

ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF  
CERTAIN INFORMATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 205  
3143701

BETWEEN                      OPN  
   Applicant  
  
AND                                EDO  
   Respondent

Member of Authority:            Peter van Keulen  
  
Representatives:                Lauren Archer, counsel for the Applicant  
   Lynda Mathieson, advocate for the Respondent  
  
Investigation Meeting:         On the papers  
  
Submissions Received:         25 February 2022 and 18 March 2022 from the Applicant  
   11 February 2022, 3 March 2022, 18 March 2022 and  
   25 March 2022 from the Respondent  
  
Date of Determination:         20 May 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1]     OPN seeks non-publication orders in relation to his identity and information that would enable others to identify him particularly in connection with criminal proceedings he has been involved in.

[2]     The basis for seeking non-publication orders is that OPN has permanent name suppression in respect of criminal matters under section 200 of the Criminal Procedure Act

2000 as the identification of him could lead to the identification of another whose name is suppressed by law.

[3] Counsel for OPN says identifying him in this matter will likely mean others will be able to identify him in relation to the relevant criminal matter and the other individual whose identity is suppressed.

[4] I accept this submission and observe that the likelihood of this occurring if I do not grant non-publication orders as sought is real. On this basis, pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication the name and identity of the applicant and any information relating to his employment and criminal offending that would identify him and/or others involved in that offending.

[5] For the purposes of this determination the applicant will be referred to as OPN and the respondent, his employer, as EDO.

### **Employment relationship problem**

[6] OPN raised a personal grievance against EDO for unjustifiable dismissal and this is the basis for his claim in the Authority

[7] OPN's dismissal arose in circumstances where he had been questioned by the Police in relation to a domestic matter and subsequently charged. OPN advised EDO of this questioning and then the charges. EDO says OPN also admitted to it that he had acted as alleged.

[8] EDO initially offered to support OPN. However, the details of OPN's alleged offending caused some employees of the business considerable distress; they say they could not comprehend or accept what had occurred and they felt betrayed by OPN and were angry at him.

[9] EDO decided that the offending was potentially problematic for OPN's continued employment because his actions had detrimentally affected their employees and because it was concerned that OPN's actions might impact on EDO's reputation. So EDO commenced a disciplinary process with OPN by raising these issues, advising him that he could potentially be dismissed and inviting him to comment.

[10] EDO held a disciplinary meeting with OPN and then subsequently dismissed him.

[11] OPN says the way in which EDO carried out the disciplinary process, including in particular some of the statements it made in relevant correspondence, shows that it had predetermined that he would be dismissed. And this means his dismissal is unjustifiable.

[12] EDO denies any predetermination and says OPN was given a full opportunity to explain himself and address the issues it raised before it decided to dismiss him.

[13] The parties have been unable to resolve OPN's personal grievance claim and it is now progressing through the Authority.

[14] In its statement in reply, EDO says the underlying offending by OPN has caused trauma and mental distress to some employees and it says the progression of OPN's claim and, in particular any investigation by the Authority, will likely cause further trauma and mental distress for employees. It also says as OPN is now incarcerated his claim is vexatious and frivolous. For these reasons it states that the Authority should dismiss OPN's claim.

[15] EDO then lodged an application to dismiss OPN's claim together with a supporting affidavit from one of its directors.

[16] OPN opposes the application.

### **The Authority's investigation**

[17] In a case management conference I agreed with the parties' representatives that I would deal with the application to dismiss OPN's claim as a preliminary matter and that I would do that on the papers, i.e., based on any affidavit evidence and written submissions from the representatives.

[18] So, I have received two affidavits from a director of EDO and written submissions from both representatives. This determination is based on my analysis of that evidence and the submissions.

[19] As permitted by s174E of the Act, my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am able

to make at this interim stage so that I can express a conclusion on whether the application should be granted or declined.

## Issues

[20] Clause 12A of Schedule 2 of the Act provides:

**12A Power to dismiss frivolous or vexatious proceedings**

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.

[21] In *Lumsden v Sky City Management Ltd*<sup>1</sup>, Judge Inglis considered this power and concluded:

- (a) The Authority has no power under cl 12A to dismiss part of a matter before it.
- (b) Whether a matter is frivolous is to be determined objectively. A matter is not simply frivolous because it has no reasonable prospect of success. The matter must trifle with the Authority's processes and be impossible to take seriously.
- (c) The Authority's power to dismiss is limited and the threshold is high.

[22] The Court of Appeal, the High Court and the Employment Court have all considered what "vexatious" means.<sup>2</sup> Applying these cases, in my view, vexatious requires there to be an improper purpose to a claim. The claim must be extreme and without proper cause or reasonable basis. The claim will be harassing or annoying, vexing a respondent beyond what is normal in a claim or it might contain scandalous or unjustified allegations.

[23] In summary, when assessing an application to dismiss a matter under cl 12A of Schedule 2 of the Act the following applies:

- (a) All parts of the matter, that is all heads of claim or causes of action, must be either frivolous or vexatious.

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<sup>1</sup> *Lumsden v Sky City Management Ltd* [2015] NZEmpC 225.

<sup>2</sup> *Hendon v Attorney-General* [2011] NZCA 9; *Rabson v Judicial Conduct Commissioner (No 2)* [2016] NZHC 2539; and *Gapuzan v Pratt & Whitney Air New Zealand Services* [2014] NZEmpC 206.

- (b) For the claims to be frivolous they must be impossible to take seriously and must trifle with the Authority's processes.
- (c) For the claims to be vexatious they must be extreme claims made without reasonable or probable cause or excuse, they are harassing or annoying, vexing a respondent beyond what is normal in a claim or they might contain scandalous or unjustified allegations and they have an improper purpose.
- (d) There is a high threshold and I should not take the step of dismissing a matter lightly as it is a draconian action.

## **Discussion**

### *The parties' positions*

[24] In EDO's application it says:

- (a) OPN's claim is frivolous because he is currently serving a custodial sentence for offending and his actions, which are the reason for his sentence, are the basis for EDO's loss of trust and confidence – so EDO's approach aligns with the serious approach taken by the Court. Further if EDO had not dismissed OPN when it did the employment relationship would have come to an end in any event due to OPN's sentence; OPN's inability to work for it means he would have been dismissed in any event and he is now unable to be reinstated which is the primary remedy in unjustifiable dismissal claims.
- (b) OPN's claim is vexatious because OPN is angry with EDO because it did not support him, he is not being accountable for his own actions and is vengeful towards EDO, trying to achieve a win over it to justify his actions. And OPN has no remorse or regard for the impact his offending had on employees of EDO nor any regard for the re-traumatisation that will likely occur for employees in the Authority's process.
- (c) OPN's claim is without merit because EDO followed a thorough and fair disciplinary process, did not predetermine the outcome and in any event the employment relationship would have come to an end on OPN being sentenced.

Further EDO says the dismissal did not cause any disadvantage to OPN as he found alternative employment immediately and was subsequently incarcerated.

[25] OPN, in reply says:

- (a) His claim is not frivolous. Both his sentence and reinstatement are irrelevant to the assessment of his claim. Further OPN says he does not seek to be reinstated and he had not been sentenced at the time of the disciplinary process and decision to dismiss; so his incarceration does not mean his dismissal is justified nor does it mean he is not entitled to remedies if successful with his claim.
- (b) His claim is not vexatious. He denies being angry at EDO and says he is entitled to challenge the process adopted by EDO in dismissing him regardless of the underlying reason for that. Essentially OPN is saying he is not motivated by vindication or revenge in bringing this claim; the claim is about the process and his right to have a fair and justifiable enquiry into the question of the impact of his actions on EDO and whether dismissal was appropriate in all of the circumstances.
- (c) His claim has merit. The dispute is over whether EDO carried out a fair process, particularly whether the outcome was predetermined. In terms of disadvantage, he was disadvantaged by the simple fact of losing his employment – this is so regardless of subsequent alternative employment and/or his sentence.

[26] The representatives' submissions largely restate these points:

- (a) The advocate for EDO adds that OPN has refused an open offer to settle this matter (on the basis of money being paid for the victim of his offending) and she stresses, very clearly and forcefully, that the employees within EDO who have become aware of OPN's offending have been traumatised and want to move on and this process will not assist that, in fact it may cause further harm to their wellbeing.

(b) Counsel for OPN submits that the threshold for dismissing a matter is extremely high and should only be exercised in very restricted circumstances and this case does not meet those circumstances and that high threshold. He says just because EDO says the disciplinary process was fair it does not mean it was. Further he says, there is basis for OPN's allegations of unfairness particularly predetermination and this is evident in the correspondence and EDO's clearly stated position of strongly disapproving of OPN's alleged behaviour at a time when he had not even pleaded to the charges brought against him. In short, there is an issue to resolve and that needs to be investigated and determined.

*Frivolous*

[27] I have assessed the allegations in the statement of problem and the documents attached to it, and then weighed these against the responses in the statement in reply and the affidavit evidence of EDO.

[28] My initial review is that the case may not be a strong one but that is not the point. I accept counsel for OPN's submission that there is an issue to be considered here as that relates to a fair process. There is a basis for allegations of unfairness and this needs to be assessed by a proper and full consideration of the evidence and not dismissed as being without merit in advance of that.

[29] Further, the evidence of OPN's incarceration and the advocate's submission in relation to it is compelling but that does not inform the fairness of the process and therefore the overall justification of the dismissal. That OPN's employment would have ended informs two things; one, that dismissal may have been substantively justified and two, that lost remuneration would be limited if it had been claimed, which it has not.

[30] In conclusion on the question of whether OPN's claim is frivolous, despite the compelling submissions of the advocate for EDO I cannot conclude the case is frivolous; it is not a case that I can say, I cannot take it seriously, nor can I conclude that it is merely trifling with the Authority process.

### *Vexatious*

[31] On review I accept there is perhaps some basis for EDO's allegations about OPN's motivations for bringing this claim against it. It might be that OPN is motivated by a feeling that he was let down by EDO and/or despite conviction and sentence he believes there is some element of vindication that can be obtained in this process. But, even if this is correct that does not mean OPN's case is simply about causing harm to EDO or being annoying and harassing to it, there are no scandalous claims nor on the face of it any unjustified allegations.

[32] Objectively there is a basis for OPN's claim. EDO may not think it is right or proper for OPN to advance a claim, particularly of being treated poorly by it, in light of the serious nature of his offending and the impact that has had both on its employees and others. However, this does not mean OPN's claim has been advanced for an improper purpose.

[33] In conclusion on the question of whether OPN's claim is vexatious I am not satisfied that the claim has been made without probable cause and I am not satisfied that it has been brought for an improper purpose, designed to be harassing and annoying. OPN's claim is not vexatious.

### *Conclusion*

[34] Reflecting on OPN's claim, the underlying events that give rise to the claim (based on my understanding to date) and the impact of this process on EDO I accept the case has unpleasant tones to it and is traumatic, stressful and offensive for EDO and probably even seems perverse to EDO based on what occurred. However, OPN has a right to a fair process when it comes to dismissal, despite what he may have done and the impact of that. And, it follows that OPN has a right to advance a claim based on not being given that fair process if there is a basis for it and it is not advanced for an improper purpose.

[35] So, despite the circumstances and the ongoing impact that the Authority process may have on EDO and others, the high threshold required for dismissing a claim is not met; OPN's claim is neither frivolous nor vexatious.

### **Orders**

[36] EDO's application to dismiss OPN's claim is declined.

## **Costs**

[37] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority