IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 98
5609853

	BETWEEN	KATHLEEN ANN BEATTIE MILNE Applicant
	AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person David France, Counsel for the Respondent
Investigation:	On the papers
Determination:	31 March 2016

DETERMINATION OF THE AUTHORITY

A. The application by Kathleen Milne for damages relating to her unemployment since her dismissal by Air New Zealand Limited in 2004 has no prospect of success and is dismissed without further investigation.

Ms Milne's application

[1] In an application to the Authority dated 22 January 2016, and stamped as received in the Authority's Auckland Office by post on 22 February 2016, Ms Milne stated her employment relationship problem for resolution as:

> I have been unemployed since the termination of employment in November 2004. I am seeking damages.

[2] She then stated the following facts as having given rise to her problem:

> My employment was terminated in November 2004 due to medical reasons.
>
> An application was made with the ERA for unjustifiable dismissal.

> In the determination of the Authority dated 3 February 2011 the Member concluded the dismissal was justified.
>
> I was unemployed since the termination of my employment by letter dated 9 November 2004. I received Work and Income benefits from 01/04/05 to 31/03/06 of $9,098.57 and from 01/04/06 to 28/02/07 of $6,552.95.

[3] The standard form for a statement of problem includes a third paragraph requiring the applicant to set out how she or he would like the problem resolved. It includes a note advising that details must be fully, fairly and clearly stated and requests the applicant to include reference to a specific remedy under any enactment or rule of law. Ms Milne's application, as lodged, omitted paragraph three. She sent three documents with the form: the Authority's determination of 3 February 2011, some IRD information, and a copy of an Air New Zealand collective agreement applying to Inflight Service Directors in the period from 2003 to 2005.

The legal position

[4] If the case or claim pleaded in a statement of problem lodged by an applicant in the Authority has no prospect of success, it is open to the Authority, after hearing from the applicant, to dismiss the claim without further investigation.[1]

[5] The threshold for the exercise by the Authority of such a power is high. Dismissing a claim is a serious step and is reserved for clear cut cases.[2]

[6] The circumstances of Ms Milne's employment and dismissal by Air New Zealand, on 9 November 2004, are already the subject of one Authority determination issued in 2011 and another determination issued in 2012. Those determinations found:

(i) Ms Milne's dismissal was justified;[3] and
(ii) a further claim about other alleged breaches by Air New Zealand of its obligations to her could not be pursued because it was lodged more than six years after her cause of action arose and was outside the six year time

[1] *AFT v BCM* [2015] NZEmpC 234 at [47].
[2] *Lumsden v SkyCity Management Limited* [2015] NZEmpC 225 at [39].
[3] *Milne v Air New Zealand Limited* [2011] NZERA Auckland 45.

limit set for such claims in s 142 of the Employment Relations Act 2000 (the Act).[4]

[7] Ms Milne challenged both determinations. Her challenges were struck out by decision of the Employment Court on 9 July 2014.[5] In that decision the Court also noted that the following orders of the Court and the Authority remained unpaid by Ms Milne:

- $10,000 security for costs on the first challenge; and
- $1,250 costs in relation to that security for costs application; and
- $1,500 security for costs on the second challenge; and
- $500 costs in relation to that security for costs application; and
- $8000 costs in the Authority.

[8] The result of the two Authority determinations referred to in paragraph [6] above, and of the Court's decision to strike out challenges to those determinations, is that Ms Milne's dismissal was justified, as far as the law is concerned, and Ms Milne should also be aware that claims lodged out of time cannot proceed.

[9] Her new application sought "damages" because she had been unemployed since 2004. The Act does provide for a remedy of lost wages where a personal grievance for unjustified action (such as dismissal) is established. It also allows the Authority to make orders of the sort that the High Court or District Court may make about contracts, so the Authority can make awards of damages.[6] However Ms Milne's claim for damages appeared to face two insurmountable hurdles.

[10] Firstly, for Air New Zealand to be liable to Ms Milne for damages as a result of her being unemployed since 2004, the Authority or a court would have to find the company acted unjustifiably in dismissing her. However the Authority has already determined Ms Milne's dismissal was justified. Because the Employment Court struck out her challenge to that determination, the Authority's existing determination currently stands as the final decision about Air New Zealand's justification for ending its employment of her. Ms Milne cannot now re-litigate that decision in the

[4] *Milne v Air New Zealand Limited* [2012] NZERA Auckland 236.
[5] *Milne v Air New Zealand Limited* [2014] NZEmpC 101.
[6] Employment Relations Act 2000, s 123(1)(b) and s 162.

Authority. A principle of finality, also called the doctrine of *res judicata*, applies to end the litigation of the same point again and again.[7]

[11] Secondly, even if an award of "damages" was open as a potential remedy, Ms Milne's cause of action on such a basis arose more than six years ago. Section 142 of the Act prevents such an action starting now, more than 11 years after her dismissal and subsequent unemployment.

Submissions from Ms Milne

[12] In light of those legal hurdles to Ms Milne's new application I reached a preliminary view that it should dismissed without further investigation. By Minute of 7 March 2016 I advised Ms Milne of that view and gave her an opportunity to make written submissions before any final determination was made. This was necessary because the Authority must comply with the principles of natural justice and act reasonably in carrying out its investigative role.[8] The 7 March Minute also advised Air New Zealand would get an opportunity to reply to any submissions from Ms Milne if what she had to say changed my preliminary view. Having received and considered the contents of a one page submission sent by Ms Milne, dated 21 March 2016, I concluded no reply from Air New Zealand was needed.

[13] Ms Milne's submission, in full, read:

> I was aware the two results of the Authority determination is that the dismissal was justified and that the claim lodged out of time cannot proceed.
>
> I was aware the Employment Court had not heard the challenges because security of costs and costs were unpaid.
>
> I [was] not aware the word "damages" and stating that I was unemployed since the termination of my employment in 2004 [meant] that I was re-litigating the decision of the Authority.
>
> I was not aware I could have made a claim in 2004 when I became unemployed.

Determination

[14] Having considered the legal position set out above and Ms Milne's submissions in response to that analysis, I concluded the Authority should dismiss Ms Milne's application without further investigation. I did so for the following reasons.

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[7] *Puna Chambers Inc v Christensen* [2014] NZEmpC 218 at [17].
[8] Employment Relations Act 2000, s173.

[15] The principles to be applied by the Authority are the same as the Court uses in considering whether or not to 'strike out' a proceeding.[9] Applying those principles, my conclusion her application should be dismissed without further investigation was based on the following propositions:

(i) the facts referred to by Ms Milne in her 22 January 2016 statement of problem are assumed to be true; and

(ii) her new claim was clearly untenable because the Authority has already determined her dismissal was justified and the Court has struck out her challenge to that determination with the consequence that Air New Zealand could not now be found liable for damages resulting from her dismissal; and

(iii) Ms Milne's application was so clearly lacking any prospect of success that it warranted exercise of the sparingly-used power to dismiss her claim without further investigation; and

(iv) no difficult questions of law arose in her claim.

[16] There might have been an alternative argument that the Authority's power, at clause 12A of Schedule 2 of the Act, to dismiss proceedings that the Authority considered frivolous or vexatious also applied to Ms Milne's claim. However, for clarity, I emphasise I did not reach the conclusion set out in this determination on that alternative basis. The use of the power in clause 12A has a high legal threshold. It considers different factors than those addressed in this determination relating to the power to dismiss a claim due to its lack of any prospect of success.[10]

[17] The overall interests of justice also had to be weighed in reaching a determination on whether or not to allow Ms Milne's new claim to proceed. The Authority must act in equity and good conscience, act consistently with the Act, and make any determination according to the substantial merits of the case, without regard to technicalities.[11] Justice considers both the interests of Ms Milne and of Air New Zealand.

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[9] *AFT v BCM*, above n 1, at [47] and *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.
[10] *AFT v BCM*, above n 1, at [48].
[11] Employment Relations Act 2000, s 157.

[18] In making a similar assessment of the overall interests of justice, in its 9 July 2014 decision, the Employment Court considered one relevant factor was that Ms Milne's claims had already been heard and determined by the Authority, so this was not a case where an applicant's claims were dismissed without any hearing whatsoever. The judge said it was "apparent from a perusal of the Authority's two determinations, that Ms Milne's complaints have been fully considered and rejected".[12]

[19] The short point about the overall interests of justice is that the Authority has already determined Air New Zealand's decision to dismiss Ms Milne in 2004 was justified. Because of that conclusion Air New Zealand could not now be required to pay Ms Milne compensation, whatever difficulties she may have experienced since her dismissal, including a long period of employment. It would not be just to allow Ms Milne to pursue a hopeless claim and to put Air New Zealand to the pointless time and expense of defending it.

Costs

[20] As Air New Zealand has not been to the expense of responding to Ms Milne's application no issue of costs arises.

Robin Arthur
Member of the Employment Relations Authority

[12] *Milne*, above n 5, at [33].