IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 235
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 and by memoranda filed on 20, 21, 22 and 29 November and 6 December 2013 (Heard at Tauranga)
Appearances:	Plaintiff in person Gail Bingham (on 14 November 2013), EA Smith (on 22 November 2013) , Mark Beech (on 29 November 2013), counsel for defendant
Judgment:	11 December 2013

JUDGMENT (NO 4) OF CHIEF JUDGE G L COLGAN

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[1] There are two applications for decision. The first is the plaintiff's to vary the terms of an order staying his challenge to a determination of the Employment Relations Authority (the Authority) unless and until the plaintiff provides security for costs. The second application is the defendant's seeking to strike out Mr Young's challenge.

[2] The Authority's determination that is challenged by Mr Young was delivered on 12 April 2011.[1] He had claimed that his complaints in the form of disclosures that he said he had made under the Protected Disclosures Act 2000, had not been resolved by the Bay of Plenty District Health Board (the Board), his former employer. Mr Young claimed that as a result of his making these disclosures, the Board dismissed him unjustifiably. He sought reinstatement in employment with the Board and continues to seek this remedy on his challenge, together with compensation for lost income over the period of about five years since his employment ended. The Authority determined that Mr Young's personal grievances arising out of his dismissal (and allegedly unjustified suspension) had already been heard and determined by it on 26 March 2010[2] and been found to have been justified.

[3] For reasons set out in its judgment delivered on 20 July 2011,[3] the Court stayed Mr Young's challenge unless and until he gave security for costs to the satisfaction of the Registrar in the sum of $6,000. Except that he has paid the Registrar $560 since July 2011, Mr Young has not given the required security or paid the costs awarded against him in favour of the Board in previous proceedings in both the Authority and this Court.

[4] On 19 November 2012 Mr Young was adjudicated bankrupt in the High Court on the application of the Board. Earlier this year, an attempt was made by the Official Assignee in the name of Mr Young to discontinue this proceeding although, by a judgment issued on 15 July 2013,[4] the Court determined that the Official Assignee was not entitled, unilaterally, to discontinue Mr Young's claims for remedies for lost remuneration, reinstatement, compensation for pain and suffering, interest, or costs.

[1] [2011] NZERA Auckland 149.
[2] AA 146/10
[3] [2011] NZEmpC 89.
[4] *Young v Bay of Plenty District Health Board* [2013] NZEmpC 131.

The application for variation of security for costs

[5] Mr Young has now applied for a variation (or a revocation) of the order for stay. Although he has filed lengthy affidavits in support of this application and in opposition to the defendant's application to strike his case out, most of their contents are of marginal or no relevance to the questions now before the Court. I will, nevertheless, attempt to discern and isolate those parts of Mr Young's evidence that are pertinent to the question of stay and security for costs. I should not be taken thereby to condone the gratuitously offensive and irrelevant comments made in that evidence by Mr Young about other persons. I propose to ignore that evidence and make a direction under cl 12(1) of sch 3 to the Act that there be no publication of the content of Mr Young's affidavits. I also took the opportunity to obtain some further pertinent evidence from Mr Young during the hearing and, because of deficiencies in the cases of both parties even then, more evidence has been provided by memoranda since the hearing.

[6] Mr Young says that he does not have the resources to provide security. He says that the serious allegations that lead to the ending of his employment effectively preclude him from obtaining other work in his field. Mr Young says that because his spouse is in employment, he is unable to qualify for legal aid or for financial assistance from Work and Income New Zealand, and has to depend for his livelihood on the charity of his family. He has some work as a caregiver. He says that this has put considerable strain on his marriage. He wants the order for stay removed so that he can prosecute his challenge.

[7] Unfortunately there are no further details of Mr Young's financial circumstances or any account of how they may have altered since the orders made in July 2011 which may justify a variation to, or even a revocation of, them.

[8] Despite Mr Young's failure to do much more than assert that he cannot pay the security ordered by the Court, there has been one significant change in circumstances since that order was made in mid-2011 which warrants examining whether that order should be varied.

[9] That is the adjudication of Mr Young in bankruptcy on the defendant's application. This status affects significantly how a bankrupt can deploy his or her resources including giving the Official Assignee a considerable degree of control over them. It is notable that since becoming bankrupt, Mr Young has paid less, and less frequently, to the Registrar although I cannot safely go further than this because there is simply no information about what the Official Assignee may or may not have permitted him to do with his property. Nor am I aware what other creditors there may be apart from the Board who are not dependent on the Official Assignee to attempt to recover their debts for them.

[10] But for the strike-out application, I would have considered it more just to permit Mr Young to continue with his challenge than to require him to provide the balance of the $6,000 as security for costs. However, this is only theoretical now because of the decision I have made on the defendant's strike-out application.

The strike-out application

[11] The defendant's application to strike out Mr Young's proceedings is based not simply on his failure to give security for costs and, thereby, the delay inherent in the proceedings being stayed. It also invokes its history and that of related litigation between the parties. It relies on the substantial delays between the events in question and when the challenge by hearing de novo is likely to be heard by the Court. It includes the merits of the grievance claim and the plaintiff's failure to raise and pursue it when he should have done so. And, as the Authority found, the defendant says that Mr Young's claim that he was dismissed unjustifiably has already been decided and he cannot have a second attempt to litigate this issue.

[12] Relevant events date back now more than five years to March 2008 when allegations of misconduct by Mr Young towards work colleagues were first brought to the Board's attention. Mr Young was suspended on 7 May 2008 and subsequently dismissed on 13 August 2008 for serious misconduct from his role as a health promoter.

A chronology of relevant events

[13] As the Authority's first determination of 26 March 2010 relates, employment relationships between Mr Young, those who worked with and supervised him, and with the Board, began to deteriorate. Complaints were made against him and he, in turn, complained about those who had complained against him. In mid-March 2008 Mr Young was placed on a three month performance management plan but this did not work as intended and there were further and more serious complaints by his colleagues against him.

[14] On 28 April 2008 Mr Young lodged his first statement of problem in the Authority. This alleged, essentially, that the defendant was refusing to be open and communicative in the parties' employment relationship.

[15] The employment relationship deteriorated further and in early May 2008 Mr Young was informed that the Board had commenced a formal investigation into misconduct alleged against him and that he was to be suspended on full pay. Mr Young engaged a lawyer who represented him at meetings and otherwise in the matter of the Board's investigation.

[16] On 7 May 2008 Mr Young was suspended pending the outcome of the defendant's investigations into allegations against him of harassment.

[17] On 9 May 2008 the defendant filed its statement in reply to Mr Young's statement of problem which the plaintiff had filed on 28 April 2008.

[18] On 16 May 2008 Mr Young wrote to the Chief Executive Officer (CEO) of the Board purporting to make a protected disclosure about various serious misconducts by the Board and some of its staff. This is referred to as the first protected disclosure.

[19] Following the Board's investigations of the complaints against Mr Young and a number of meetings between the parties (including Mr Young's lawyer) in May, July and early August 2008, Mr Young wrote on 13 August 2008 (the same day as he

was dismissed) to the CEO of the Board making what he asserts was his second protected disclosure although this was largely repetitive of the first.

[20] There followed correspondence between the CEO and Mr Young in August 2008 about his protected disclosures.

[21] On 13 November 2008 Mr Young filed an amended statement of problem in his proceedings which had been filed originally in the Authority on 28 April 2008. Significantly, there was no reference in this comprehensive amended statement of problem filed by Mr Young's solicitor, to the plaintiff's protected disclosures or any assertion that they had played a part in his dismissal by the Board.

[22] On 4 December 2008 the Board applied to the Authority to strike out the plaintiff's 13 November 2008 amended statement of problem. The defendant's ground for strike-out was that the grievance raised by the amended statement of problem was out of time. The Board asserted that Mr Young had not raised with his employer his grievance that he had been dismissed unjustifiably within the 90 day period for doing so after 13 August 2008 when he was notified of his dismissal. The Board asserted that the first advice received by it of a grievance relating to the dismissal was when the plaintiff's amended statement of problem was served on it on 13 November 2008, 93 days after his employment ended. The Board submitted that it was not open to the plaintiff to amend his original statement of problem filed before his dismissal, to avoid the 90 day limitation period. The Board sought a telephone conference call with the Authority to make further directions on its application to strike out the amended statement of problem. The documentary trail does not reveal what happened to that application. I infer that the Authority allowed Mr Young to pursue his dismissal grievance because he did so in the following year.

[23] Although having had a lawyer until shortly before its investigation meeting, Mr Young was not professionally represented at the Authority. It conducted its meeting to investigate his grievances over three days in late August 2009 and then received written submissions from the parties for the balance of that year.

[24] On 26 March 2010 the Authority issued a comprehensive (15 page, 44 paragraph) determination dismissing Mr Young's personal grievances. The Authority reserved costs and set a timetable for submissions on these.

[25] Mr Young did not challenge the Authority's determination within the statutory 28 day period that he had for doing so and his application for leave to challenge out of time was filed 12 days after the expiry of that period. For reasons that can be seen from the judgment on the application for leave[5] the Court refused to extend the time for filing Mr Young's challenge.

[26] The next event in the chronology was the filing by Mr Young of a further amended statement of problem (unjustified dismissal) in the Authority on 13 December 2010. The first reference to his protected disclosures being the reason for his dismissal is in this document.

[27] The Board's response to that grievance was to file an application with the Authority on 20 December 2010 to strike out the grievance purportedly filed a week earlier. The grounds for strike-out included that Mr Young's grievance relating to the justification for his dismissal had already been heard and determined in the Authority. The Board also pointed out that a challenge to that determination had not been brought within time and Mr Young's application for leave to bring a late challenge had been dismissed by this Court. Ground 8 of the Board's strike-out application was as follows:

> Furthermore the current grounds alleged by the Applicant have no chance of success as the evidence clearly shows that the [Protected] Disclosure was made after the Bay of Plenty District Health Board commenced the disciplinary action that led to termination of the applicant's employment with the District Health Board (letters of 6 and 16 May attached). To allow this action to continue would constitute a re-litigation of a case that the Authority has already determined.

[28] There is then an absence of documentary evidence until the Authority issued its determination on 12 April 2011[6] following what it described in the entituling to it as a hearing "On the papers". The Authority concluded: "The present statement of

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[5] [2010] NZEmpC 145.
[6] [2011] NZERA Auckland 149.

problem does not refer specifically to the May or the August disclosure, but from its context the allegation of unjustified and constructive dismissal must concern the May disclosure."[7] The Authority's determination concluded that both of Mr Young's protected disclosures were investigated by senior officers of the Board who were not the subject of complaint in those disclosures and their findings were reported to Mr Young.

[29] The Authority determined that Mr Young was not dismissed, whether actually or constructively, as a result of making a protected disclosure, saying:

> [18] It is not open to Mr Young to assert a new personal grievance at this late stage and in the way he has. 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. He is dissatisfied with the response, but that does not mean it is open to him to create an entirely new allegation of unjustified dismissal in a further attempt to obtain the response he requires.
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> [19] Because Mr Young had an opportunity to raise his concerns about the protected disclosure during the Authority's investigation into the substantive matter - and because the findings regarding both the true grounds and the justification for the dismissal were so clear - I would not in any event grant leave to Mr Young to proceed any further even had he made a less misconceived application than the present one.

[30] For these reasons the Authority declined to investigate Mr Young's personal grievance further and confirmed that he would not be reinstated in employment. It is this second determination of the Authority which is the subject of the current proceedings by way of challenge that the Board asks the Court to dismiss.

Was a grievance raised?

[31] Mr Young did not apparently ever raise a grievance with his former employer, following the s 114 requirements for doing so, alleging that he had been dismissed unjustifiably in retaliation for his making protected disclosures. There was no reference to the protected disclosures in the comprehensive amended statement of problem that the Authority allowed be the basis of Mr Young's claims that he was

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[7] At [14].

dismissed unjustifiably. It appears not to have been referred to at all in his evidence presented to the Authority. I address that below. The first formal occasion on which he linked his dismissal on 13 August 2008 with the disclosure he had made on 16 May 2008, was in his amended statement of problem filed with the Authority on 13 December 2010, two years and four months after his dismissal.

Mr Young's evidence in the Authority

[32] Mr Young's brief of evidence, signed by him on 3 March 2009, which I assume was used in the first Authority investigation meeting after that date (26-28 August 2010), makes no reference in its 33 numbered paragraphs to the plaintiff's protected disclosures. The brief of evidence concludes with Mr Young's statement that his dismissal was unjustified because of the matters set out in his statement of problem.

[33] There is a further and lengthier brief of evidence of the plaintiff dated 3 June 2009. This was completed after Mr Young had read and considered the briefs of evidence of the defendant's witnesses in the Authority. This runs to 34 numbered paragraphs over 17 pages. Despite addressing the Board's evidence in justification for his dismissal, this second brief contains no reference whatsoever to the protected disclosures.

Mr Young's protected disclosures

[34] The contents of the protected disclosures upon which the plaintiff wishes to rely in his contention that he was dismissed unjustifiably in retaliation to making these, are an element in assessing whether the current proceedings should be struck out.

[35] The first protected disclosure letter of 16 May 2008 makes a number of serious allegations including "corrupt and irregular use of resources which poses a serious [but very generalised] risk to public health and safety and to the environment"; "serious wrong-doing by the Administration and Management of

Regional Community [Services]"; "Gross misuse of authority to create fear, mistrust and oppression in the workforce that leads to suicidal conduct, multi powerless complaints by employees and diminishes public health provisions"; "Vendetta by persons controlling institutional power"; and the like. However, there were very few specific or concrete examples which were the subject of this significant complaint. On p 3 of Mr Young's letter of 16 May 2008 there appears, under the heading "Concrete example", an allegation that a specified manager had "commandeered" for his personal use a four wheel drive vehicle that should have been used by health protection officers to work in rural East Cape areas. The complaint was that Board funding had been misspent, that this endangered lives, and reduced the effectiveness of public health services.

[36] Not surprisingly, the defendant's response to Mr Young's 16 May 2008 letter (sent to him on 19 May 2008) noted the absence of specific detail of his serious complaints which made them difficult to investigate. Mr Young was asked for further examples and dates and, relating to the four wheel drive vehicle allegation, the plaintiff was asked to provide some further detail.

[37] The next document provided to the Court in the series is a letter dated 27 May 2008 from the Board to Mr Young on the subject of his protected disclosure. This letter advised that the General Manager of Governance and Compliance, Gail Bingham, had completed her investigation. Ms Bingham advised Mr Young that, in the absence of any requested specific examples of his complaints about "organisational culture", the Board acknowledged that there had been issues such as those complained of by Mr Young but that strategies had been put in place to deal with those. Ms Bingham invited Mr Young to provide any specific instances that might refute her conclusion and indicated her preparedness to investigate those further.

[38] As to the four wheel drive vehicle allegation, the Board confirmed that the relevant manager was authorised to use one of its vehicles between home and work but that this authority did not include a four wheel drive vehicle. Ms Bingham assured Mr Young that the manager's practice of using such a vehicle without

authority would cease "forthwith". The defendant thanked Mr Young for bringing that matter to its attention.

[39] Following Mr Young's dismissal on 13 August 2008, the defendant's CEO wrote to him on the following day (14 August 2008) in response to Mr Young's second protected disclosure letter which he had faxed to the CEO on the previous day. The CEO dealt with Mr Young's complaint that investigation of the protected disclosure had been delegated to Ms Bingham and with the issue of confidentiality of the protected disclosure. The CEO advised Mr Young that he regarded the matter as closed following Ms Bingham's earlier investigation and report. As to Mr Young's complaint that Ms Bingham had a conflict of interest because she was also involved in the investigation of his other employment issues, the CEO denied that this was so, except to the extent that she provided legal advice to those who were investigating the complaints against Mr Young which led to his dismissal. The CEO rejected Mr Young's contention that it ought to have taken independent legal advice to have avoided confusing the protected disclosure and employment investigation matters and that this failure had disadvantaged Mr Young. The CEO advised Mr Young that in fact independent legal advice had been sought in relation to his employment matters but not in respect of the protected disclosures because other legal issues were involved in those. The CEO's letter concluded:

> … all matters relating to your protected disclosure of 16 May 2008 have been fully investigated and any necessary action taken and you have been advised of this. The matter is therefore considered closed by the DHB.

[40] Mr Young responded promptly to the CEO's letter by email later on 14 August 2008. He disputed the CEO's finding that the matters of his protected disclosures had been concluded. He invoked the Board's policies and advised that having contacted the Office of the Ombudsman, it confirmed his view that Ms Bingham's interests in these matters were conflicted.

[41] The CEO replied to Mr Young by letter dated 15 August 2008 indicating that he had reviewed the plaintiff's comments and the process used, concluded that the latter was correct, and that from the Board's point of view the situation was unchanged.

[42] Mr Young then wrote to the Board Chair by letter dated 20 August 2008. He purported to re-raise his previous protected disclosures. Mr Young said that if the Board Chair would not deal with his protected disclosures independently of the CEO and the Chief Operating Officer who had previously done so, he would take the matters up with other authorities including the Ombudsman or the Minister of Health.

[43] Any written response from the Board Chair is not included in the documents that have been supplied to the Court. However, the document trail to that point indicates that the plaintiff took several opportunities to air his protected disclosure complaints with the Board, both before and after his dismissal, and long before he took proceedings in the Authority challenging the justification for that.

[44] As the Authority's determination records, Mr Young's statement of problem in those proceedings alleged matters arising out of his disclosure under the Protected Disclosures Act 2000 had not been resolved and, in particular, he had been dismissed constructively and unjustifiably as a result of making that disclosure. Mr Young again sought the remedy of reinstatement in employment.

The Protected Disclosures Act 2000

[45] Although the Authority did not analyse Mr Young's claims by reference to the Protected Disclosures Act 2000, I consider it is necessary to do so, in a limited way at least, if, as the Board asks, the claims which arise under the Employment Relations Act are to be extinguished other than on their merits.

[46] Section 17 of the Protected Disclosures Act 2000 provides that where an employee makes a protected disclosure of information under that Act but claims to have suffered retaliatory action from his or her employer or former employer, such an employee may raise a personal grievance under s 103 of the Employment Relations Act. This means that if an employee is dismissed or disadvantaged unjustifiably in retaliation for making a protected disclosure under the Act, the way to a remedy for that claimed wrong is by raising a personal grievance. So, in effect, the appropriate statutory response for retaliation for making a protected disclosure is

the same as for any other statutory personal grievance. It is clear that at the time of making what Mr Young says were his protected disclosures, he was an employee as required by s 17 of the Protected Disclosures Act and as defined in the Employment Relations Act.

[47] In such cases, Part 9 of the Employment Relations Act applies including the time and way in which a grievance must be raised with the employer or former employer. Although s 17 creates a new species of grievance, this must be dealt with in the same way as are other grievances under the Employment Relations Act.

[48] This means, in practice, that Mr Young had to raise his protected disclosure retaliation grievance with his former employer within 90 days of his dismissal or, alternatively, within 90 days after he became aware that his dismissal may have been a retaliatory act by the Board in respect to his having made a protected disclosure of information. No such grievance was ever raised by Mr Young with the Board. The first formal personal grievance step that he took in relation to it was the filing of his further amended statement of problem on 13 December 2010, some 28 months after his dismissal, and certainly much more than 90 days after he could have come to believe that he was dismissed in retaliation for making his protected disclosure.

The case for the plaintiff

[49] Because Mr Young is not represented professionally in these proceedings and because the issues include technical legal limitations and similar points, I consider it fair to not limit the Court's consideration only to those arguments advanced by Mr Young himself. They are, for the most part, irrelevant to the issues to be decided now. Given the potential finality of the Board's strike-out application which, if it succeeds, will preclude Mr Young from exploring what he considers are the merits of his case, the interests of justice require that not only should the Court consider the arguments put up by Mr Young, but also what should have been advanced for him. That is especially so where, as here, the defendant has been represented largely by its in-house lawyer who was closely associated with Mr Young's complaints and how they were dealt with. Finally, this course is appropriate because of the assertive litigation tactics adopted by the defendant against Mr Young which have included

several strike-out applications, an application for security for costs, and petitioning for his bankruptcy.

[50] Although it might be contended for Mr Young that the Board consented impliedly to the Authority considering his protected disclosure retaliation grievance or had otherwise acquiesced in the plaintiff's failure to raise that grievance with his employer within 90 days of its occurrence, I do not consider that this was so. The evidence shows that the first occasion on which Mr Young alleged that his unjustified dismissal was in retaliation to his making protected disclosures was when he filed his second amended statement of problem in the Authority on 13 December 2010, 28 months after his dismissal. The Board's immediate response was to apply to the Authority to strike out Mr Young's claims. In these circumstances, it cannot be said that when the Board became aware of a protected disclosure retaliation grievance, it consented impliedly to Mr Young's failure to raise this grievance with it within the period of 90 days of the occurrence of the circumstances giving rise to it. From that time onwards, the Board has opposed assiduously Mr Young's attempts to have this grievance investigated and determined.

[51] In addition to wishing to continue to prosecute his case to expose what he considers to have been corporate and individual persecution of him, Mr Young has expressed two particular concerns in opposing the Board's application to dismiss his challenge at this stage. The first is, he says, that the Court should immediately reinstate him in employment with the Board. The second is his concern that he is alleged to have harassed other staff including having sexually harassed them.

[52] As to reinstatement, the Court is not empowered to do so at this point. The Court can only exercise the remedy of reinstatement if there is a finding that Mr Young was dismissed unjustifiably. He has no such finding in his favour and indeed the first determination of the Authority that he was dismissed justifiably is the last word on that subject.

[53] For the sake of completeness, I should also say that the Court is empowered, theoretically, to make an interim order for reinstatement. However, no such application has been made to it and the Court would not do so in any event without

offering the Board an opportunity to present evidence in opposition (as I have no doubt it would) and to consider very carefully such an application on its merits. On the bases of the extensive affidavit material currently before the Court and the Authority's determinations, I consider that Mr Young would have a very difficult, perhaps even impossible, task in now obtaining an order for interim reinstatement in employment that ended now more than five years ago. If nothing else, Mr Young's own evidence very clearly establishes a complete absence of the trust and confidence that is necessary in all employment relationships and, in particular, as would be required in the employment relationship between a district health board and a remote health facilitator as Mr Young was.

[54] Mr Young's pursuit of reinstatement appears to be on another ground with which I should deal. Mr Young says that protected disclosure issues should be decided in the context of continuing employment, that is that he should be back on the job to enable his protected disclosures to be considered and decided as the legislation intends.

[55] I do not agree that this is either in the Protected Disclosures Act expressly or is implicit in it. Nor is it a principle underlying the Employment Relations Act's reinstatement provisions. Whilst employees making protected disclosures will, in many cases, remain in their employment whilst those are investigated and decided, if an employee ceases, for whatever reason, to be employed, this will not affect substantively the employer's obligations under the Protected Disclosures Act. Where, as here, it is alleged that an employee who has made a protected disclosure is either disadvantaged in his or her employment or dismissed from it in retaliation, then this is to be dealt with as a personal grievance. That status brings with it the employee's rights under the Employment Relations Act to the remedies of reinstatement and interim reinstatement. There is no presumption of reinstatement necessary to resolve protected disclosure issues.

[56] Turning to Mr Young's second issue, his concerns about his reputation as an harasser of colleagues and a sexual harasser in particular, I do not propose to second-guess the Authority's findings about his conduct towards work colleagues. Those speak for themselves in the Authority's determination. What can be said, however, is

that sexual harassment in employment is defined statutorily and must be determined objectively. There is not sexual harassment simply because someone considers that he or she has been harassed sexually. The statutory definition of sexual harassment is set out in s 108 of the Employment Relations Act 2000 (the Act). It must consist of one or more of a number of behaviours. Materially for the purpose of this case, that would include, under subs (1)(b), the use of language (whether written or spoken) of a sexual nature or physical behaviour of a sexual nature which, directly or indirectly, subjects another employee to behaviour that is unwelcome or offensive to that employee and that, by its nature or through repetition, has a detrimental effect on that employee's employment, job performance or job satisfaction.

[57] Again having recourse to what I consider is the best objective conclusion about these matters (the Authority's substantive determination of 26 March 2010), there is no finding of statutory sexual harassment by Mr Young. The Authority concluded that his relationships with colleagues and staff who supervised him (and therefore with the Board as his employer) were so multi-factorally dysfunctional that it was justified in dismissing him as it did, and that it did so in a fair and reasonable way. The Authority's determination was that no one of the many instances of misbehaviour complained of would probably have justified dismissal. However, together and in light of Mr Young's lack of insight into his conduct, it concluded that these amply justified his dismissal. There is no finding by the Authority that Mr Young was a sexual harasser.

[58] Finally, I understand Mr Young to take issue with the involvement for the Board of some of the same people who both investigated the complaints against him that lead to his dismissal, and investigated and/or determined his protected disclosures. Assuming that Mr Young's assertions are true, there may have been some personnel cross-over in these two contemporaneous exercises. Although the acceptance by an employer of the validity of a protected disclosure does not necessarily mean that an employer will not dismiss in retaliation to the making of the disclosure, in this case Mr Young is unable to point to evidence beyond suspicion that he was dismissed for that reason.

The defendant's case for strike-out

[59] Of the two broad grounds that the Board advances for striking out Mr Young's challenge, the first (inordinate delay in its prosecution) cannot be sustained, in respect of the period since mid-2011 at least, for the following reasons.

[60] Mr Young has not prosecuted his challenge since then because it has been stayed on the Board's application unless and until security for costs is given. Except to a modest extent, Mr Young has not given the security directed. That absence of security has, however, been as a result of his inability to make payment, especially following his bankruptcy which was sought and granted on the Board's application. It would be unjust to strike out Mr Young's claims for non-prosecution of them in these circumstances.

[61] So it is only the second broad ground advanced by the Board which is now for consideration. It says that Mr Young's challenge is vexatious, is an abuse of the Court's process, and has no prospects of success on its merits. Those grounds are required to be established to a high standard of probability. The Court must be sure that they have been established before preventing him from pursuing what are otherwise his statutory rights to have his complaints determined on their merits.

[62] Mr Young's difficulty with his wish now to have the Board's response to his protected disclosures addressed is that he is significantly out of time to do so.

[63] Mr Young's first protected disclosure was made on 16 May 2008, nine days after his employment was suspended by the Board in the course of investigating allegations of misconduct against him, which investigation had commenced in March 2008.

[64] Mr Young's second protected disclosure was made on 20 August 2008, one week after he was dismissed by the Board. This second protected disclosure really only reiterates the allegation set out in his first protected disclosure, albeit that the second was directed to the Board's Chairperson rather than its CEO, as his first protected disclosure had been.

[65] There is no evidence, however, that Mr Young raised a personal grievance in respect of the employer's response to his protected disclosures, certainly not within the period of 90 days after that response or otherwise. Mr Young's amended statement of problem, which was lodged with the Employment Relations Authority on 13 November 2008 by his solicitors and which set out his claims that he had been dismissed unjustifiably by the Board, contains no reference whatsoever to the protected disclosures or the Board's response to them. That is despite Mr Young's amended statement of problem setting out his unjustified dismissal claims in a comprehensive fashion.

Decision on strike-out

[66] It was, as the Authority said in its determination of 12 April 2011, too late for Mr Young to subsequently attempt to re-litigate the justification for his dismissal on protected disclosure grounds which were available to him at the time of or before its investigation meeting in August 2009. This is now a collateral attempt to re-litigate the question of justification for his dismissal which had previously been determined by the Authority on the grounds put forward by Mr Young which could have, but did not, include the protected disclosure allegations. Further, as the Authority noted, Mr Young had by then also failed to challenge that determination within the time allowed to do so and had been refused leave by this Court to lodge a challenge out of time.

[67] Shorn of all embellishments, collateral complaints and attacks on the Board, Mr Young's grievance that he was dismissed unjustifiably has been heard and determined by the Employment Relations Authority. Mr Young lost his opportunity to appeal against that determination by de novo challenge and was not permitted to do so out of time. He is faced with what lawyers call issue estoppel. This is the rule of law that prohibits the same issue being tried again in separate proceedings between the same parties. It is an abuse of the Court's process to attempt to do so and such proceedings should not be permitted to vex the other party to them, or the Court. The appropriate process for ensuring that this does not occur is to strike out such vexatious proceedings as the Board has now asked the Court to do.

[68] The plaintiff's case has another fundamental flaw. Mr Young did not ever raise with his employer as required by s 114 of the Act, a personal grievance that he had been dismissed unjustifiably in retaliation for making a protected disclosure or disclosures. That was a jurisdictional requirement for consideration of such a grievance by the Authority. With professional assistance at the time, Mr Young participated fully in the grievance process but at no time did he ever refer to his protected disclosures when there were opportunities for doing so.

[69] The merits of Mr Young's complaints are also relevant. Given that the Board's response to Mr Young's protected disclosures was to acknowledge their validity and to make changes to its practices, it seems inherently unlikely that Mr Young was dismissed in retaliation for making those disclosures. As the Authority's first determination illustrates, the Board had ample grounds to justify dismissing him without recourse to retaliation for his protected disclosures.

[70] These events all took place a long time ago and it would not be in the interests of justice to permit the proceedings to continue following the substantial opportunities that Mr Young has had to litigate his employment relationship problems before he was required to give security and was bankrupted. Mr Young's case impresses me as having no prospects of success on its merits even if his grievance had been commenced lawfully by his raising it with his former employer within the 90 day period that he had for doing so.

[71] It is difficult to be unsympathetic to Mr Young's personal circumstances from which he says he has been unable to escape whilst unable to challenge the way in which his protected disclosures were dealt with in 2008. But, regrettable as those personal circumstances are, other tests also apply to whether he should be able to revive litigation which, in retrospect, Mr Young wishes had been run differently by him and his advisers at the time. The court process is, unfortunately for Mr Young, not the one that will allow him to again serve his community and use his qualifications to support his family as he wishes to do.

[72] In the foregoing circumstances the interests of justice require that the plaintiff's challenge should now be, and is, dismissed.

Costs and security given

[73] I do not propose to make any orders for costs between the parties on this challenge. The Board must meet its own costs of representation.

[74] The security that the plaintiff has lodged with the Registrar can now be repaid either to Mr Young himself or to the Official Assignee if the Official Assignee considers that this fund is properly available for Mr Young's creditors. The Registrar is to correspond formally with the Official Assignee as to what is to be done with the security given by Mr Young.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on Wednesday 11 December 2013