



Employment Court of New Zealand

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Carver v Metallic Sweeping (1998) Limited [2022] NZEmpC 189 (21 October 2022)

Last Updated: 27 October 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2022\] NZEmpC 189](#)

EMPC 228/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike-out or stay the proceeding and security for costs
AND IN THE MATTER OF	an application for leave
BETWEEN	PAUL ERIC CARVER Plaintiff
AND	METALLIC SWEEPING (1998) LIMITED Defendant

Hearing: 23 September 2022 (Heard at Christchurch)

Appearances: P Carver, plaintiff in person
T McGinn, counsel for defendant

Judgment: 21 October 2022

JUDGMENT OF JUDGE K G SMITH

(Application to strike out and other orders)

[1] Paul Carver unsuccessfully sought to pursue a personal grievance against his former employer, Metallic Sweeping (1998) Ltd, in the Employment Relations Authority.

[2] Mr Carver's claim was unsuccessful because the Authority held he raised his personal grievance outside of the 90 days allowed by the Employment Relations Act

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2000 (the Act). That conclusion meant the Authority lacked jurisdiction to consider the claim.¹

[3] Metallic did not consent to Mr Carver raising his personal grievance outside the time allowed under the Act and he did not apply for leave to extend time to raise it. The Authority observed that there was, in any event, no evidence that might have supported such an application. The claim was dismissed.²

[4] Mr Carver was dissatisfied with the Authority's determination and challenged it. The challenge, however, has not progressed smoothly. The proceeding has reached its fourth amended statement of claim, which Metallic maintains does not comply with reg 11 of the [Employment Court Regulations 2000](#).

Application to strike out

[5] Metallic has applied to strike-out the statement of claim. As an alternative, it has applied for an order for security for costs and a stay of the proceeding until any security is paid or provided.

[6] The Court may strike out all or part of a pleading if it:

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

[7] There is no dispute about the criteria to apply:

1. *PTQ v Metallic Sweeping (1998) Ltd* [2021] NZERA 256 (Member Cheyne) at [12]; and [Employment Relations Act 2000, s 114\(1\)](#).

2 At [13]–[15].

3. See r 15.1 of the High Court Rules 2015 as applied by reg 6 of the [Employment Court Regulations 2000](#).

- (a) pleaded facts, whether admitted or not, are assumed to be true;
- (b) to succeed in the application, the cause of action or defence must be clearly untenable, meaning that the Court is certain it cannot succeed;
- (c) the jurisdiction is exercised sparingly and only in clear cases;
- (d) the jurisdiction is not excluded by the need to deal with difficult questions of law; and
- (e) the Court should be slow to strike out a claim in a developing area of law.

[8] Metallic relied on four grounds in its application to strike out the proceeding:

- (a) the fourth amended statement of claim does not comply with reg 11;
- (b) the Court and Metallic have not been fully and fairly informed by the pleading of the nature of the claim or the relief sought;
- (c) the pleading is likely to cause prejudice to Metallic and delay the resolution of the case; and
- (d) Mr Carver has been granted extended time and indulgences to file a complying pleading but has not done so.

Mr Carver's application

[9] Mr Carver opposed the application and in response filed an “application for leave”. At first blush that application sought an order authorising him to begin a fresh proceeding against Metallic arising from his subsequent employment by that company. That impression arose because, in an unusual twist, Mr Carver succeeded in being re-employed by the company but in a different branch from the one he originally worked for. He was dismissed for a second time for allegedly failing to make material disclosures when he was re-employed.

[10] At the hearing Mr Carver explained that the purpose of his application for leave was not to seek any order relating to his second dismissal. It was a request for time to enable him to gather evidence to support his claim relating to the first dismissal. Submissions about Mr Carver's application proceeded on that basis.

Discussion

[11] Mr McGinn, counsel for Metallic, submitted that the company was disadvantaged because the fourth amended statement of claim did not comply with reg 11. The pleading gave no indication of the claim or claims to be addressed. While a statement of defence was filed previously, that pleading amounted to supposition by the company about the claim not an attempt to reply constructively to it.

[12] Mr McGinn acknowledged that it may be tempting to draw inferences favourable to Mr Carver from the fact that a challenge was filed. He cautioned, however, against that course of action because he said it involved significant departures from the actual pleading and assumptions that might ultimately be misplaced and unfair to Metallic. If inferences were to be drawn the company would still not know when Mr Carver said he raised his grievance, or how, and would have no ability to anticipate his responses to its affirmative defences it had previously pleaded.

[13] When Mr Carver presented his submissions, he did not respond to Mr McGinn's criticisms. Instead he concentrated on what he saw as the deficiencies in Metallic's decision to dismiss him and on his desire to establish what he described as the intent of the employment agreement.

[14] Mr Carver filed his first statement of claim in July 2021. Amended statements of claim were filed on 9 March, 15 March and 2 May 2022 before the fourth amended statement of claim was filed on 25 May 2022.

[15] The fourth amended statement of claim consists of nine very short paragraphs that do not convey the claim Mr Carver is attempting to make. The first three paragraphs are confined to stating his intention to challenge the determination and to

elect to have the matter reheard without any elaboration beyond those statements.⁴ The fourth paragraph pleaded that he was employed by Metallic as a collector/driver and, contrary to the finding by the Authority, that he was dismissed with effect from 13 November 2018.

[16] Paragraph six pleaded that the dismissal lacked any formality without any further particulars to explain what the claim means. Paragraph seven pleaded an agreement was signed on 28 October, without reference to a year, and raised an issue about the notice clause in that agreement. This paragraph was presumably about the employment agreement and its termination provisions, but the passage ended with a statement that no payment was made for work already undertaken without explaining if that was a claim for unpaid wages.

[17] Paragraphs eight and nine are impenetrable; they refer to what happened “next Tuesday” and to unspecified interactions and exchanges between Mr Carver and Metallic.

[18] No part of the fourth amended statement of claim states that Mr Carver intends to establish his personal grievance claim was raised in time or could reasonably bear such an inference.

[19] As previously noted, Metallic filed a statement of defence in response to a previous statement of claim but that was done under protest because the company believed it was forced to speculate about the issues it would be required to deal with.

[20] Metallic’s statement of defence raised three affirmative defences: first, that the personal grievance claim was out of time; secondly, that Mr Carver’s employment was subject to a trial provision that would preclude him from obtaining a remedy and thirdly, that the employment agreement was frustrated by circumstances beyond the control of the company and Mr Carver.⁵ The last affirmative defence arose because Mr Carver was the subject of a trespass notice issued by the owner of certain premises he would be required to enter to undertake work for Metallic.

⁴ [Employment Relations Act 2000, s 178.](#)

⁵ [Employment Relations Act 2000, ss 67A and 67B.](#)

[21] [Regulation 11](#) requires that a statement of claim must specify the general nature of the claim, the facts on which it is based, and the relief sought. Regrettably, Mr Carver’s fourth amended statement of claim falls well short of those elementary requirements. The pleading does not state the nature of the claim, or the facts that he will rely on. It is not possible to discern if Mr Carver disputes the Authority’s conclusion about the timeliness of his steps to raise a personal grievance, or is an attempt to raise some other dissatisfaction he has about the company’s decision to dismiss him. I accept Mr McGinn’s submission that Metallic is placed in an intolerable position where it has not been adequately informed about the claim to be faced.

[22] Before Mr Carver filed the fourth amended statement of claim he was provided with opportunities to amend his previous pleadings and encouraged to take professional advice. He was also directed to file a reply to the company’s affirmative defences but did not. During the hearing I asked him about the claim he intended to bring in an effort to identify whether an amended pleading might be possible. Despite that invitation he did not or could not describe the case he wants to have decided. His answers gave no indication that allowing time for an amended pleading to be filed would produce a statement of claim complying with the regulations or at least providing some information to enable his claim to be understood.

[23] In *Marshall Futures Ltd (in liq) v Marshall* a comparison was drawn between cases which should be struck out and those that should not be, by describing the difference between a cause of action which is “a write off and one which is deficient but capable of reasonable repair” and should not be struck out.⁶

[24] I have reached the conclusion that the fourth amended statement of claim is at the “write off” end of the spectrum. The pleading is incomprehensible and the number of unsuccessful attempts to write a statement of claim describing what Mr Carver intended to place in issue is an indication that his claim is not capable of articulation.

[25] The point has been reached where the defendant should be relieved of the burden of the proceeding.

⁶ *Marshall Futures Ltd (in liq) v Marshall* [\[1991\] NZHC 2244](#); [\[1992\] 1 NZLR 316 \(HC\)](#) at 328.

Conclusion

[26] Metallic's application is successful and the fourth amended statement of claim is struck out. It follows that the remaining interlocutory applications do not need to be considered.

[27] Costs are reserved. If they cannot be agreed memoranda will be received.

K G Smith Judge

Judgment signed at 4.05 pm on 21 October 2022

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