

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 491
3093872
3140141

BETWEEN	TALENT PROPELLER LIMITED Applicant
AND	YJL Respondent

Member of Authority:	Marija Urlich
Representatives:	Richard Upton, counsel for the Applicant Ashleigh Fechny, advocate for the Respondent
Investigation Meeting:	21 October 2021 (by audio visual link)
Submissions received:	At the investigation meeting from Applicant At the investigation meeting from the Respondent
Determination:	8 November 2021

DETERMINATION OF THE AUTHORITY

[1] YJL applies to have Talent’s claims dismissed as vexatious or frivolous.¹ Talent opposes the application. YJL also seeks a special form of non-publication order to shield YJL from risk of identification between this matter and other related matters. This is opposed by Talent.

¹ Clause 12A, schedule 2 Employment Relations Act 2000.

The Authority's investigation

[2] On 6 October 2021 YJL lodged a dismissal application and a request that the application be dealt with urgently given a concurrent related interlocutory matter and the proximity to the substantive investigation meeting scheduled for December 2021.

[3] On 7 October Talent filed a notice of opposition and advised it agreed with the urgency request. On 8 October the Authority proposed a timetable for filing submissions and any supporting evidence and that an investigation meeting be held by audio visual link on 21 October. The request for urgency was granted. The parties confirmed the proposed timetable and submissions were filed accordingly. YJL's submissions raised the non-publication issue and outlined argument in support. The parties did not take the opportunity to file evidence – they referred to documents already before the Authority. With respect to the non-publication order sought YJL relies on evidence already before the Authority and has not sought to file further evidence.

[4] The representatives attended an investigation meeting on 21 October held by audio visual link at which they spoke to written submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[6] There are two issues before the Authority for consideration:

- Should application 3093872 and the overlap with 3140141 be dismissed as frivolous and/or vexatious?
- Should a special form of non-publication order be granted in respect of YJL's non-publication order?

Should 3093872 and the overlap with 3140141 be dismissed on the grounds it is frivolous and/or vexatious?

[7] Clause 12A of Schedule 2 of the Act gives the Authority power to dismiss frivolous or vexatious proceedings. The Employment Court in *Lumsden v Sky City Management Limited* recognised that the Authority’s power to dismiss proceedings on the grounds that they are frivolous or vexatious is limited and the threshold for establishing that is high.² Dismissing a claim is a serious step, not one to be taken lightly.

[8] The Authority’s jurisdiction comes from s 161 of the Act. This provides that the Authority has “exclusive jurisdiction to make determinations about employment relationship problems generally”. Section 4(2) identifies the employment relationships that are covered by the Act. Section 5 of the Act defines an employment relationship problem. Section 6 of the Act sets out the meaning of an employee.

[9] The Supreme Court considered the jurisdiction of the Authority arising out of s 161 in the recent judgment of *FMV v TZB*.³ The Supreme Court stated that s 161 of the Act:

[...] reflects the relational framework of the Act and drives the fact-based, problem-solving approach of the Authority. The Authority has exclusive jurisdiction to make determinations about “problems generally”, not specific causes of action. **The only requirement is that the problem must be an “employment relationship” one; that is, it must relate to or arise from the “employment relationship”** in its entire sense [...] (emphasis added.)⁴

[10] Talent’s claim alleges YJL breached the employment agreement prior to her starting employment and has rendered YJL liable to a penalty. YJL says there was no employment agreement when the alleged breaches occurred and it follows the claim of breach and penalties has no prospect of success. YJL says Talent’s claim is vexatious and frivolous because:

- there was no employment relationship in place at the time of the alleged breach and YJL was not an employee and not a person intending to work;
- the claims were brought vexatiously;

² *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.

³ *FMV v TZB* [2021] NZSC 102.

⁴ Above at [60].

- the claim is prejudicial to YJL; and
- the claim cannot be amended because it has no legal basis.

[11] Talent says whether its claims have merit is a matter for the substantive investigation and are not “impossible to be taken seriously”:

- there can be an employment agreement without an employment relationship – the written employment agreement exists in isolation until negotiated and agreed;
- the wording of s 134 does not require a party to an employment agreement to be an employee as defined by s 6 or it may be given the circumstances of this matter YJL meets the definition of employee; and
- Talent can file an amended statement of problem to clarify the provisions of the employment agreement allegedly breached.

[12] Talent’s claim will turn, in part, on the application of the law to the facts as they are established at the investigation meeting and in particular the operation of s 134. If an employment agreement is found to have existed at the relevant time, as Talent contends, that will be a result of an application of the law to the established facts. Or, as Ms Fechny accepted, whether YJL was a person intending to work can only be answered having considered it as a mixed question of fact and law. Talent has a claim that YJL breached the employment agreement or was a person intending to work. These matters cannot be said to be frivolous and/or vexatious to the extent that they warrant dismissal at this stage.

[13] YJL invites the Authority to conclude Talent’s claims are brought vexatiously and with an improper purpose based on the proximity of one week between disciplinary action taken against YJL by Talent and Talent lodging claims in the Authority based on the same reasons as the disciplinary action. Talent says this may show strong feelings or promptness but not an improper purpose. There is insufficient evidence at this stage to establish to the high standard required for a strike out that Talent’s claim is improperly motivated. Whether Talent’s actions could be said to amount to double jeopardy would be a relevant factor to weigh in any consideration of penalty if a breach is established.

[14] A consideration of a dismissal on the grounds sought involves an exercise a discretion. Having considered the issues raised by the parties I decline to exercise that discretion to dismiss Talent's claims at this stage of the proceedings. The factual basis of the parties' respective claims are inexorably linked. The events involving the offer of employment and its acceptance and the transmission of the executed written employment agreement are matters which became the subject of a disciplinary investigation during YJL's employment, findings made as a result of that investigation became the basis of disciplinary action which then became grounds for a personal grievance which is now before the Authority. If Talent's claims were dismissed now it is unclear how the attached events and any associated evidence could be cleaved out without raising the prospect of further dispute which would not assist with a fact-based, problem solving approach to the investigation of this employment relationship problem.

Special form of non-publication order

[15] It is appropriate that the existing non publication order attaching to these file numbers is extended to this application. This is not opposed and is so ordered.

[16] YJL seeks a further level of protection to distance this application and determination from the other matters between the parties by a different identifier for the applicant and non-publication of Talent's identity.

[17] The purpose of a non-publication order usually relates to party, witness or third party identity or evidence. Such non-publication orders are in place for this and related matters for the purpose of party identity and evidence. The purpose of the further level of protection sought appears to be to shield the applicant from ready association with this application in the context of the parties' ongoing litigation.

[18] Though it is accepted litigation is inherently stressful and there are particular relevant factors here which have and continue to warrant the non-publication order in place there is no evidence before the Authority that the current application in itself may amplify the factors which form the basis of the existing order. Further, I am not satisfied the proposal can achieve the purpose sought because even if the party identifiers were changed the thread of file numbers remains the same.

Costs

[19] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority