IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 473
5359692

	BETWEEN	JOHN ROBERT ANDERSON Applicant
	AND	CHIEF OF DEFENCE FORCE Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Nigel Lucie-Smith, counsel for Respondent
Consideration of Papers:	2 November 2011
Determination:	2 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem lodged in the Authority on 11 October 2011 the applicant Mr John Anderson has alleged that the respondent Chief of Defence Force breached terms of a Record of Settlement and acted contrary to requirements of good faith.

[2] Annexed to the statement is a copy of the Record of Settlement which was made under s 149 of the Employment Relations Act 2000 on 10 November 2010. It is signed by Mr Anderson, counsel Mr Lucie-Smith and a Department of Labour mediator.

[3] Also attached by Mr Anderson to his statement of problem is an email he was sent by an HR adviser of the New Zealand Defence Force (NZDF) on 16 September 2011 which reads:

> *Following receipt of your applications for the vacancies below, I am writing to confirm that the New Zealand Defence Force is unwilling*

> *to consider your applications for employment. This is because you are considered unsuitable for employment within the NZDF given your previous employment background with us. Please let me know if you would like your application information returned directly to you.*

[4] In his statement Mr Anderson refers to the email and the advice that he was found to be unsuitable for employment in the NZDF, as follows:

> *I am no longer employed with the New Zealand Defence Force as I resigned from the NZ Navy but I am seeking employment with the NZDF by applying for employment with the NZ Airforce or Army.*

[5] To resolve the matters raised in his application Mr Anderson has requested the following:

> *That the respondent be punished the maximum amount under "Punishment of a Wrongdoing". Penalties available under the Employment Relations Act 2000.*

[6] Section 149 of the Employment Relations Act provides that a person who breaches an agreed term of settlement arrived at under that provision is liable to a penalty imposed by the Authority.

[7] In a statement in reply the Chief of Defence Force has given a full response outlining the various matters raised as employment relationship problems previously by Mr Anderson and which led to settlement in mediation and production of the record the parties signed in November 2010.

[8] The position taken by the Chief of Defence Force is that no breach of the terms of settlement resulted from the rejection by NZDF of Mr Anderson for employment and that his claims are frivolous and vexatious and should be dismissed.

Clause 12A – frivolous or vexatious proceedings

[9] Under clause 12A of Schedule 2 of the Act the Authority has the power to dismiss frivolous or vexatious proceedings. It may do so at any time in any proceeding where the Authority considers the matter to be frivolous or vexatious.

[10] The parties were notified that they could make written submissions for consideration by the Authority before it decided whether to exercise the power under clause 12A.

[11] Submissions were received from Mr Anderson and Mr Lucie-Smith.

[12] In relation to clause 12A the explanatory note to the Employment Relations Amendment Bill (No 2) indicates that a purpose of the provision is to allow the Authority to dismiss claims with little or no merit without needing to fully investigate them.

[13] In the context of court rules from different jurisdictions explanations have been given as to the nature of frivolous or vexatious proceedings. For example in *Attorney-General v. Wentworth* (1988) 14NSWLR 481 at 491, the New South Wales Court held that proceedings are properly to be regarded as vexatious if:

> *… irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless. Vexatious proceedings have also been described as proceedings which lack reasonable grounds.*

[14] In New Zealand under the High Court Rules - Rule 15.1 - that Court may strike out proceedings which are frivolous or vexatious. McGechan on Procedure with reference to Rule 15.1 describes 'frivolous' as referring to a proceeding which is not a serious and proper use of the Court process, but which trifles with it.

[15] I consider that Mr Anderson's application has no merit and discloses no tenable employment relationship problem. In reaching that conclusion I have assumed that the facts are correctly stated by him and are capable of being proved. It appears that after Mr Anderson resigned his employment with the NZDF in 2010 he applied for several positions which I am satisfied were with the same employer of civilians who may work for different services within the NZDF. He was rejected for employment because he was considered unsuitable having regard to his previous employment background with that employer.

[16] That background was not something brought into being only for the purposes of mediation but was a matter of record within the NZDF, so there is no breach of confidentiality covering the terms of settlement if that is one of Mr Anderson's complaints. He refers to the provisions of the Record of Settlement which contemplate the Chief of Defence Force giving a reference and also being able to answer a direct question by saying that Mr Anderson would not be employed again because of personality clashes.

[17] The subject of the clause is obviously a reference that the Chief of Defence Force is, if requested, to supply to another employer rather than to the NZDF, which

would otherwise be supplying to itself a reference about a former employee, or supplying to itself a statement about why it would not employ that employee again.

[18] Another term of settlement records the following:

> *5. This agreement is a full and final settlement of all matters in dispute, including future disputes, between the parties either arising from their employment relationship or otherwise.*

[19] Although with the inclusion of "future disputes" the term is far reaching in scope, it is one the parties agreed to in mediation and, as with any provisions in a record of settlement, is not one that the Authority could interfere with or seek to re-write on their behalf. The cascade of grievances settled may explain the term.

[20] Mr Anderson's applications for new or further employment with the NZDF may seem in themselves to have been frivolous or vexatious in view of the term of settlement he agreed to that allowed the Chief of Defence Force to say that he would not be employed again and to give the reason why that was.

[21] I find on the material he supplied that Mr Anderson's claim to have an employment relationship problem is so obviously untenable and manifestly groundless as to be without prospect of success. His meritless claim is the basis of a vexatious proceeding which may be dismissed under clause 12A.

[22] I also find that Mr Anderson's claim is frivolous in the sense that it is not a serious and proper use of the Authority's investigation process.

Determination

[23] Accordingly by order of the Authority given in the exercise of its discretion under clause 12A of Schedule 2 of the Employment Relations Act, the claim by Mr Anderson is dismissed as being frivolous or vexatious.

A Dumbleton
Member of the Employment Relations Authority