

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 170  
5550759  
5557212

BETWEEN

CLAIRE LOW  
Applicant

A N D

CARE GROUP LIMITED  
Respondent

Member of Authority: T G Tetitaha  
Representatives: E Bickerton, Advocate for Applicant  
A Schirnack, Counsel for Respondent  
Investigation Meeting: On the papers  
Submissions received: No submissions from Applicant  
26 May 2015 from Respondent  
Date of Determination: 12 June 2015

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**DETERMINATION OF THE AUTHORITY**

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**A. The application under file 5550759 is a frivolous and vexatious proceeding and is dismissed pursuant to clause 12A, Schedule 2 Employment Relations Act 2000.**

**B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

**Employment Relationship Problem**

[1] The applicant filed an inadequate statement of problem. The statement of problem alleged an unjustified dismissal but did not provide any supporting facts. Instead it referred to attachments (A) and (B) which were correspondence between the parties and a third attachment being the termination letter which was not attached at all.

[2] On 20 April 2015 I issued a Minute via the Registry directing:

- (a) The statement of problem is to be returned to the applicant;
- (b) The applicant to file within 14 days an amended statement of problem detailing the facts she relies upon to give rise to the unjustified dismissal;
- (c) The applicant to file within 14 days copies of all documents she relies on as specified in the statement of problem, including attachment (C);
- (d) If no amended statement of problem is received the file is to be referred to an Authority member to consider dismissal upon the papers;
- (e) The respondent is not required to file a statement in reply until served with an amended statement of problem.

[3] On 12 May I issued a Minute giving the applicant one further opportunity to comply and be heard. If the applicant remained non-compliant she was put on notice I intended exercising my powers under the Act to dismiss this proceeding without holding an investigation meeting. The applicant was directed to comply with my above directions dated 20 April 2015 and both parties may file submissions regarding the exercise of my powers to dismiss this proceeding by **26 May 2015 3 pm**.

[4] On 21 May 2015 the applicant filed a new application with the Authority including a more detailed statement of problem. This has been allocated a separate file number 5557212. The new application was a duplicate of the original statement of problem with more detail included. The Support officer concerned raised with the applicant if it was meant to be a separate file or placed upon the original file. It had been processed as a new file and served upon the respondent.

[5] On 26 May 2015 the respondent filed a Memorandum seeking dismissal of this proceeding pursuant to s160(1)(f), 174D and 221 of the Employment Relations Act 2000. The alleged grounds refers to various failures to comply with directions, communicate with the respondent and the Authority, filing new applications creating confusion, unnecessary use of the Authority resources and further cost to the respondent. It also referred to the length of the delay from the time the applicant raising the personal grievance and the filing of an inadequate statement of problem.

[6] By email dated 29 May 2015 Ms Bickerton replied:

*Apologies for the mistake. Are we able to include the amended statement of problem in the original file, rather than creating a new file. My mistake.*

[7] The Support officer suggested the applicant withdraw the new application by way of email to her and to send an amended statement of problem to the Support officer dealing with this file (5550759). There has been no response from the applicant.

[8] On 2 June 2015 I issued a further minute seeking the filing of any appropriate applications within 7 days or the likely dismissal of this application upon the papers. No further correspondence has been received from the applicant.

[9] The matter has now been referred to me for a determination upon the papers.

### **Determination**

[10] 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).

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

[12] The Authority may determine a matter without holding an investigation meeting pursuant to s.174(d) of the Employment Relations Act 2000 (the Act).

[13] A person commences proceedings in the Authority by lodging two copies of an application that complies with the Employment Relations Regulations 2000. Regulation 6 states that a statement of problem must “*a statement of the problem or matter to which the application relates*”.

[14] The statement of problem filed does not in my view meet the requirements of Regulation 6 in its current form. It states there was an unjustified dismissal but gives

no particulars. Instead the applicant refers to attachments (A) and (B). She also refers to attachment (C) which is not annexed to the statement of problem.

[15] The Authority's role in resolving employment relationship problems requires it to establish facts. It cannot do so if the original application does not set those out in the application filed. While I am required to determine "*the substantial merits of the case, without regard to technicalities*"<sup>1</sup> the omission to set out any facts relied upon as giving rise to the cause of action in an application is a fundamental flaw.

[16] I have also been referred the file 5557212. The Support Officer asked for a copy of the applicant's employment agreement to be filed given it is referred to in the correspondence and the new statement of problem form 1 requires a copy to be filed. D Feist from the applicants advocates offices replied stating:

*"We do not have an EA as client not given one. The ERA is breaching the Act which requires expediency.*

*PS we are about to approach Human Rights Commission and Ombudsman."*

[17] While I can understand the applicant seeks expediency, this is not helped by the complicated way her advocates have elected to manage this matter. It is not the job of the Support officers or the Authority member to manage an applicant's case. Opportunities to resolve the duplicated proceedings and lack of clarity have been given and not taken up by the applicant. The matter now requires orders and directions to ensure low cost efficient and speedy access to justice for both parties.

[18] In my view both statements of problem do not meet the requirements of the Employment Relations Authority Regulations 2000. The facts disclosed in both applications do not support a prima facie dismissal having occurred at all.

[19] The applicant alleges she was dismissed by a client of the respondent employer ('Toni') by way of an abusive text message. Given this client was not her employer I cannot see how termination could have occurred.

[20] The applicant then alleges in the alternative she was dismissed by her team leader on 14 or 15 July 2014. This occurred when the team leader raised concerns

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<sup>1</sup> Section 157 Employment Relations Act 2000

about alleged illegal activity and the need to ‘reconsider her rostering going forward.’ This statement is ambivalent. It does not expressly dismiss the applicant.

[21] I have no information about the terms of her employment other than her job title and hourly rate. I have no information about the rostering system. She may have had no expectation of ongoing work. I assume she did not work for the respondent after 15 July but this is not stated anywhere. I do not know if she was offered work but rejected it or was never offered work again. The statement of problem is simply inadequate.

[22] I have the power to dismiss a frivolous or vexatious proceeding (clause 12A of Schedule 2 of the Act).

[23] 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>.

[24] 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.*

[25] Part of this application appears to be an error in law. The applicant cannot have been dismissed by a client of the respondent when they are not her employer. I do not have jurisdiction to determine actions between parties whom are not part of the employment relationship.

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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)

[26] I remain concerned about the adequacy of the information surrounding the alleged dismissal by the team leader. It is not obvious on its face if dismissal occurred at all by the respondent team leader raising her concerns and the need to reconsider rostering. These are not express words dismissing the applicant. There is no explanation how the applicant believed these words could have constituted dismissal in the circumstances.

[27] There is a pattern of proceedings that are becoming prolix and incomprehensible. Threats to go to the bodies such as the Human Rights Commission may also invoke s112 of the Employment Relations Act 2000 and remove the applicant's right to have the matter heard here. This behaviour is not assisting matters but adding to their unnecessary complexity and cost.

[28] I have already given the applicant three opportunities to comply with my directions about her documentation. My Minute of 11 May and 2 June 2015 gave opportunities to file the amended pleading and/or an appropriate application. She has not taken any steps on file 5550759.

#### **Application 5550759**

[29] Taking into account the above, the application under file 5550759 is a frivolous and vexatious proceeding and is dismissed pursuant to clause 12A, Schedule 2 Employment Relations Act 2000. The reasons for the dismissal are the limited resources of the Authority, necessity to prevent the respondent from facing the same proceeding twice, absence of any appropriate application to deal with the duplicated proceeding, opportunity given to the applicant to be heard and to rectify the duplicated proceeding being given and my allowance of the continuance of the proceeding file 5557212.

[30] Costs are reserved in respect of file 5550759. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

#### **Application 5557212**

[31] In respect of file 5557212 the applicant is directed to file an amended pleading within 14 days addressing the following:

- a) The basis on which the applicant believed the client ‘Toni’ had the authority to dismiss her?
- b) Details of the entire text message she received from ‘Toni’;
- c) If not expressly stated that she had been dismissed in the text message from Toni, an explanation why she believed she was dismissed by the text message other than the fact it may have been abusive?
- d) In the absence of any express dismissal from the respondent’s team leader, an explanation why she believed she was dismissed?

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