

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 78  
5540000

BETWEEN            BENGAL INVESTMENTS  
                          LIMITED t/a MUFFIN BREAK  
                          JOHNSONVILLE  
                          Applicant

AND                    STACI IBELL  
                          Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Andrew Crook, for Applicant  
                              Nathan Bourke, for Respondent

Investigation Meeting:    On the papers

Submissions Received:    6 August 2015, from the Applicant  
                                  4 and 9 August 2015, from the Respondent

Determination:            19 August 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Bengal Investments Limited t/a Muffin Break Johnsonville (Muffin Break Johnsonville) lodged proceedings in the Authority alleging a breach of confidentiality by the respondent following a mediated settlement. Ms Ibell denies any such breach. She has applied to the Authority for the matter to be dismissed on the basis that it is a frivolous or vexatious proceeding. Ms Ibell also seeks costs.

[2] Andrew Crook, a director of Bengal Investments Limited, opposes the application.

[3] The matter is for preliminary determination on the papers. Both parties made written submissions supporting their respective views of the matter.

[4] Counsel for Ms Ibell, Mr Bourke, submits in support of her application to have the matter dismissed that the allegation made by her former employer is based on a text message exchange between Mr Crook and another person. In that text exchange the other person, who was also a former employee of Muffin Break Johnsonville, purportedly suggested Ms Ibell had been "*the last person to sue (Muffin Break Johnsonville) and win*".

[5] Mr Bourke notes that Muffin Break Johnsonville had filed no witness statements in the proceedings and had advised the Authority it did not intend to file any evidence but wished to proceed on the basis of its statement of problem. A document purporting to be a transcript of the text message had been included with the statement of problem.

[6] Mr Bourke submits the text message transcript amounted to hearsay. It did not refer to Ms Ibell by name, simply referring to a "Stacy". Further, there was no reference in the text messages as to what the person named Stacy was alleged to have said, or when, and no mention had been made of any outcomes from a mediated settlement. He submits that the bringing of a proceeding to the Authority on the basis of this evidence is both vexatious and frivolous and has absolutely no prospect of success.

[7] Mr Crook submits that, at the time of entering into the mediated settlement in September 2011, the mediator impressed upon all parties the enduring nature of the confidentiality attaching to it. He says both parties acknowledged this.

[8] Mr Crook says the emails he received from a recently resigned employee clearly referred to Ms Ibell. He had employed staff for 18 years in the hospitality industry and, in that time, had only ever employed one person by the name of Staci and had only attended one mediation once, again with Ms Ibell.

[9] In Mr Crook's submission the text message from the former employee was, on the balance of probabilities, evidence of a breach of the settlement by Ms Ibell. At the time of making his submissions, Mr Crook had not been able to locate the former employee to require him to attend the Authority's investigation meeting.

[10] Mr Bourke submitted in reply it would be a breach of natural justice for Ms Ibell to be required to attend the Authority and respond to alleged inferences arising

from a text conversation in which she took no part, without having the opportunity to cross-examine the former employee who had been involved in that text conversation.

### **Determination**

[11] Clause 12A of Schedule 2 to the Employment Relations Act 2000 provides the Authority with the discretion, at any time in any matter before it, to dismiss a matter or defence that it considers to be frivolous or vexatious. I am not persuaded by counsel for Ms Ibell that this is an appropriate instance for exercise of that discretion.

[12] I am aware Mr Crook has had difficulty in locating the former employee he seeks to summons to attend the Authority's investigation which is set down for 2 September 2015. Since receiving the final submissions of Mr Bourke, however, Mr Crook informed the Authority he had now obtained an address for that employee and a witness summons has been prepared, if not yet served.

[13] On that basis, I am not prepared to dismiss Muffin Break Johnsonville's application as being frivolous or vexatious.

### **Costs**

[14] The matter of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority