



[5] The Respondent disputes that all of the discussions held between the parties on 23 August and 11 September 2013 were agreed to be conducted on a confidential basis, and has filed an application in opposition to the application for strike out.

### **Issues**

[6] The issues for determination are whether:

- paragraphs 2 (v)(vi)(vii)(viii) and (ix) of the Statement in Reply are inadmissible and should be struck out.
- Paragraphs 6,7 and 8 of the Statement in Reply are inadmissible and should be struck out.

### **Determination**

#### **Principles of strike-out**

[7] In *Kim v Thermsash Commercial Limited*<sup>1</sup> Judge Inglis set out the strike out principles:

*[7] The Court's approach to strike out applications is well-settled<sup>2</sup>. In summary, pleaded facts are assumed to be true. The cause of action complained about must be clearly untenable. The Jurisdiction is to be used sparingly and only in clear cases. Striking out a claim is a draconian step. The Court may receive affidavit evidence but will not attempt to resolve genuinely disputed issues of fact and will generally limit evidence to what is not in dispute. Where a defect in pleading, challenged as disclosing no reasonable arguable cause of action, can be cured by amendment which the plaintiff is willing to make, the Court will almost always permit amendment rather than striking out.*

[8] In this case the Applicant is claiming that the whole of the discussions at the meetings held on 23 August and 11 September 2013 which concerned both the proposal to make him redundant and a restraint of trade issue were held on a 'without prejudice' basis.

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<sup>1</sup> [2011] NZEmpC 169

<sup>2</sup> *Couch v Attorney-General* [2008] 3 NZLP 725 (SC); *Attorney-General v Prince & Gardiner* [1998] 1 NZLR 262, 267 (CA)

[9] Mr Tobin has filed an affidavit in support of the application to strike out in which he asserts that the whole of the meetings on 23 August and 11 September 2013 were carried out on an: “*off the record*” basis.

[10] The Respondent has filed an affidavit in opposition from Ms Anne-Marie Sutton, General Manager of the Respondent, in which she asserts that only a portion of the meeting held on 11 September 2013 was held on an: “*off the record*” basis.

*Procedure in the Authority*

[11] Section 173 of the Employment Relations Act 2000 (the Act) states:

***173 Procedure***

*(1) The Authority, in exercising its power and performing its functions, must-*

*(a) comply with the principles of natural justice; and*

*(b) act in a manner that is reasonable, having regard to its investigative role;*

[12] It is not for the Authority to attempt: “*to resolve genuinely disputed issues of fact*” in respect of the affidavits filed, it is for the Authority to determine in due course the merits of the Applicant’s claims in the case before it.

[13] Mr Tobin has claimed unjustifiable dismissal arising from the Respondent’s alleged failure to follow a fair and reasonable procedure by failing to consult with him.

[14] It is a principle of natural justice that a party be entitled to offer a defence to allegations against it. In the Statement in Reply the Respondent responded to the allegations in respect of its failure to follow a fair and reasonable process in respect of the subsequent redundancy of Mr Tobin’s position.

*Meeting held on 23 August 2013*

[15] The first meeting held on 23 August 2013 was indicated by the email sent by Ms Anne-Marie Sutton to Mr Tobin, which stated:

*Darren,*

*I would like to meet with you later this week to present some changes being considered within the structure of Rapid Labels. The nature of*

*the discussions is sensitive as the changes, if implemented, would affect your current role.*

[16] The Applicant refers to what was discussed during that meeting at paragraphs 4 and 5 of the Statement of Problem in which he set out that the matters he wished the Authority to determine were lack of consultation with him, and the failure to consider him for the newly created position of Sales Manager.

*Meeting held on 11 September 2013*

[17] Prior to this meeting Mr Organ sent an email dated 11 September 2013 to Counsel for Mr Tobin proposing the items to be discussed at the meeting to be held on 11 September 2011. Items 2 and 3 on that agenda are clearly related to the claims made by the Applicant which are before the Authority, namely Mr Tobin's feedback to the proposal and: "*All other matters relating to consultation*".

[18] In order to determine whether or not the Respondent carried out a fair and reasonable process in this matter, the Authority must examine the dealings between the parties. This will necessarily involve an examination of what was discussed with the Applicant at the two meetings held with him on 23 August and 11 September 2013 which appear from the communications between the parties prior to each meeting were to discuss the restructuring proposal as it affected his position.

[19] There is a dispute of fact over what occurred at the meeting held on 23 August 2013 which the Authority will need to investigate and determine.

[20] There is also a dispute of fact over what occurred at the meeting held on 11 September 2013, although there is common ground and no dispute that it was agreed that part of that meeting, which has no connection to the Applicant's claims before the Authority, would be held on an "*off the record*" basis. However the Authority will need to investigate and determine what occurred during that part of the meeting that is applicable to the Applicant's claims before the Authority.

[21] As observed in *Kim v Thermsash Commercial Limited*<sup>3</sup>, strike out applications are draconian in nature, and the jurisdiction is used sparingly. In this case there is no evidence, other than the affidavit evidence which is not determinative as it contains disputed issues of fact, that supports the assertion by the Applicant that the meeting discussions on 23 August and 11 September 2013 were held on a 'without prejudice' basis.

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<sup>3</sup> [2011] NZEmpC 169

[22] I determine that paragraph's 2 (v) (vi)(vii) and (ix) and paragraphs 6, 7 and 8 of the Statement in Reply are not inadmissible, and the Applicant's application for a direction to strike out is not granted.

[23] The Authority will contact the parties shortly for a case management telephone conference to progress the matter.

**Costs**

[24] Costs are reserved pending the final resolution of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**