

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2013] NZEmpC 203  
ARC 34/11**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

AND IN THE MATTER    of interlocutory applications

BETWEEN                RODERICK JOHN YOUNG  
   Plaintiff

AND                        BAY OF PLENTY DISTRICT HEALTH  
   BOARD  
   Defendant

Hearing:                14 November 2013  
   (Heard at Tauranga)

Appearances:        Plaintiff in person  
   Gail Bingham, counsel for defendant

Judgment:            14 November 2013

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**ORAL INTERIM JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] There are two issues before the Court today. The first is Mr Young's application to vary the order for security for costs and stay of proceedings that the Court made on 20 July 2011.<sup>1</sup> The second is the Board's application to strike out Mr Young's challenge.

[2] Although I have sufficient evidence and submissions on the first issue to decide it, very regrettably and frankly enigmatically, neither party has brought to court today their files which will probably contain, or confirm that they do not contain, important documents that either exist or do not exist. These will affect significantly the question of whether the case should be struck out. I can only

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<sup>1</sup> *Young v Bay of Plenty District Health Board* [2013] NZEmpC 131.

assume that both parties have anticipated that this would not be a significant hearing, although that is hard to understand given the nature of the application to strike out which, if it is granted, is final. Nevertheless, I think I have no alternative but to reluctantly allow both parties a very limited period to have access to their files and to provide the Court either with some documents which I will identify shortly, or to confirm that those documents do not exist.

[3] The documents that I refer to, if they exist, are as follows.

[4] First, chronologically, Ms Bingham tells me that on 28 April 2008 the Board received notice that a statement of problem had been filed by Mr Young. Neither the notice (if it was in writing) nor the statement of problem has been put before the Court and Ms Bingham cannot assist me in giving any further information about the notice or even what the statement of problem is about. So, I require further information about the notice and the statement of problem and the provision of copies of those. Assuming that the statement of problem is a statement of problem of an employment relationship matter in the Employment Relations Authority, then any statement in reply filed by the Board in response should also be provided.

[5] Next, although Nick Cockroft's affidavit attaches, as Exhibit C, a statement of problem filed with the Authority by Mr Young's solicitors on 13 November 2008, the accompanying letter from the Authority to the Board of 13 November 2008 refers to that as an "Amended Statement of Problem". If it is an amended statement of problem, I do not have the statement of problem that it amended. That apparent absence or discrepancy needs to be cleared up so that if there is or was a statement of problem in file number 5122669 in the Authority, then that should be furnished together with any statement or statements in reply to the statement of problem and/or any amended statements of problem on that file.

[6] Next, although I have had handed to me this morning, and helpfully, Mr Young's statement of problem filed in the Authority and dated 13 December 2010, which purports to file an unjustified dismissal grievance in reliance on Mr Young's contention that he was dismissed in retaliation for making protected disclosures, I do

not have, but need to have, information about a statement or statements in reply filed by the Board in respect of that statement of problem. These too should be provided.

[7] These documents are important because there is now confusion about what happened in the Authority during its three day investigation conducted by Member KJ Anderson on 26, 27 and 28 August 2009 under Authority file 5122669 which resulted in the Authority's determination issued on 26 March 2010.<sup>2</sup> That confusion arises because of three apparently contrary statements about what happened. The first is set out at [18] of the Authority's determination which was delivered by Member RA Monaghan on 12 April 2011.<sup>3</sup> At [18] the Member says, in relation to Mr Young's wish to have his claim that he was dismissed in retaliation for making a protected disclosure:

... Not only has the justification for his dismissal been heard and determined - resulting in a strong finding from the Authority regarding the presence of justification in the form of Mr Young's own misconduct - but Mr Young had an opportunity to and did raise concerns about the relevance of his making a protected disclosure during that process.

[8] That statement appears to refer to the investigation meeting before Member Anderson in 2009. Mr Young has given evidence today that he attempted to, but was prevented from, raising concerns about his protected disclosures during that investigation meeting. So, it may be that if Mr Young is right, he had the opportunity to, but did not, raise his concerns and was prevented from doing so.

[9] Ms Bingham, as counsel but who was present at that investigation meeting in the Authority, says that such concerns were not raised at all by Mr Young. If that is correct, then it is difficult to reconcile with the Authority's statement that Mr Young had an opportunity to, and did, raise those concerns at the investigation meeting before Member Anderson.

[10] Whether Mr Young has advanced a grievance, including raising it with his employer and filing it in the Employment Relations Authority, and how the Authority may have dealt with that, are important questions on the strike-out application on which I need more information before deciding that application.

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<sup>2</sup> AA146/10.

<sup>3</sup> [2011] NZERA Auckland 149.

[11] In those circumstances, having otherwise heard evidence and received submissions, the Court will give its judgment after the expiry of seven days within which the parties have to supply that further information.

GL Colgan  
Chief Judge

Judgment delivered orally at 1.16 pm on Thursday 14 November 2013