

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rory Hamilton (Applicant)

AND Dominator International Limited (First Respondent)
AND Gary Foster (Second Respondent)
AND Michael Fisher (Third Respondent)

REPRESENTATIVES F J Wall, Advocate for Applicant
Tim McGinn, Counsel for First Respondent
No attendance by second and third respondents

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 28 June 2006

DATE OF DETERMINATION 5 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by the first respondent Dominator International Limited (Dominator) to strike out the applicant's (Mr Hamilton) claim on the basis of a want of prosecution and/or on the basis of Mr Hamilton's alleged failure to properly identify a cause of action.

[2] Mr Hamilton resists that application on the footing that the delays, if any, were either not or his making or, in the alternative, were not exclusively of his making and that if his pleadings were unclear to Dominator, they ought to have made their views known to him immediately so that he could remedy the situation.

[3] Mr Hamilton said through his representative that this hearing was the first occasion on which he was aware that Dominator did not understand the nature of his claim, in particular the extent of his claim, the basis for it and the remedies that he is seeking.

History

[4] Because this matter has had a somewhat tortuous path to the point at which it falls for the Authority to consider this application to strike the proceedings out, it is useful to set out a short chronology.

[5] On 26 November 2003, Mr Hamilton filed in the Authority a statement of problem dealing with an allegation that he was unjustifiably disadvantaged in that he was demoted from his position

as a manager to a shop level position. In addition to the personal grievance for disadvantage, Mr Hamilton also seeks penalties for various breaches.

[6] No statement in reply seems to have been received by the Authority in relation to that initial statement of problem.

[7] The matter went to mediation on 27 January 2004 and was not settled.

[8] On 24 February 2004, Mr Hamilton filed a further statement of problem in response to a direction from the Authority to better particularise the nature of his claims.

[9] There was a telephone conference convened by the Authority member then presiding on 14 June 2004 at which Dominator was directed to file a statement in reply and Mr Hamilton was directed to file a fresh statement of problem.

[10] A statement in reply was filed on 10 August 2004 and after a further telephone conference convened by the Authority on 1 September 2004, the proceedings were adjourned *pending the proper completion of an application for removal to the Court* in respect to another matter which allegedly impacted on this particular proceeding.

[11] The file came onto my list early in calendar 2006 and I convened a directions conference with the parties on 9 March 2006 at which I determined a timetable for an application by the first respondent to strike out the applicant's proceedings.

[12] A further directions conference was convened by me on 19 April 2006 at which the strike out application was set down for an investigation meeting and a timetable for the applicant to file and serve his statement in reply was determined.

[13] That 19 April telephone conference resulted in the hearing of the matter on 28 June 2006.

The nature of the hearing

[14] The hearing on 28 June concerned itself exclusively with hearing argument from the parties representatives. No evidence was heard.

[15] In its application to the Authority dated 30 March 2006, Dominator seek orders striking out both the statements of problem filed by Mr Hamilton and seek costs against Mr Hamilton and/or Mr Hamilton's representative.

[16] The substantive argument advanced by Dominator for the proceedings to be struck out in their entirety proceeds on the footing that the claim advanced by Mr Hamilton is so lacking in specificity, notwithstanding several attempts to clarify it, that it should be struck out and/or that the claim should be struck out for want of prosecution.

[17] Mr Hamilton resists the application by expressing surprise at the lack of understanding of his claim and denies that the matter has been the subject of unreasonable delay or, at least unreasonable delay by him.

[18] In addition, Dominator seek to have Gary Foster and Michael Fisher the second and third respondents respectively removed as parties to the proceeding. Dominator say that Mr Fisher and Mr Foster, in so far as they were involved in the matters complained of by Mr Hamilton were involved exclusively as employees, at the relevant time, of Dominator and for no other reason.

[19] Mr Hamilton argued that Mr Fisher and Mr Foster ought to remain as parties because it is alleged they fall within the terms of s.134(2) of the Employment Relations Act 2000 being persons who incited *inter alia* breaches of Mr Hamilton's employment agreement and were thus liable to a penalty imposed by the Authority.

[20] At the hearing, I expressed my reluctance to find that officers of Dominator, acting within their normal role or roles as senior employees of the employer could be found to be in breach of s.134(2) of the Act. However, given the nature of the hearing and in particular the fact that I had not heard any evidence on any matter to do with the employment relationship problem, I have reached the conclusion that it would be unfair and unjust to direct the removal of the second and third respondents from these proceedings without hearing them and giving the applicant and the first respondent the opportunity of testing their evidence on the matter as well.

[21] Accordingly, I direct that Mr Foster and Mr Fisher are to remain parties to this proceeding as the second and third respondents respectively. They have the option of attending the hearing voluntarily or, should they chose not to do that, the Authority will make whatever judgments it thinks appropriate by their failure to participate.

Determination

[22] I have heard no evidence and have indicated to the parties that the delays that this matter has been subject to are unacceptable. Accordingly, I have given urgency to this determination which, as will become apparent shortly, is in the nature of an interim determination.

[23] I think the matter is very finely balanced and the elements are certainly present to allow me to contemplate striking the proceeding out altogether. However, I have reached the conclusion that the justice of the case requires that Mr Hamilton get one further opportunity to succinctly and clearly put his claim in order that the three respondent parties can properly address it.

[24] The application to strike out the proceedings is not granted and the parties are directed to prepare for an investigation meeting in the week commencing 4 September 2006.

[25] I make the following specific directions in respect to the upcoming investigation meeting:

- (a) Mr Hamilton is to file and serve a fresh statement of problem covering all the matters complained of including the demotion grievance, the dismissal grievance and the alleged breaches subject to penalty action and this is to be attended to by 4.00 pm on 19 July 2006.
- (b) The statement of problem is to particularize the claim against each respondent, section by section, such that each respondent can clearly identify which allegation they have to respond to and what remedy is sought.
- (c) Each respondent is to file and serve a statement in reply by 4.00 pm on 2 August 2006 responding only to the claim made against that respondent.
- (d) Mr Hamilton is to file and serve his briefs of evidence by 4.00 pm on 9 August 2006.
- (e) The respondents are to file and serve their briefs of evidence by 4.00 pm on 16 August 2006.

- (f) The statement of problem, statements in reply and the various briefs of evidence are to deal exclusively with the facts relied on by the party or witness. Issues of law are a matter for submissions at the end of the hearing.

[26] Once this determination issues, a directions conference will be arranged to confirm the investigation meeting date.

[27] Costs are reserved.

James Crichton
Member of Employment Relations Authority