

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 114D/07
5050368

BETWEEN Maxine Hodgson
AND Parentline Charitable Trust

Member of Authority: Janet Scott

Representatives: Mark Hammond for Applicant
Phillip Morgan & Julie Hardaker for Respondent

Investigation Meeting: 19 July 2007 at Hamilton

Submissions received: 19 July 2007 for applicant
15 August 2007 for respondent

Determination: 7 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] An application has been brought on behalf of the applicant in this matter to strike out the respondent's counterclaim regarding salary.

[2] The respondent opposes the application.

Background

[3] The applicant has brought a number of claims to the Authority for investigation. They include claims that she was constructively dismissed from her employment and unjustifiably dismissed during her notice period.

[4] The respondent denies the claims and has brought counterclaims against the applicant. One of these counterclaims relates to a claim for repayment by the applicant to the respondent of an unauthorised salary increase in the sum of \$52,000 –

the value of the increased salary (\$26,000 p.a.) for a period of two years from August 2004.

[5] This Determination addresses and disposes of the application to strike out the respondent's counterclaim.

[6] It is important to note also that the strike out application was filed and addressed on the 11th day of a 14 day investigation. The respondent's submissions on the application were received after the hearing on all matters had been concluded.

Legal Principles

[7] The parties have made submissions addressing the Authority's powers in the matter (s.162 Employment Relations Act) and the legal principles governing strike out applications. (Reference High Court Rule rr 186 and the developed case law case e.g. Clark v NCR [NZ] Corporation [2006] 1 ERNZ 401).

[8] The Court in Clark stated:

“These rules of course have been the subject of numerous decisions in this Court as well as the courts of general civil jurisdiction. The principles to be adopted are well established.....

(1) The question to be assessed is whether it has been demonstrated that the case pleaded is so clearly untenable that it cannot possibly succeed.

(2) The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied that it can reach a definite and certain conclusion.

(3) It is not a valid criticism of an application to strike out that extensive and complex argument and even evidence is necessary to demonstrate that the case is clear enough for the Court to exercise its summary powers of striking out.

(4) The Court will not strike out a proceeding if, on the way to doing so, it has to decide disputed questions of fact.

(5) Even if jurisdiction exists and the absence of a tenable case is established, the Court has a residual discretion to decline the application if the justice of the case so requires, but that discretion will not often be exercised if the Court has been able to form a clear view of the case”.

[9] Also noted in this case was the principle described by Judge Goddard in the case NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW and Anor [1989] 3 NZILR 284 at 288.

“For an application to strike out to succeed, it must be apparent that on the facts alleged there can be no possible legal basis for the proceeding or cause of action relied upon. The technique is to approach the application to strike out on the footing that the applicant or plaintiff will be able to prove at the hearing every material allegation of fact contained in the Statement of Claim. If, on that basis, there is a cause of action then there is no room for the exercise of the Court's jurisdiction to strike out the proceedings or the cause of action”.

[10] In considering the application I have also had regard to the Authority's very broad powers to investigate a matter before it, untroubled by technicalities or the way the parties have described the matter, with a view to resolving the employment relationship problem on the substantial merits of the case. (Silbey v Christchurch City Council, unreported CC 14/02). In this regard, I note a recent Determination of the Authority Martyn Williams and Camira Furniture Ltd unreported AA 269/07. In that case the Authority found a worker had been unjustifiably dismissed, it awarded remedies albeit they were reduced because the Authority found the applicant had contributed to the situation that gave rise to the grievance. It also directed the applicant to repay to the respondent the cost incurred by the respondent resulting from his in personal internet use (\$4500). This decision did overall justice between the parties and it exemplifies the Authority's broad approach to resolving employment relationship problems.

Discussion and Determination

[11] In arriving at a Determination on the application before me I have had regard to all of the above and the submissions of the parties.

[12] Mr Hammond concedes that a number of factors argued by him do not reach the high threshold required to strike out the counterclaim in question. However, he does submit that the Board's case is founded on a fundamental error of reasoning drawn from the documents founding the claim. Mr Hammond submits this error is sufficient to reach the threshold required to strike the claim out. Mr Hammond traverses the documentary evidence pertaining to the claim to arrive at the conclusion that the Board cannot meet the requisite standard of proof in the matter.

[13] The respondent sees the matter differently. It disputes the applicant's claim that its case is advanced on the basis of a fundamental error of reasoning in relation to the documentary evidence submitted.

[14] Its states that its position is that at the time the salary increases for staff were being considered there were work performance and governance issues between the applicant and the Board and plans for a performance review; there was no documentation put before the Board increasing the applicant's salary and the Board did not approve it and the applicant had a statutory duty of good faith not to mislead or deceive the Board or to do anything that was likely to do so.

[15] The documentary evidence relating to the claim is also traversed by the respondent leading it to conclusions altogether different to those made for the applicant - including a conclusion that the applicant manipulated Parentline's finances and budget and the Board to give herself an increase she was not entitled to.

Conclusion

[16] Having regard to the Authority's wide powers as an investigatory body with a brief to resolve employment relationship problems; the legal principles governing applications to strike out claims and the submissions of the parties I conclude the applicant has not established the counterclaim cannot succeed.

[17] In fact the submissions on the counterclaim establish two opposing views of the claim and I find that it should be determined in the usual way along with the other matters that must be decided in resolving the employment relationship problem between the parties. The fact that all the evidence has now been heard confirms my view that this matter should be dealt with as part of the overall task of considering and arriving at findings and determinations in the matter including credibility findings.

Determination

[18] The application to strike out the respondent's claim relating to the applicant's salary increase is declined.

Costs

[19] Costs are reserved and will be dealt with in determining overall costs in the matter.

Janet Scott

Member of the Employment Authority