

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

[2014] NZERA Wellington 106
5451801

BETWEEN	ELIAS WYBER Applicant
AND	MIDAS INFOMEDIA LIMITED Respondent

Authority's Consideration: On the papers on file by 18 September 2014

Member of Authority: P R Stapp

Date of Minute: 22 October 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application made pursuant to clause 12 A of Schedule 2 of the Employment Relations Act 2000 (the Act) that an application for re-opening is frivolous or vexatious from Mr Wyber.

[2] The frivolous or vexatious application has been made by the respondent on the grounds that the application for re-opening lacks substance, that a challenge to the Employment Court on an Authority determination is out of time, that Mr Wyber is trying to delay the payment of costs, that the time it has taken Mr Wyber to apply for the re-opening involves a delay, and that there is no genuine dispute.

[3] Mr Wyber does not accept or dispute the information contained in an affidavit from the respondent as to the summary of facts on the frivolous or vexatious matter. He has replied in writing.



The facts

[4] Mr Wyber has applied to reopen an investigation where a determination has been issued and asked for a stay on a subsequent costs determination.¹ His application dated 3 July 2014 raises a number of matters that he believes supports his claim to reopen the investigation and stay costs. Midas Informedia Limited provided a full statement in reply (dated 22 July 2014), but did not claim then that Mr Wyber's application was frivolous or vexation. It did claim the application was spurious. Subsequently it provided notice that it was considering applying for a determination that the application was frivolous or vexatious, and formally did so on 1 September 2014 by memorandum.

Determination

[4] The principles are as follows. "*A frivolous case is one that, on the face of it, no reasonable person can properly treat as bona fide.*"² *A proceeding may be vexatious despite the fact that it may disclose the germ of a legitimate personal grievance or other cause of action...*", and having regard amongst other things to:

...

- (i) *A pattern of complex, prolix and sometimes incomprehensible pleadings.*
- (ii) *Extravagant claims or scandalous allegations that the litigant has no prospect of substantiating or justifying.*
- (iii) *The extent to which the litigant allowed the proceeding to be dormant.*³

[5] Mr Wyber has raised matters that relate to the application for re-opening. Whether or not they will be successful is another matter, but it cannot be said that the matters lack substance for consideration. Indeed the claim that the application is spurious does not mean that it is without substance. The matters are arguable in regard to the tests applied to a re-opening application. Nothing has been particularised and identified to support the matters being frivolous or vexatious, other than the matters generally asserted by the respondent.

¹ [2013] NZERA Wellington issued on 11 November 2013 and [2014] NZERA Wellington 41 issued on 28 April 2014

² *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZILR 1055 (LC).

³ *McGechan on Procedure* (online loose leaf edition, Brookers) at [J88B.04]



[6] First here is no requirement for a determination to be challenged in the Employment Court as a requirement and/or precondition for an application for re-opening an investigation meeting. They are both options under the Act. Mr Wyber did have the option of applying for leave out of time to challenge the determination. There has been no challenge made in the Employment Court or leave requested to proceed out of time. There may be matters that are more appropriate for a challenge to a determination than reopening. If such matters happen to be relied upon for re-opening, I will need to consider them in light of not revisiting and/or re-determining the original findings made by the original member if the information happens to be the same. This is because a re-opening application is not a challenge and/or appeal. The fact that there is no challenge in the Employment Court means that care needs to be taken so as not to treat the re-opening as a challenge and/or appeal on the original determination. That means that I am required to consider the matters Mr Wyber has raised and the impact in regard to the justice of the matter.

[7] Secondly, there is no proof that Mr Wyber's motive is to delay any payment on costs because he has not paid them. For a start the respondent has a range of options open to it for recovery and enforcement of the matter. There are no timeframes that have been identified to prove Mr Wyber is deliberately being tardy or delaying payment. He has provided an explanation on securing funds for costs. Mr Wyber has asked for a stay on costs pending the applications before the Authority. That is a matter of substance given the respondent has opposed it, but Mr Wyber needs to understand that the outcome of the re-opening matter does not mean that a stay on costs follows.

[8] Third, there has been a time delay by Mr Wyber in lodging his application to re-open and stay costs. That will be a consideration in the re-opening matter. Both parties clearly have their own views about the amount of time it took to lodge the application, but saying that the respondent's statement in reply only addressed the substance of the claim and did not make a claim that the application was frivolous and vexatious. In any event Mr Wyber has made an explanation about the delay that I will have to weigh up in the fullness of time. It should be noted that there is no timeframe in regard to a re-opening application, but any time taken must be reasonable having regard to the facts.

[9] The above means that the application is not frivolous or vexatious.

[10] The respondent's application that Mr Wyber's application to re-open and stay costs is frivolous and vexatious, is declined. The next step is for me to determine the application for re-opening and a stay on costs. This ideally will be done on the papers, in a timeframe to be advised, because of the documents that have been already lodged that make it appropriate for such consideration.

[11] Costs are reserved.

P R Stapp

P R Stapp
Member of the Authority