

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 158  
5555042

BETWEEN                      KIM LA  
   Applicant  
  
A N D                              ALPHA LABORATORIES  
   (NZ) LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:            Gregory Bennett, Representative for the Applicant  
   David Luttig, Representative for the Respondent  
  
Submissions Received:    25 May 2015 from the Applicant's representative  
   2 June 2015 from the Respondent's representative  
  
Investigation Meeting:    On the papers  
  
Date of Determination:    5 June 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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- A.    The application by the respondent, Alpha Laboratories (NZ) Limited to dismiss paras 1, 2.1 to 2.8 and 3.1(i) of the applicant, Ms Kim La's statement of problem pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 is declined.**
- B.    Costs are reserved.**

**Employment relationship problem**

[1]    The respondent, Alpha Laboratories (NZ) Limited (Alpha), has made an application to the Authority seeking an order that certain matters in the proceeding brought by the applicant, Ms Kim La, be dismissed as frivolous or vexatious pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act).

[2] Ms La opposes Alpha's application.

[3] Both parties have agreed that this matter be dealt with by the Authority on the papers filed.

[4] The current application before the Authority relates to paras.1, 2.1 to 2.8 and 3.1(i) of the statement of problem.

### **Background facts**

[5] Alpha is a New Zealand company specialising in the manufacture and export of nutritional dietary supplements, including soft gel capsules, hard gel capsules, tablets and a number of other products<sup>1</sup>.

[6] Ms La was employed in 2005 by Alpha as a Sorting and Packing Operator.

[7] In November 2014, Ms La received a final written warning in relation to some aspects of her performance. A personal grievance was raised on behalf of Ms La on 10 November 2014 alleging among other things that Ms La may potentially have a constructive dismissal claim as a result of the manner in which she was being dealt with by Alpha.

[8] In March 2015 a disciplinary process was initiated by Alpha in respect of alleged conduct by Ms La which Alpha considered may amount to serious misconduct. Ms La was suspended from her employment on 20 March 2015 and subsequently dismissed on 10 April 2015.

### **Ms La's statement of problem – 06 May 2015**

[9] On 06 May 2015, Ms La filed a statement of problem in the Authority claiming that she had been unjustifiably disadvantaged by Alpha when it issued the final written warning in November 2014, unjustifiable disadvantages in relation to the disciplinary process and suspension in March 2015 and unjustifiable dismissal. Ms La seeks various remedies from Alpha.

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<sup>1</sup> [www.alphalabs.co.nz](http://www.alphalabs.co.nz)

**Alpha's application to dismiss – 22 May 2015**

[10] On 22 May 2015, Alpha filed an application pursuant to clause 12A of Schedule 2 to the Act to dismiss parts of Ms La's proceeding on the grounds they are frivolous or vexatious. Particularly, Alpha seeks dismissal of paragraphs 1, 2.1 to 2.8 and 3.1(i) of the statement of problem.

[11] Mr Luttig for Alpha seems to be arguing that since the date of the personal grievance in November 2014 and the initiation of disciplinary action by Alpha in respect of Ms La in March 2015, there was no action by Ms La. In paragraph 6 of his memorandum of submissions dated 2 June, Mr Luttig refers to Ms La's statement that she "did not want to proceed with the personal grievance in November 2014" as therefore precluding her from now pursuing the matter. Ms La appears to have had reasons for not proceeding with the personal grievance at that time despite having raised it.

[12] Mr Luttig further claims that the personal grievance claim in November 2014 refers to Ms La being constructively dismissed and because Ms La remained in employment there could not be a constructive dismissal.

**Ms La's response – 25 May 2015**

[13] Mr Bennett for Ms La, in respect of the first point above, quite correctly in my view argues that an employee has a period of 3 years to proceed with a personal grievance claim raised with an employer. Clearly, Ms La is within the 3 year period specified in s.114(6) of the Act to pursue her claim of unjustifiable disadvantage raised on 10 November 2014. I understand Mr Luttig's opposition to this. However, it is my view that this personal grievance claim does form part of the factual matrix, was raised within time and Ms La now wishes to take that matter further.

[14] With regard to the argument regarding constructive dismissal, it is clear from the letter raising a grievance of unjustifiable disadvantage on 10 November 2014 that Ms La claimed "*a potential constructive dismissal due to the manner in which ...*" [she was being dealt with].

**Determination**

[15] The Act was amended to include clause 12A with effect from 1 April 2011. The amendment empowered the Authority to dismiss cases with little or no merit without them needing full investigation by the Authority in order to reduce costs and avoid stress for parties. Alpha has not convinced me on the balance of probabilities that Ms La's proceeding is vexatious or frivolous or that her claims have little or no merit. Accordingly I decline to make the order pursuant to clause 12A of Schedule 2 of the Act sought by Alpha.

[16] Alpha is to file a statement in reply to the statement of problem within 7 days of the date of this determination.

**Costs**

[17] Costs are reserved.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**