IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 216
ARC 61/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of interlocutory matters
BETWEEN	YASODHARA DA SILVEIRA SCARBOROUGH Plaintiff
AND	MICRON SECURITY PRODUCTS LIMITED Defendant

Hearing:	On the papers filed: Application dated 8 October 2014, Notice of Opposition dated 17 October 2014, plaintiff's memorandum dated 3 November 2014, defendant's memorandum dated 7 November 2014 and plaintiff's memorandum in reply dated 14 November 2014
Representatives:	Plaintiff in person D France and S Worthy, counsel for defendant
Judgment:	19 November 2014

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

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[1] The plaintiff, Ms Scarborough, was employed by the defendant, Micron, on 16 September 2013. Three months later on 16 December 2013 she was given notice of redundancy and her employment concluded on 20 December 2013. Ms Scarborough had originally been employed under the WINZ placement programme under which her employer received a subsidy towards the costs of employing her.

[2] Ms Scarborough commenced a claim before the Employment Relations Authority that she had been unjustifiably dismissed.[1] She also claimed that the defendant had breached its good faith obligations under the Employment Relations Act 2000 (the Act).

[3] Following an investigation meeting on 10 June 2014, the Authority issued a determination on 11 June 2014. The determination held that the defendant in dealing with Ms Scarborough's dismissal on the grounds of redundancy had breached its good faith obligations by failing to provide her with information relevant to the decision before it terminated her employment. Nevertheless, the Authority held that the redundancy was genuine. The defendant acknowledged that it did not comply with procedural fairness. As the dismissal was held to be substantively justified, Ms Scarborough was not entitled to any lost remuneration. The claim for reinstatement was dismissed. She was awarded compensation for humiliation, loss of dignity and injury to her feelings amounting to $750. In addition the employer defendant was ordered to reimburse her the sum of $71.56 for her filing fee. The defendant has attempted to make payment of these sums to Ms Scarborough but she has returned the payment made to her.

[4] Ms Scarborough filed a challenge to the determination. That challenge will be heard in the Employment Court in Auckland commencing at 9.30am on Monday 16 and continuing on Tuesday 17 February 2015. The proceedings are directed to be subject to the hearing management system provided by the Employment Court Regulations 2000 (the Regulations) and a hearing management meeting is scheduled for 9.30am on 17 December 2014.

[5] Following the filing of her challenge Ms Scarborough raised some preliminary issues. These have been dealt with in an interlocutory judgment of Chief Judge G L Colgan dated 25 September 2014. That judgment dealt with the history of the matter before the Authority and in the Court leading up to that point. In the judgment, Ms Scarborough's application to join the proprietors of the defendant as parties was dismissed. In reaching that decision it was mentioned in passing that no remedies in any event had been sought against the individuals concerned. In

[1] *Scarborough v Micron Security Products Ltd* [2014] NZERA Auckland 231.

addition Ms Scarborough had sought to have the proceedings remitted back to the Authority. Chief Judge Colgan held that except in judicial review proceedings, such an order was not available to Ms Scarborough. In any event, as Ms Scarborough's challenge is still before the court, there would be no jurisdiction to consider judicial review of the Authority. Even if that was what she was seeking, no proceedings for judicial review had been commenced in accordance with the requirements of the legislation.

[6] Having dealt with the issues raised by Ms Scarborough, Chief Judge Colgan then continued in the judgment to give directions to enable the challenge to proceed to a hearing. It was perceived that there may be interlocutory applications relating to the disclosure of documents. Accordingly, the direction was given that any further interlocutory applications were to be filed by 15 October 2014 and that a hearing would be set for 6 November 2014 to deal with any such applications. In passing Chief Judge Colgan dealt with Ms Scarborough's intention to call a number of witnesses when the challenge is heard and his view that she should seek the benefit of legal advice.

[7] Following the judgment on 25 September 2014, Ms Scarborough filed an application "for Leave to apply for Jurisdiction of Court" dated 8 October 2014. The application refers to a number of sections in the Act relating to compliance, offences and general functions and powers of the Court. It is totally un-focussed. The application is accompanied by a rambling affidavit from Ms Scarborough. This repeats and adds to serious allegations, which Ms Scarborough had earlier made against the proprietors and a fellow employee of her employer. Chief Judge Colgan in his judgment described these assertions as of an "egregious and scurrilous nature and so irrelevant to the issue in the proceedings that counsel would refuse to include them in pleadings and would decline to act further if Ms Scarborough insisted on pursuing them". It was on the basis of the assertions by Ms Scarborough that Chief Judge Colgan came to the view that Ms Scarborough was seeking to join the proprietors for frivolous, vexatious and scurrilous reasons.

[8] It is difficult to ascertain what Ms Scarborough is now seeking from her further application, although in the application itself there appears to be a repetition

or redirection of her earlier application attempting to bring the matter within the judicial review jurisdiction of the Court. The true intention of the application is perhaps ascertained in the final paragraphs of her supporting affidavit where it seems plain that once again she is applying to have the matter transferred back to the Authority. Chief Judge Colgan has already dealt with and rejected such an application. If the further application is once again seeking judicial review of the Authority, then it overlooks the extremely limited nature of the Court's jurisdiction to judicially review the Authority. In any event Ms Scarborough has failed to understand Chief Judge Colgan's earlier comment as to procedural requirements and her further application does not remotely comply with such requirements.

[9] The application does not deal with the anticipated dispute over documents. However, in a memorandum from Ms Scarborough filed on 3 November 2014, which I treated as her submissions in preparation for the hearing on 6 November 2014, she refers to her disputes over the documents now disclosed by the defendant. It appears that she may be regarding the memorandum as a further interlocutory application partially in respect of documents. If that is the position then it has been filed outside the time limit specified in the earlier judgment and there is no application before the Court seeking leave to now extend the time to raise this matter.

[10] Ms Scarborough did not appear at the hearing set on 6 November 2014 and it was adjourned. As I have indicated in a minute dated 10 November 2014 following that hearing date, it was clear that Ms Scarborough was under the misapprehension that her application would be dealt with on the papers. She overlooked the fact that there had been no written submissions in reply from Mr France, counsel for the defendant, nor would any such written submissions be necessarily expected. There had been a notice of opposition filed to Ms Scarborough's application. In further submissions she has now filed, she takes issue with the fact that there is no affidavit in support of the notice of opposition. However, that assertion arises from her inexperience in such matters as a lay person. Such an affidavit is not necessarily required.

[11] In my minute of 10 November 2014, I allowed time to Mr France to file written submissions in answer to the document that Ms Scarborough had filed on 3 November 2014. Mr France has now done so. I also allowed Ms Scarborough the right to file submissions in reply and these have now been received from her. It has been agreed that the Court will now deal with the application on the papers filed. In her submissions in support of her application and in the submissions in reply, Ms Scarborough made a further attack on the integrity of Mr France who has acted properly and professionally throughout this difficult matter. The allegations are totally unsubstantiated and will be ignored.

[12] Dealing first with the issue of documents, it is clear that the defendant has supplied documentation, which is relevant to Ms Scarborough's assertions contained in her challenge. The defendant is yet to finalise its annual accounts for the year ended 31 March 2014. Mr France has stated that when these are finalised they will be disclosed to the plaintiff. Mr France in his memorandum has also provided an explanation and response to Ms Scarborough's contentions contained in her submissions in relation to other documents produced so far. As Mr France has pointed out in his submissions, however, if Ms Scarborough is now intending to take the issue of documents further, no application has been filed in time. He also points out that there has been no application for a verification order even though Ms Scarborough has referred in her submissions to form 9 in the Regulations. The submissions, which Mr France has made that the defendant has complied with its obligations as to documents, are accepted. Ms Scarborough is not entitled to take that issue further without seeking leave to do so.

[13] What appears to be the real purpose of Ms Scarborough's application is to simply attempt to relitigate issues that were raised in her earlier applications and which have been dealt with by Chief Judge Colgan in his judgment. As the Court is now seized of Ms Scarborough's challenge to the determination of the Authority there is no basis upon which the Court could undertake a judicial review. The Act is specific as to the entitlement of the Court to judicially review the Authority. Even if an appeal by way of a challenge were not pending and even if Ms Scarborough had adopted required procedures, which she has not, there is nothing set out by her to bring the matter within the very narrow grounds of lack of jurisdiction entitling the

Court to remove the decision of the Authority by review. Chief Judge Colgan in his judgment has already dealt with Ms Scarborough's application to have the matter referred back to the Authority in this context. There is no entitlement to revisit these findings even though that appears to be the purpose of Ms Scarborough's further application. It is dismissed.

[14] A further matter which arises from Ms Scarborough's submissions is that she appears to be under a misunderstanding that the Court will be calling witnesses on her behalf. It is for Ms Scarborough to decide who she intends to call as witnesses for the hearing of her challenge. If a witness she wishes to call will not come voluntarily to the Court then she may file and serve the appropriate summons to witness as prescribed by the rules. Chief Judge Colgan has also given her advice in this respect in his earlier judgment, which she would do well to heed. I do add that if she does proceed in this way she will need to provide the witness with reimbursement expenses in having to attend at Court. Certainly this is not a case where the Court would choose to exercise its jurisdiction to call witnesses of its own volition.

[15] As indicated earlier, this matter is subject to a hearing management system. This means that the parties have obligations to be met pursuant to reg 55-59 inclusive of the Regulations.[2] Regulation 59 in particular requires the evidence and documents to be relied upon at the hearing be included in briefs and bundles by the parties prior to the hearing management meeting set for 9.30am on 17 December 2014. Judge Inglis has confirmed the timetabling directions for this in her minute of 21 October 2014. Accordingly, Ms Scarborough would be well advised to ensure that she meets those requirements within the time specified.

[16] I repeat the concern expressed by Chief Judge Colgan in his earlier judgment that Ms Scarborough is choosing to represent herself in circumstances where she should be receiving the benefit of proper legal advice. If Ms Scarborough chooses to continue representing herself in the preparation of the briefs of evidence, then it is appropriate that she realises that she is not to repeat in them the insulting and

[2] Employment Court Regulations 2000: *System for management of hearings*.

scurrilous comments she has made against parties involved in this matter, counsel for the defendant and the Authority Member.

[17] In view of the fact that Ms Scarborough's application has been dismissed and was in reality an attempt to relitigate matters already dealt with by the Court, the defendant is entitled to reasonable costs in opposing the application. The amount of such costs is reserved for later consideration by the Court when other issues of costs are for determination.

M E Perkins
Judge

Judgment signed at 12.55 pm on 19 November 2014