legal basis on which an employee can be jointly and severally liable with a co-worker for the acts of that co-worker. An employee can only be liable for his own breaches of his employment agreement and not the breaches of another person's employment agreement or any other duties owed by Mr Lupin to the respondent.

[5] The applicant further submits that Rule 13.8 of the Rules of Conduct and Client Care for Lawyers provides that a lawyer engaged in litigation must not attack a

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<sup>1</sup> [2001] ERNZ 157

person's reputation without good cause in Court or in documents filed in Court proceedings. The counterclaim is an attack on the reputation of the applicant and Mr Lupin. The counterclaim refers to the respondent's belief about various actions undertaken by the applicant and Mr Lupin. A mere belief prior to full investigation is inadequate to ensure that reasonable grounds exist to plead the allegations and submits that counsel has not complied with his duties to the Authority.

[6] The applicant submits further and better particulars should be required and sets these out in para.15 of his memorandum.

[7] The applicant believes the counterclaim ought to be severed because:

- (a) The issues for determination of the personal grievance are separate to and distinct from the issues for determination in the counterclaim because the respondent does not allege the applicant was dismissed therefore the factual inquiry for both matters is entirely different;
- (b) The counterclaim is likely to occupy more than the two days currently set aside by the Authority to investigate this matter. The directions timetabling does not afford sufficient time to prepare a defence;
- (c) To allow the counterclaim to proceed in the same hearing would add to the length of time and legal costs the applicant would incur.

[8] On 1 May 2015, the applicant filed a further supplementary memorandum. He has gone through the respondent's evidence and submits it does not meet the threshold for establishing an arguable case.

[9] The applicant further states that the respondent has not filed an amended statement of counterclaim that addresses the applicant's request for better particulars.

[10] The applicant further submits significant further discovery would be required to support the allegations in the counterclaim and further witness evidence will need to be adduced which has not yet been filed by the applicant. The applicant is disadvantaged as he does not know the case he has to defend and the current timetable affords too little time for the applicant to scrutinise and then defend the claims against him. He believes the investigation into the counterclaim will require more time than

currently set aside for the investigation meeting and the applicant has been prejudiced by the failure of the respondent to plead its counterclaim property.

### **Frivolous or vexatious proceeding**

[11] The power to dismiss a frivolous or vexatious proceeding is contained in clause 12A of Schedule 2 of the Act:

**12A Power to dismiss frivolous or vexatious proceedings**

(1) *The Authority may, at any time in proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.*

[12] A frivolous case is one which “*as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived*”<sup>2</sup>.

[13] The Courts have considered the meaning of vexatious in relation to s.88B of the Judicature Act 1908. The cases indicate the following shows a plaintiff’s proceedings are vexatious<sup>3</sup>:

- (a) *Pattern of complex, prolix, and sometimes incomprehensible pleadings;*
- (b) *The proceedings showing the plaintiff to be an almost compulsive litigant against a widening circle of defendants;*
- (c) *Extravagant claims or scandalous allegations which the litigant has no prospect of substantiating or justifying;*
- (d) *The frequency with which part or all of the plaintiff’s statements of claim have been struck out;*
- (e) *The extent to which the plaintiff allowed his proceedings to lie dormant.*

[14] I cannot see how this counterclaim is vexatious.

[15] Similarly I do not find the counterclaim is frivolous. The High Court has held the Authority continues to have jurisdiction even in cases where causes of action for breach of fiduciary duty arise:<sup>4</sup>

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<sup>2</sup> *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZILR 1055 (LC) at 1069

<sup>3</sup> *McGechan on Procedure* (online ed, Brookers) at J88B.04(2)

<sup>4</sup> *The Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24 at [34] and [38]

*Further, an employment relationship may give rise to obligations of trust and confidence, which may give rise to claims in equity for breach of fiduciary duty. Even though the statutory duty of good faith may overlap the equitable obligation, that does not oust the jurisdiction of the Authority to apply equity in such cases. There is no reason why the Authority should not hear a case involving an employment relationship problem, even if the Authority applies equity. Section 161(1)(r) allows it to hear such a claim.*

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*Section 161(1)(r) does not support the society's case. It applies in other cases arising from or related to the employment relationship, other than cases within the Employment Court's jurisdiction. As this case is within s 161 (1)(b) for breach of contract and (f) for breach of a good faith obligation, (r) applies only if the claim is considered as one for money had and received or for breach of fiduciary duty in equity. As these are both claims arising directly out of an employment relationship, (r) allows the Authority to hear them.*

[16] Until a higher authority determines otherwise, there is an arguable case I may retain jurisdiction to determine paragraphs 3 and 4 of the counterclaim.

[17] The allegation that the losses in paragraph 5 of the counterclaim cannot be based upon joint and several liability with another employee is a matter of remedies. It does not indicate a “*patent or glaring error of law*”. Rather it is an argument that the losses recoverable from this applicant ought to be restricted to the losses he incurred. Losses incurred by the actions of others may not be recoverable. The extent to which damages should be awarded against this applicant (if any) are more appropriately dealt with at hearing.

[18] There is an evidential basis for the counterclaim. The respondent has filed its briefs of evidence. That said, the test for striking out a proceeding on the basis it is frivolous requires identification of “*patent and glaring error of law*”. The adequacy of evidence does not fall within that definition. The applicant makes submissions about the weight attributable to the respondent’s evidence. This is a matter more appropriately determined at hearing. It does not indicate the counterclaim is frivolous or vexatious. I also do not have jurisdiction to determine alleged breaches of the Rules of Conduct and Client Care for Lawyers.

### **Further particularisation of counterclaim**

[19] I decline to order better and further particulars of the counterclaim. The respondent's evidence has been filed in advance. This should provide the particularisation sought by the applicant.

[20] The Authority is "*an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.*"<sup>5</sup> Although technically in other jurisdictions a fulsome pleading may be required, that is not necessarily the case for the Authority having regard to its investigative role. I do not believe I will be substantially assisted by further delays in seeking a more detailed counterclaim.

### **Further discovery**

[21] Although there is an allegation of "*significant further discovery*" being required, I do not know what documents are sought, whether they are relevant and if any steps have been taken by the applicant to resolve disclosure by consent. Prior to any application, the applicant ought to put a written request to the respondent for documents. If the request is refused, an application to the Authority for particular disclosure can be made specifying the documents and how they are relevant to the investigation. Without more information and/or evidence, this application is refused.

### **Severance**

[22] The applicant does not identify what law he relies upon for the application for severance of the counterclaim. I assume this is being sought as a direction about the more effective disposal of this matter.

[23] I am generally empowered to "*follow whatever procedure the Authority considers appropriate*" by s160(1)(f) of the Act. I also bear in mind the matters set out in s157 (2)(a) (principles of natural justice) and (3)(a) (compliance with Act).

[24] I have a specific power in s.221(1)(d) of the Act to "*generally give such directions as are necessary or expedient in the circumstances*" and consider whether

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<sup>5</sup> Section 157(1) Employment Relations Act 2000

such direction shall “*more effectually dispose of any matter before it according to the substantial merits and equities of the case*” (s221(1)).

[25] The counterclaim and evidence filed in support deal with issues of possible contributory conduct. This is directly relevant to possible reduction in remedies under s124 of the Act. I see no purpose in refusing to hear this evidence together with the personal grievance proceeding. A separate hearing of the counterclaim will significantly add to the costs and delays in determining both applications.

[26] The parties have filed briefs to date from five witnesses. Two days have been set aside for hearing this matter. This would usually be more than enough time to resolve a matter involving this amount of witnesses. I have dealt with the issues of further particularisation, disclosure and evidence above.

[27] I also have regard to the investigative role the Authority has under s157(1) of the Act. This does not usually require Counsel to conduct extensive cross-examination. In my view the time allocated should be more than sufficient resolve both proceedings.

## **Orders**

[28] Accordingly I now make the following orders:

- a) The application to dismiss the counterclaim on the basis it is frivolous and vexatious pursuant to clause 12A, Schedule 2 of the Employment Relations Act 2000 (the Act) is dismissed;
- b) The application for further particularisation of the counterclaim is dismissed;
- c) The application for further disclosure is dismissed
- d) The application for severance of the counterclaim is dismissed.
- e) Costs are reserved.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

