UNDER THE EMPLOYMENT RELATIONS ACT 2000

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND REGISTRY

File Number: 43 / 2023

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

BETWEEN **CODY JOYCE**

Plaintiff

AND **ULTIMATE SITEWORKS LIMITED**

Defendant

File Number: 30 / 2024

IN THE MATTER An application for a strikeout/dismissal of substantive claim and an application for a sanction under s 40 of the Employment Relations Act 2000

BETWEEN **ULTIMATE SITEWORKS LIMITED**

Plaintiff

AND **CODY JOYCE**

Defendant

FURTHER SUBMISSIONS ON COSTS FOR CODY JOYCE

Dated this 6th day of September 2024

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MAY IT PLEASE THE COURT, Advocate for Cody Joyce submits:

1. Costs should lie where they fall (the original position).

1.1. In the writer's prior submissions on costs dated 20 May 2024 it was submitted at that time that, in summary **(ANNEXED)**:

1.1.1. Costs should lie where they fall.

1.1.2. Put fairly, one third of hearing time was dedicated to USL's claims against Mr Joyce for which there was no success for USL. This was first filed as an interlocutory application which was rejected and a Statement of Claim was then filed by USL.

1.1.3. Interlocutory activity resulted in most success for Mr Joyce:

1.1.3.1. Responding to USL's unsuccessful Security for Costs application.

1.1.3.2. Responding to USL's unsuccessful strikeout application.

1.1.3.3. Success in achieving a stay.

1.1.3.4. Responding to USL's disclosure application appeared to be a wasteful exercise given that no documentation sought existed.

1.1.4. Mr Fleming spent no work time whatsoever on making the Common Bundle of Documents, Mr Anderson's office made the Common Bundle. All that USL and Mr Fleming did was demand that all documents from the Authority be placed within it.

1.1.5. Allocation 27 for Inspection of Documents is not claimable given there were no documents to inspect.

1.1.6. Allocation 35 would not have taken two full days given that USL's briefs of evidence were identical to the witness statements already produced for the Authority.

1.1.7. Mr Gelb's (non-solicitor) hourly rate was higher than Mr Flemings' (solicitor) rate; most of which is recorded as administrative work.

1.1.8. Mr Fleming did not articulate how and why costs on USL's memorandum for costs should be awarded.

1.1.9. The writer took exception to adverse comments made by Mr Fleming about the writer in USL's cost submission, giving rise to subsequent events.

1.2. Ultimately, costs should lie where they fall given much mixed non-success by both parties; notwithstanding Mr Joyce was mostly successful in interlocutory matters.

2. What gave rise to the application for orders against Mr Anderson was an unreasonable reaction by Mr Fleming to Mr Anderson conveying exception to said adverse comments.

2.1. USL's first memorandum on costs dated 16 May 2024 contained the following adverse comments about the writer:

2.1.1. *"Mr Joyce and his representative Lawrence Anderson acted in ways that unnecessarily increased the amount of time needed to deal with these proceedings, and resulted in wasted costs"*.[1]

2.1.2. The submissions went on to make various false statements about the writer in how the case was conducted.[2]

[1] USL Costs Submissions 16 May 2024, para [41]
[2] Para [42]

2.1.3. There was an entirely untrue assertion that the writer acted abusively directly toward USL.[3] The writer did not have contact with USL, other than many months before having stated that Mr Gelb does not know about the law of contract. Which is a true statement. Most employment advocates do not go to law school and their knowledge is poor.[4]

2.1.4. There was an untrue assertion that the writer was abusive to Mr Fleming and Mr Gelb. The writer denies that communications were abusive. There were some intemperate communications, but they were not abusive and do not meet that threshold.

2.1.5. Mr Fleming asserted that an uplift in costs should be given as to alleged conduct but did not articulate how and why further costs were said to be incurred.[5]

2.1.6. Further: *"the way proceedings were conducted"* is untrue.[6] The writer was diligent and efficient in conducting proceedings.

2.2. Said comments are adverse, untrue and thoroughly unfair.

2.3. The writer wrote to Mr Fleming and left a voicemail message to convey the writer's dissatisfaction to the adverse comments made. No threatening statements were made. This is what gave rise to Mr Fleming's application for contempt of court.

2.4. On a reasonable reading of said email and transcript of voice recording, there is nothing in it to warrant the filing of a contempt of court application.

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[3] Para [43]

[4] Speaking from experience and having spoken to Mr Gelb and other members of ELINZ, most employment advocates become advocates having failed in their chosen industry of work. They then discover the personal grievance gravy train, s 236 of the Employment Relations Act 2000, and then they make a business out of it.

[5] Para [45]

[6] Para [49](c)

3. **This is no longer a "contempt of court matter"; the scope and what is sought has been significantly reduced from "contempt of court" to seeking publish admonishment against Mr Anderson, a person that is not party to proceedings.**

3.1. Mr Fleming went for "contempt of court" against the writer. At that time the orders sought by Mr Fleming were very far overreaching and did not appear to have any legal basis.

3.2. The application has since been reduced to seeking only comments about the writer to be put into the public domain.

3.3. Mr Fleming demanded that the writer signs an "undertaking" that would amount to a "gotcha contract" to be able to attempt to seek "contempt of court" against the writer on an agreed deed or contractual basis.

3.4. In negotiation Mr Fleming did not accept the writer's proposal.

3.5. Mr Fleming refers to an allegation that the writer has committed a crime under s 117 of the Crimes Act 1961. How that is so is not reasonably made out in any way. The writer suggests that this allegation of a crime relates to the negotiation to attempt to resolve this between representatives.

3.6. At the most recent Case Directions Conference, the writer raised with the court that the writer is not a defendant and not a named party.

3.7. The ensuing discussion resulted in Mr Fleming only wishing to pursue this as a matter of being within the context of a costs.

3.8. None of the cases cited by Mr Fleming apply given that the writer is not a party to the proceedings. A sensible reading of *Blue Water Hotel Limited v VBS* demonstrates this proposition.[7]

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[7] Blue Water Hotel Limited v VBS [2019] NZEmpC 24

4. This interlocutory matter was "moot"; if it was a claim against Mr Anderson it would be struck out; it should be struck out now.

4.1. The Court has the jurisdiction to strike out this application by application of r 15.1 under the High Court Rules.[8]

4.2. In *Drought*, the Court referred to r 15.1 allowing the Court to strike out a proceeding as if to permit it to continue would be an abuse of the processes of the Court.[9]

4.3. It is a well-recognised common law principle that it is contrary to public policy for the Courts to entertain proceedings where there is no actual outstanding issue in existence between the parties.[10] It is an abuse of the process of this Court for it to receive and determine claims where the decision will have no utility. The effect is that Court resources are wasted. The direct result may be that causes which have utility are delayed.[11]

4.4. The label "abuse" is a technical one, not necessarily pejorative.[12] An abuse of process can take a number of forms; for example, proceedings brought for an improper purpose, a proceeding that attempts to relitigate matters that are already determined, and a proceeding brought where it is inevitable that a remedy will be refused, even if one or more grounds are made out.[13]

4.5. Proceedings may be struck out for abuse of process if they are moot.[14] A "moot" point in the context of a judicial proceeding is one that is academic or abstract; it has no practical effect on the rights of the parties to the litigation.[15]

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[8] High Court Rules 2016, r 15.1(1)(a)-(d) inclusive
[9] Auckland Council v Drought [2019] NZEmpC 63 at [18]
[10] Simpson v Whakatane District Court (No 2) [2006] NZAR 247 (HC) at [21]
[11] At [28]
[12] Te Runanga o Ngai Tahu Ltd v Durie [1998] 2 NZLR 103 (HC) at 107
[13] Rabson v Judicial Conduct Cmr [2016] NZHC 2539; [2016] NZAR 1679 at [31]
[14] See for example Friends of Pakiri Beach v McCallum Bros Ltd [2008] NZCA 87
[15] W J Stewart ed Collins Dictionary of Law (online ed, 2006): "…as an adjective, a point of law is often said to be moot if, raised in a litigation, the point does not any

4.6. In Gordon-Smith, the Court held that the traditional position is that New Zealand Courts will not hear a case where the "substratum" of the litigation has gone and there was no matter remaining in actual controversy requiring a decision.[16]

4.7. The substantive issues between the parties have been resolved, that being for both Mr Joyce's claims for unjustifiable dismissal and USL's cross claims in seeking a fine. The substratum of the litigation is gone. The parties were only awaiting judgment on costs relating to substantive and prior interlocutory matters. There was not to be any further filings or appearances in the substantive and costs matters.

4.8. Mr Fleming's present application would have no utility and no practical purpose for this litigation of the named parties. The utility wholly appears to relate to Mr Fleming and Mr Gelb's personal issues with the writer, which lies outside of the matters of the parties named in the ended litigation. Therefore, this application is a Moot proceeding that ought to be struck out as an abuse of process.

4.9. The orders originally sought by Mr Fleming were far overreaching and inevitably are impossible to be imposed. They were sought on a pre-emptory basis, that being pre-empting something in the future regarding the publishing of online material, that has not happened yet and entirely outside the scope of the named parties to the ended proceeding.

4.10. The nature of counsel's application for the Applicant is that of a frivolous and vexatious nature. Notwithstanding for reasons described above it should be struck out. This application is brought by Mr Fleming for an improper purpose.

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longer affect the decision in the case before the court." <https://legal — dictionary.thefreedictionary.com/moot>. See also Gordon — Smith v R [2008] NZSC 56; [2009] 1 NZLR 721 at [16]; Borowski v Attorney-General [1989] 1 SCR 342 at 353

[16] Gordon-Smith v R [2008] NZSC 56, [2009] 1 NZLR 721 at [14]. Relying on Finnegan v New Zealand Rugby Football Union Inc (No 3) [1985] 2 NZLR 190 (CA) and by reference to Sun Life Assurance Co of Canada v Jervis [1944] AC 111 at 114

5. Costs were not increased due to Mr Anderson's communications.

5.1. The various cases Mr Fleming refers to about costs being increased involved actual and quantifiable reasons for costs being increased such as:

5.1.1. Withdrawing a case before the hearing; and breaches of timetable directions.[17]

5.1.2. Not filing for a stay when it would have been reasonable to when filing a challenge, and not notifying the Court of document destruction.[18]

5.2. No timetabling directions have been breached by the writer.

5.3. The writer conducted proceedings diligently for Mr Joyce.

5.4. Mr Joyce having been arrested on the first day of trial was entirely outside of the writer's control. The writer acted promptly and appropriately when this arose on that morning.

5.5. There was never any poor behaviour exhibited by the writer in the court room or during the many case direction conference calls that were undertaken.

5.6. There were at worst some limited intemperate communications and banter from the writer which occurred outside of the Court's processes.

5.7. There was never any threats, or bullying made to the directors of USL. The writer's complaints to Mr Fleming to retract his unfair and untrue comments, which were not retracted by Mr Fleming could not have increased costs.

5.8. Mr Fleming entirely fails to demonstrate how and why costs were increased, allegedly because of the writer.

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[17] ACF v IEN [2023] NZEmpC 200

[18] Hilford v Board of Trustees of Whangarei Boy's High School [2023] NZEmpC 91

6. **Allegations of "gratuitous and offensive comments about counsel to the Employment Relations Authority" are covered by the confidentiality provisions of an s 149 settlement; notwithstanding a wholehearted apology was made and accepted.**

6.1. There was an intemperate communication by the writer in another file matter that was made because Mr Fleming wrote to the Authority seeking costs personally against the writer.

6.2. This occurred after Mr Fleming had filed the application for overreaching orders against the writer.

6.3. The parties since settled and agreed that all communications between the parties and their representatives, including before the Authority be confidential to the parties and their representatives.

6.4. Mr Fleming does not respect the settlement agreement as described and relies on the email here.

6.5. An apology was made.

6.6. The Authority took it no further having accepted the writer's apology.

6.7. The complaints against the writer fall far outside of the procedure undertaken before the court.

7. **Maarschalk v West Auckland Trust Services Limited,[19] "This is coming to the internet"**

7.1. It was alleged that the writer increased West Auckland Trust Services Limited's costs when sending an AI generated image to Ethelred Chey.

7.2. That AI generated image is **ANNEXED** below.

7.3. This has no relevance whatsoever; for Mr Fleming to mention it here is simply outrageous and speculative of its nature.

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[19] Maarschalk v West Auckland Trust Services Limited [2024] NZERA 422

8. **Mr Fleming and Mr Gelb's conduct deserves to be mentioned in the judgment, comprehensively discussed in Mr Anderson's affidavit.**

8.1. The interlocutory activity produced by Mr Gelb and then especially Mr Fleming was unmeritorious and out of control.

8.2. Mr Gelb obtained by deception and forcefully from Mr Joyce's subsequent employer Mr Joyce's personal employee file. Mr Gelb then used this information to attempt to frame Mr Joyce as being a "liar".

8.3. Mr Gelb and Mr Fleming used the complaint that Mr Gelb filed to AMINZ about the writer as a bargaining chip and as blackmail to attempt to pressure the writer and Mr Joyce to withdraw the case.

8.4. Mr Fleming also expected that the writer should have recused himself or been taken off the case during which time there were timetabled directions for submissions etc for the interlocutory matters for strikeout and disclosure against Mr Joyce. That was entirely without any thought to Mr Joyce and the integrity of the judicial process.

8.5. Mr Fleming talks about the writer allegedly attacking USL, in fact, Mr Fleming attacked Mr Joyce when bringing the claim for strikeout and fines at the late stage that it was brought.

9. **ELINZ**

9.1. During the relevant events Mr Fleming was a member of ELINZ; Mr Gelb remains a member throughout.

9.2. It is the writer's experience that ELINZ members do not have any respect for confidentiality and privacy laws.

9.3. Anthony Drake accused the writer of harassment and told the writer to cease and desist when the writer challenged ELINZ policy regarding failing to do anything about their members' failing to provide client files.

9.4. Mr Fleming and Mr Gelb have no business criticizing the writer for not being associated with (un)professional bodies.

10. No recent costs incurred by USL in this current round.

10.1. USL appears to not have incurred any costs in this current round of interlocutory warfare.

10.2. The directors of USL have not given any evidence on this.

10.3. This is entirely Mr Fleming and Mr Gelb’s campaign.

10.4. USL and Mr Joyce have no real interest in all of this.

10.5. Mr Fleming is using the issue of costs to seek to have the Court admonish the writer.

10.6. Written publications within the employment law community will likely follow from this. That appears to be what Mr Fleming wishes to achieve.

11. Costs should lie where they fall (the final position).

11.1. As another very pointless round of interlocutory activity that is entirely based around the discord between representatives…

11.2. This present matter has not achieved anything and should be regarded as counting toward Mr Joyce’s case that costs should lie where they fall given the offset of costs and the circumstances.

12. Final comment

12.1. The writer’s hand is forced to make public statements and publications in rebuttal and to address upcoming legal community publications that will follow from this judgment.

Lawrence Anderson Dated: 6 September 2024