



New Zealand Employment Relations Authority Decisions

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Auton v Auton Limited [2020] NZERA 476 (7 December 2020)

Last Updated: 14 December 2020

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI

ŌTAUTAHI ROHE

[\[2020\] NZERA 476](#)

3093712

BETWEEN ANDREW MYERS AUTON

Applicant

A N D R AUTON LIMITED

Respondent

Member of Authority: David G Beck

Representatives: Phillip N Allan, counsel for the Applicant

Hamish A Evans and Samuel B Henry counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 November and 20 November 2020 from the Applicant

16 October 2020 from the Respondent

8 December 2020

7 December 2020

Date of Determination:

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Andrew Myers Auton (“Andrew”), in a statement of problem received by the Authority on 27 February 2020, claims that his father Robert William Auton, the sole director of R Auton Limited (“RAL”) unjustifiably dismissed him on an unspecified date. Andrew seeks as remedies: lost income, KiwiSaver contributions, holiday pay and severance pay, damages, compensation for shares and the return of tools and personal belongings.

[2] Despite being directed to do so by the Authority, Andrew filed no documentation to establish the existence of an employment relationship and the circumstances and timing of its ending and, he did not respond to RAL’s amended statement in reply. That statement in reply with supporting documentation was lodged on 7 September

2020 in which RAL asserted that Andrew's employment ended on 3 August 2015 and that they were unaware of the personal grievance until it was filed in the Authority on 27 February 2020.

[3] RAL says that due to the significant delay, they do not consent to the matter being heard out of time pursuant to s 114 [Employment Relations Act 2000](#) ("the Act"). RAL also suggest that any recovery of wages action for the period prior to 27 February is statute barred.¹

[4] Without prejudice to their respective positions, the parties attended an unsuccessful mediation but the matter remains unresolved.

[5] RAL then made an application on 16 October 2020 for an order that Andrew's claims be dismissed in their entirety as "frivolous or vexatious" pursuant to [s 12 A](#), Schedule 2 of the Act.

[6] By a memorandum in response, Phillip Allan, recently instructed counsel for Andrew, filed a submission opposing the application for dismissal.

The Authority's Process

[7] The parties have agreed that the preliminary issue be determined on "the papers" following written submissions from both parties including a memorandum and affidavits provided by the respondent's counsel to clarify issues that despite allowing a time for response nothing was forthcoming from the applicant's counsel .

[8] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

1 Section 11(3) [Wages Protection Act 1983](#).

Issue

[9] The preliminary issue for determination is whether or not Andrew's claims are frivolous or vexatious pursuant to [s 12A](#), Schedule 2 of the Act and if so, should the claims be dismissed.

How this dispute arose

[10] Andrew, whilst alluding to a past employment relationship, produced a copy of an unsigned letter from his father Robert to a bank of 14 April 2009, supporting a mortgage application by Andrew for the purchase of a property. This letter outlined that Andrew "will be drawing an income from R Auton Limited, of \$85,000 per year (eighty five thousand dollars per year) Gross" and that from June 2009 he would become "a shareholder in the company and eventually he will take full control of manufacturing and marketing of our products".

[11] RAL, in response, initially provided scant background detail of the formation of the employment relationship, its duration and tenor, except to assert that Andrew's employment ended on 3 August 2015 and that he ceased working for health reasons, directing RAL to discontinue his wage payments due to the impact such was having on him drawing a sickness benefit. RAL's counsel noted that Andrew has had the opportunity to make an application under s 114(3) of the Act for leave to have his personal grievance heard out of time but has not done so.

[12] By contrast, Mr Allan provided a submission with an affirmed affidavit signed by Andrew's father concerning unrelated legal proceedings that suggests as at 11 June 2018, that Andrew had an ongoing promotional/sales role with RAL. This described role, included reference to an envisaged November 2018 RAL business trip to Germany that Andrew was to undertake. Andrew's counsel also provided limited documentation suggesting that during the month of August 2019, RAL was remunerating Andrew.

[13] I then asked the respondent to clarify the above and in response they provided a sworn affidavit from a Chartered Accountant who deposed that they were responsible for preparing

the respondent's annual financial accounts and had undertaken a review of "all available financial information to provide an expert opinion on whether Andrew received any wages and salary payments after 3 August 2015". This review included

viewing relevant financial statements and the general ledger records of the respondent for the years under dispute (2014- to present). The review concluded no wages, salary payments or contractor fees had been made after 3 August 2015 but that Andrew's father Robert had made various personal payments to Andrew that came from drawings from his shareholders account unconnected to any engagement for employment purposes. The accountant also disclosed that contrary to his father's supportive affidavit for court proceedings, Andrew was not and never has been a director or shareholder of the respondent company.

[14] Andrew's mother Valerie also provided a 16 April 2020 affidavit used for an associated Court proceeding backgrounding his well-being issues and fraught family relationship including significant ongoing financial support that had been provided to meet Andrew's living and accommodation needs including the provision of a rent free property post the Christchurch earthquake and after Andrew's relationship breakdown with his partner, ongoing accommodation that was punctuated by evictions and ongoing disputation. The affidavit also demonstrated that the affidavit of his father Robert of 2018 (cited above) purporting to place Andrew in an ongoing role with the respondent company had been basically embellished to prevent Andrew from being the subject of a custodial sentence.

[15] Mr Allan submitted that the threshold issue of whether Andrew could be deemed to be an employee needed exploring as a preliminary matter in substantive proceedings.

Legal issues – the Authority's discretion to dismiss an application

[16] The approach the Authority takes is well established² and stems from the Employment Court first considering the matter in *Lumsden v Sky City Management Limited*³; a decision that made it clear that the Authority's discretion to dismiss a matter is very limited in scope.

² A detailed summary of the Authority's legal approach is set out in Member Robinson's determination *Qiang Deng v Henry Feng Lawyers Ltd* [2017] NZERA Auckland 118, 19 April 2017.

³ *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.

In *Lumsden*, Judge Inglis found that something more was required to deem a matter frivolous than simply that it has no reasonable prospect of success⁴ and concluded:

...the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step and not one to be taken lightly. It cuts the claim off at the knees and, because of its draconian effects and having regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases.⁵

[17] Helpful guidance from the Court on how they approach applications and assess such 'threshold' claims is found in *Newick v Working In Limited* where Judge Inglis in approaching a 'strike out' application, outlined the following criteria to apply:

[2] There is no dispute that the Employment Court has power to strike out all or part of a pleading. The criteria applying to strike out applications are well accepted, and can be summarised as follows:

- a. It is assumed that facts pleaded are true;
- b. The cause of action must be so clearly untenable that it cannot possibly succeed;
- c. The jurisdiction is to be exercised sparingly;
- d. The jurisdiction to strike out is not excluded where the claim includes difficult questions of law requiring extensive argument;
- e. The Court should be slow to strike out claims in a developing area of law.

[3] A claim should not be summarily struck out unless the Court can be certain that it cannot succeed.

[4] The Court can strike out a pleading where it constitutes an abuse of the Court's process.⁶

RAL's case for dismissal

[18] In summary, RAL's counsel alluded to Andrew's significant delay in advancing his claims, complete lack of specificity in the pleadings, failed allied litigation that Andrew had recently pursued in the High Court and Tenancy Tribunal against RAL, and that he is an impecunious litigant with an outstanding costs awards remaining unpaid.

4 At [37].

5 At [39].

6 *Newick v Working In Limited* [\[2012\] NZEmpC 156](#)

[19] In citing relevant authorities RAL overall claim that “these proceedings are an abuse of process and are frivolous and vexatious”.

Frivolous

[20] Judge Corkill in *Gapuzan v Pratt & Whitney Air New Zealand Services*, after extensively traversing authorities on the meaning of ‘frivolous’, concluded that:

The underlying theme of these statements is that there must be significant lack of legal merit so that it is impossible for the claim to be taken seriously.⁷

[21] In this context, it is my observation that Andrew has failed to properly set out his initial claim and detail relevant background facts that may require investigation. I have given Andrew considerable leeway whilst he was unrepresented to provide documentation to support his claims but he has refused to do so. Now that he is represented by counsel, all I have before me is Mr Allan making unexplained allusions to Andrew’s difficulties in locating documents and a bare statement that his client “can provide detailed explanation of the work completed for the respondent over this time” (since 2015).

[22] Mr Allan has also failed to articulate in taking instructions, a point in time when Andrew alleges he was dismissed. As such, I am unable to ascertain if this claim has any legal merit. I thus consider that Andrew’s challenge to be potentially ‘futile’ - a term that in *Smith v Attorney General* Judge Palmer considered was an adequate synonym for “frivolous”.⁸ I am also obliged to consider a comment made by Chief Judge Inglis in *Lumsden* that:

It seems to me that a matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority processes, lacking the degree of seriousness required to engage the attention of the Authority in the sense referred to in the *Shipwrights* case. A matter may be said to trifle with the Authority’s process where it is, to use Chief Judge Goddard’s terminology, impossible to take seriously.

⁷ *Gapuzan v Pratt & Whitney Air New Zealand Services (T/A Christchurch Engine Centre)* [\[2014\] NZEmpC 206](#) at [\[58\]](#).

⁸ *Smith v Attorney General* [\[1991\] NZEmpC 79](#); [\[1991\] 3 ERNZ 556](#) at [\[589\]](#).

Vexatious

[23] In *Gapuzan*, Judge Corkill dealt with the definition of ‘vexatious’ by first alluding to Black’s Law Dictionary, deeming it to be conduct “without reasonable or probable cause or excuse; harassing; annoying”⁹ and then outlined that:

The term appears in s 88B of the *Judicature Act 1908*, where the High Court may, where a person has persistently without any reasonable ground instituted vexatious legal proceedings, order that such a person be subject to restrictions in instituting or continuing further proceedings. In *Heenan v Attorney-General* the Court of Appeal approved previous points made about this section a number of which I consider to be of assistance when assessing whether a proceeding is “vexatious” under cl 15:

- (a) Recognition of the fundamental constitutional importance of the right of access to the courts must be balanced against the desirability of freeing defendants from the burden of groundless litigation.
- (b) Relevant is the character of the proceeding. Did the proceeding have a reasonable basis and how has it been conducted; have such proceedings been issued persistently?
- (c) Whether attempts have been made to re-litigate issues already determined, containing scandalous and unjustified allegations.
- (d) A factor may well be whether the litigant is found to have had an improper purpose in commencing proceedings.¹⁰

[24] On the limited pleadings I have before me and RAL’s submission, I regrettably conclude that Andrew’s claim is also potentially vexatious as it has no reasonably articulated basis. I am not persuaded by Mr Allan’s suggestion

that a way forward is to determine the threshold issue of Andrew's status (employee or otherwise) for the period 2015 to December 2019 – the pleadings advanced so far provide an insufficient basis for this alternative matter to be explored but I recognise that is an issue that may arise to be determined in an investigation dealing with all matters.

[25] It would appear on the scant information provided that Andrew is attempting to use the forum of the Authority to advance what is essentially a long running family dispute. To allow it to proceed may cause all parties further distress and involve them in unnecessary litigation costs.

9 Bryan A. Garner (ed) Black's Law Dictionary (9th ed, Thomson Reuters, St Paul (MN), 2009) at 1701.

10 At [67].

Factors mitigating against dismissing the claim

[26] However as described above, the Authority's discretion to dismiss an application is very limited and a partial dismissal is not possible. The application has to be frivolous or vexatious and no other grounds exist; this is not akin to the 'strike out' jurisdiction of the Court and no partial dismissal of claims can occur; it is 'all or nothing'. 11

[27] A problematic issue for RAL is that Andrew has raised an issue of non-payment of holiday pay which is an ongoing accumulation crystallising at the time employment ceased (which is disputed but at the earliest it was 3 August 2015) - this claim is not statute barred and record keeping issues may also arise. 12

Conclusion

[28] Given that the threshold for the Authority dismissing cases is more limited than the strike out jurisdiction of the Employment Court, I find that Andrew's claims that rest on the centrality of him alleging he was unjustifiably dismissed on an unspecified date, is exceedingly problematic and subject to being out of time but given that he has also raised a non-payment of holiday pay claim he is entitled to be heard.

[29] As a result, I reluctantly do not grant RAL's application to have all of Andrew's claims dismissed but I observe that there is legitimacy in RAL's contention that the claim for an unjustified dismissal is well out of time and before I can deal with this Andrew needs to identify the date he claims he was dismissed so I can ascertain whether an application under s 114(3) of the Act is required if, as alleged by RAL, an out of time issue is still apparent.

[30] To progress this matter I will soon convene a directions conference to determine what further information and/or amended pleadings are required of the applicant before this matter is ready to be timetabled for an investigation meeting.

11 *Lumsden* at [38].

12 See section 83 [Holidays Act 2003](#).

Outcome

[31] I determine that R Auton Limited's application to have Andrew Myers Auton's claims dismissed on the grounds that they are frivolous or vexatious under s 12A, Schedule 2 of the Act, fails.

Costs

[32] Costs are at the discretion of the Authority and here R Auton Limited was not successful in the claim to have Andrew Myers Auton's claim dismissed. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs and in assessing costs I will be taking into account the deficiencies I have identified in the respective parties pleadings.

[33] If no agreement is achieved, Andrew Myers Auton has fourteen days following the date of this determination

to make a written submission on costs and R Auton Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck

Member of the Employment Relations Authority

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