

[3] On 29 November 2018, Mr Nand applied for leave to file a challenge to the Authority's determination out of time. However, that application was withdrawn on 1 March 2019 after the parties reached an agreement in full and final settlement of the matter on 27 February 2019.

[4] On 15 April 2024 Mr Nand applied for a rehearing of his original application for leave to file a challenge out of time. He claimed that his representative in 2019 misled him into signing the settlement agreement. He said that he did not know that he would no longer be able to pursue his application after entering into the settlement agreement and that his representative did not tell him that he had withdrawn the application. He also noted that he had been unwell.

[5] The respondent, Idea Services Ltd, has now applied to strike out Mr Nand's application on the basis that it is frivolous or vexatious, discloses no reasonably arguable cause of action, is statute barred, is an abuse of process, and is so fatally flawed that no amendment of the pleadings might remedy the issues.

Principles for strike-out applications

[6] The Court, via reg 6 of the Employment Court Regulations 2000, has a discretion to strike out all or part of a pleading under r 15.1 of the High Court Rules 2016 if the pleading:

- (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
- (b) is likely to cause prejudice or delay; or
- (c) is frivolous or vexatious; or
- (d) is otherwise an abuse of the process of the court.

[7] The principles applying to an application to strike-out are well settled. The pleaded allegations of facts, whether admitted or not, are assumed to be true. The jurisdiction to strike out a matter on the ground that it discloses no reasonably arguable

cause of action is to be exercised sparingly and only in clearly untenable cases.² Special caution is required where a claim involves a developing area of the law.³

[8] These principles apply in the Employment Court.⁴

Mr Nand's application must be struck out

[9] As Mr Nand discontinued his original application before any hearing was conducted, there is no basis for his application for a rehearing. There can be no rehearing where no hearing ever occurred. However, an application ought not to be struck out where issues can be resolved by having the pleadings amended.⁵ Ultimately, Mr Nand is seeking for his application for leave to file a challenge out of time to be reinstated.

[10] Where a matter has been withdrawn, subsequent identical proceedings can be brought so long as the costs arising from the original matter have been paid.⁶ However, the proper procedure is to file a fresh application rather than to file an application for proceedings to be reinstated.⁷ Alternatively, if subsequent identical proceedings cannot be filed, the Court also likely has inherent power to reinstate a previous application.⁸

[11] However, irrespective of whether the matter is reinstated or filed as a fresh application, where a matter has been withdrawn as a result of a settlement agreement, the Court has previously noted that it would be an abuse of the Court's processes for the matter to be litigated afresh unless the settlement agreement has been set aside.⁹

² *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

³ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

⁴ *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

⁵ *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) at 324.

⁶ High Court Rules 2016, r 15.24. That rule is applied via reg 6 of the Employment Court Regulations 2000, see *Kapadia v Axiom Rolle PRP Valuations Services Ltd* [2007] ERNZ 579 (EmpC) at [15]–[21]; and *Alkazaz v Enterprise IT Ltd* [2022] NZEmpC 224 at [3].

⁷ *Paterson v Registrar-General of Land* [2019] NZHC 2356 at [30].

⁸ Employment Relations Act 2000, s 186; Philip A Joseph *on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 902 and fn 609; and *Wade v Hume Pack-N-Cool Ltd* [2011] NZEmpC 57 at [53]. But see *Attorney-General v Christchurch District Court* [2017] NZHC 1873, [2017] NZAR 1256.

⁹ *X v A* [1992] 2 ERNZ 1079 (EmpC); *United Food Workers v Talley* [1992] 3 ERNZ 423 (EmpC) at 445; and *Clearkin v Geneva Healthcare Ltd* [2019] NZEmpC 174 at [17]–[18].

[12] In the present case, the application for an extension of time to file a challenge was withdrawn as a result of a settlement agreement. That settlement agreement has not been set aside. There is also no reason to believe that it could be set aside based on the facts as pleaded by Mr Nand. Even if Mr Nand's former representative misled him into signing the agreement, that would not give him the right to cancel the agreement as there was no suggestion that Idea Services was involved in any such misrepresentation.¹⁰ Further, given that Mr Nand complied with the settlement agreement, he is not in a position to argue that he was not bound by it, particularly given that he took five years to take any further steps. Ultimately, Mr Nand may have a case against his former representative, but it does not appear to be reasonably arguable that the settlement agreement could be set aside.

[13] Even if Mr Nand's application was repleaded as an application to reinstate his application for leave to file a challenge out of time, that reinstatement application would not be reasonably arguable because it would be an abuse of the Court's processes to reinstate the application in the circumstances. Similarly, if Mr Nand seeks to refile his application for leave, it would likely be struck out on the basis that it would be an abuse of process. Therefore, Mr Nand's application for a rehearing must be struck out.

Idea Services Ltd is entitled to costs

[14] The Court has a broad discretion as to costs.¹¹ It uses a guideline scale to guide the exercise of that discretion.¹²

[15] As the successful party, Idea Services is entitled to costs. It seeks costs on a category 2 band B basis with a 50 per cent uplift, which comes to a total of \$23,661, along with an additional \$864.22 in disbursements. Mr Nand opposes Idea Services' position on costs and submits that the costs claimed are excessive and that he is in no financial position to pay any award of costs.

¹⁰ Contract and Commercial Law Act 2017, s 37.

¹¹ Employment Relations Act, sch 3 cl 19; and Employment Court Regulations, reg 68.

¹² "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[16] I consider that this application was a matter of average complexity such that costs should be calculated on a category 2 basis under the guideline scale. However, although of average complexity, I consider that only a comparatively small amount of time should reasonably have been spent on this application so that costs should be calculated using band A rather than B.

[17] Turning to consider the steps sought by Idea Services, I accept that most of them appear to be reasonable. However, I do not accept the claim for preparing and filing affidavits for the strike-out application. Mr McBride, counsel for Idea Services, relied on step 49 as analogous, but that step relates to affidavits filed in support of applications for freezing orders and search orders. Affidavits filed with such applications are normally much more comprehensive and complex than the affidavit filed in these proceedings. I consider that insofar as costs should be recoverable for the preparation of the affidavit, the steps relating to filing the application and preparing the bundle sufficiently cover that.

[18] I also do not accept the claim for the memoranda dated 22 April 2024, which was an invitation to Mr Nand to withdraw his claim, and the claim for 0.1 days in relation to addressing Mr Nand's non-compliance with timetabling. Those claims are best dealt with when addressing whether scale costs should be increased. For completeness, I note that no claim is sought for preparation and attendance at Court directed mediation due to uncertainty about legal aid in relation to that.

[19] Idea Services seeks that the amount of scale costs be uplifted by 50 per cent on the basis that Mr Nand was fully on notice of the costs consequences of progressing misconceived proceedings in the Court and also on the basis that Mr Nand's actions caused delays in the proceedings being resolved. I accept that a modest uplift of 10 per cent is appropriate given Mr Nand's continued pursuit of matters which are not reasonably arguable; however, given Mr Nand's weak financial position, I do not consider that a larger uplift is appropriate.

[20] In light of the above analysis, the following scale costs are recoverable on a category 2 band A basis:

Step	Description	Days	Cost \$
8	Filing opposition to application for rehearing	0.5	1,195
11	Preparation for directions conference	0.2	478
12	Filing memorandum for directions conference	0.2	478
13	Appearance at directions conference	0.2	478
28	Filing interlocutory application for strike-out	0.3	717
30	Preparation of written submissions	0.5	1,195
31	Preparation of bundle for hearing	0.4	956
32	Appearance at hearing	0.5	1,195
Total		2.8	\$6,692
		+10%	\$7,361.20

[21] Idea Services also seeks disbursements of \$864.22. The claimed disbursements cover photocopying and binding and also travel and accommodation.

[22] Mr Nand did not raise any objection to the disbursements relating to photocopying and binding but says that Mr McBride could have travelled to Auckland on the day of the hearing to avoid having to stay overnight in Auckland. He also notes that the hearing was on 20 February 2025 but that Mr McBride's evidence concerning his flights shows him flying into Auckland on 18 February 2025 and leaving Auckland on 19 February 2025. Finally, he submits that he should not be liable for disbursements relating to out-of-town counsel.

[23] The cost of counsel's travel will not be reasonable where there is no special justification for instructing out-of-town counsel.¹³ I can understand why Idea Services might prefer to instruct Wellington-based counsel, but given the overall simplicity of this case, I do not accept that there was special justification for instructing Wellington-

¹³ *Ainsworth & Collinson Ltd v Edmunds* (2009) 19 PRNZ 565 (HC) at [5]–[9].

based counsel in this case. Further, even if Mr McBride's involvement was required given his previous experience with the underlying issues, he could reasonably have appeared by AVL. As a result, I do not accept that the travel and accommodation costs were reasonably necessary for the conduct of the proceeding.¹⁴

[24] Further, the claimed disbursements include GST. As Idea Services is presumably GST registered, the disbursements for photocopying and binding ought to be exclusive of GST.¹⁵ That leads to total disbursements of \$252.04.

[25] In conclusion, Idea Services is entitled to increased scale costs of \$7,361.20 and disbursements of \$252.04.

Outcome

[26] Mr Nand's application for a rehearing is struck out.

[27] I order Mr Nand to pay Idea Services \$7,613.24 as a contribution to its costs and disbursements within 28 days of the date of this judgment.

M S King
Judge

Judgment signed at 3.50 pm on 16 April 2025

¹⁴ High Court Rules, r 14.12.

¹⁵ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260 at [17]–[18].