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THE ORDER PROHIBITING
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TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch131
3028831

BETWEEN QNI
 Applicant

AND ZXH
 Respondent

Member of Authority: Helen Doyle

Representatives: QNI in person
 No appearance for Respondent

Investigation Meeting: 31 August 2018
Submissions received: 17 August 2018 from Respondent
Determination: 12 September 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Prohibition from Publication

[1] With the agreement of both parties I prohibit from publication their names and any matters that may identify them. I also prohibit from publication the name of the counsel for ZXH.

Investigation meeting

[2] The Authority held a telephone conference on 19 July 2018 with QNI and in-house counsel from ZXH. It was agreed that the Authority would investigate and determine a preliminary issue of whether the Authority had jurisdiction to investigate the problems identified by QNI in his statement of problem. ZXH was not represented at the investigation meeting.

[3] ZXH made submissions before the investigation meeting on whether QNI's claim could be considered frivolous or vexatious and therefore be dismissed under clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act).

[4] QNI supplied in advance to the Authority a statement about his issues of concern and other information in emails.

[5] At the investigation meeting on 31 August 2018 the Authority heard evidence from QNI.

Employment with ZXH

[6] QNI commenced employment with ZXH in or about October 2017 on a fixed term agreement until October 2018. In the statement of problem lodged with the Authority the problems were described as:

- (a) Abusing economics of scale by preying on the bottom of the pyramid and undermining customers integrity with respect to selling of caged eggs; and
- (b) Pre-meditated sexual harassment of QNI'S sexual identity; and
- (c) Psychological trauma.

[7] QNI wanted the problem to be resolved by way of taxing of ZXH's caged eggs to subsidise free range eggs. QNI in a subsequent email to the Authority shortly before the

investigation meeting stated that he was prepared to receive a monetary award by way of remedy.

[8] QNI explained that he could no longer work for ZXH when he became aware of its rebranding of caged eggs and the use of caged eggs in the cafeteria.

[9] He gave four weeks' notice in or about mid-February 2018 however in a further email to a senior manager advised he was working under duress and was told that he could terminate his contract immediately. He accepted this offer and was paid out for the remainder of the notice period. QNI confirmed in evidence that his problem is that his resignation was in the nature of a constructive dismissal.

[10] QNI clarified that the harassment on the basis of sexual identity is linked with the caging of chickens and other animals.

Clarification of additional issues

[11] There is reference to issues in other employment including at a University from in or about 2009 and employment in Australia and general concerns about persecution over an extended period from about 2009. There are concerns about places QNI has resided at, people he has resided with, hospitals and the New Zealand Police. There is also frequent reference to a Justice of the Peace whose name I prohibit from publication.

[12] QNI said in his evidence that he considered the Authority's powers should be increased and improved where situations occur and businesses are behaving badly. He said he wanted an immediate injunction on selling all caged chicken eggs. He also wanted the Authority role to include assisting those whose employment has been terminated to obtain other roles.

[13] QNI was concerned that whilst ZXH had offered a certificate of service he needed a verbal reference in order for him to obtain future employment.

Assessment of jurisdiction

[14] The Authority has jurisdiction under s 161 of the Act to make determinations about employment relationship problems.

[15] The Authority does not have jurisdiction to deal with any employment relationship problem that may have preceded the employment with ZXH as the claim before the Authority is against ZXH only. I also record about other earlier periods of employment the Employment Relations Act provides that no action may be commenced in the Authority in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised.¹

[16] The Authority does not have jurisdiction to deal with claims that are not employment relationship problems such as concerns QNI has raised about the New Zealand Police and treatment of him by the Police.

[17] The Authority does have jurisdiction to consider personal grievance claims against ZXH but cannot provide a remedy of a reference as the Authority is restricted to remedies in the Employment Relations Act.²

Is the proceeding against ZXH frivolous or vexatious?

[18] The Authority has the power under clause 12A of Schedule 2 of the Act to dismiss frivolous and vexatious proceedings. ZXH says that the Authority should dismiss the proceeding as frivolous or vexatious.

[19] Judge Inglis (as Chief Judge Inglis was then) considered for the first time the scope and application of clause 12A of Schedule 2 of the Employment Relations Act in *Lumsden v*

¹ Employment Relations Act 2000 s 114(6)

² Employment Relations s 123

*Sky City Management Ltd.*³ *Lumsden* was approved in another subsequent Employment Court judgment in *AFT v BCM*.⁴

[20] It is clear from *Lumsden*⁵ that a matter is not frivolous simply because it has no reasonable prospect of success. It requires something more. There was reference in *Lumsden* to observations in *New Zealand (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW*.⁶ Chief Judge Goddard observed that:

...Frivolous cases are more than just cases which disclose no cause of action. A frivolous case is one, to use the words of Lush J in *Norman v Matthews*:

“which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court.”

It is one which it is impossible to take seriously ...

[21] Counsel for ZXH placed some weight on a further statement by Chief Judge Goddard in another Labour Court judgment in *Creser v Tourist Hotel Corp of New Zealand*:

...to categorise a case as frivolous it is not necessary for the Court to be able to make positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.⁷

[22] The two claims before the Authority are constructive dismissal and sexual harassment.

[23] The evidence confirmed that the constructive dismissal claim was related to the sale of caged eggs and use of caged eggs in the staff cafeteria. The concerns about this included the branding of caged eggs with what was regarded as misleading wording to consumers because it was not reflective of the suffering caused. Another issue is the cost of caged versus free range eggs with free range eggs being outside of the budget of many shoppers. QNI also said the profits from selling caged eggs were being used by ZXH to provide alcohol at functions.

³ *Lumsden v Sky City Management Ltd* [2015] ERNZ 389.

⁴ *AFT v BCM* [2015] NZEmpC 234

⁵ Above n 1 at [37]

⁶ *Shipwrights v NZ Amalgamated Engineering* (1989) ERNZ Sel Cas 516, [1989] 3 NZILR

⁷ *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZILR 1055 (LC) at 1069

[24] The Authority understood from the evidence about sexual harassment that it was connected with the caging of chickens and other animals.

[25] Counsel for ZXH submits that no reasonable person could draw a connection between the sale of caged eggs/use in the staff cafeteria and QNI's employment as a basis for a personal grievance to be brought before the Authority. He refers to the initial remedy of taxing the sale of caged eggs as being related to the view that QNI has that caged eggs should not be sold by ZXH rather than relating to a perceived employment relationship problem.

[26] Striking out a proceeding on the basis that it is frivolous or vexatious is unusual and should only be done in the clearest of cases. That is because as was concluded in *Lumsden* the power of the Authority to dismiss is limited and the threshold to do so is a high one.⁸

[27] I acknowledge that QNI has genuinely held views that the sale of caged eggs, their use in the staff cafeteria and elsewhere is wrong. He also holds a strong view that chickens and animals' living in cages is unnatural and cruel.

[28] Those genuinely held views form the basis of the claim before the Authority. Objectively assessed the claim is a means to advance those views as employment relationship problems. I have looked behind the remedy to the substance of the claim. QNI brings a claim to the Authority based on his view that the business activities of ZXH in relation to caged eggs are wrong. Whilst I do not conclude QNI is insincere in bringing his claim it is not a claim that a reasonable person could treat seriously as a genuine personal grievance claim. It is misconceived in its entirety. In terms of the merits it is a weak claim if not untenable.

[29] I conclude this is one of the very rare cases where the claim should be dismissed on the basis it is frivolous in the legal sense of the word. The proceeding needs to be brought to an end.

⁸ Above n 1 at [39]

[30] The proceeding is dismissed on the basis it is frivolous.

Costs

[31] In the unusual circumstances of this matter I make no order as to costs.

Helen Doyle
Member of the Employment Relations Authority