

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 118
5643075**

BETWEEN QIANG DENG
 Applicant

AND HENRY FENG LAWYERS LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: May Moncur, Counsel for Applicant
 Lee Goffin, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 9 January 2017 from Applicant
 1 March 2017 from Respondent

Determination: 19 April 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Ms Qiang Deng, is claiming that she was unjustifiably dismissed by the Respondent, Henry Feng Lawyers Ltd (HFL).

[2] Ms Deng also claims unjustifiably disadvantage, a breach of the employment agreement, and a breach of good faith by HFL.

[3] HFL denies all claims by Ms Deng.

[4] The preliminary matter which is before the Authority for determination is whether or not the claim against HFL is frivolous and vexatious and should be dismissed.

[5] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties.

Issues

[6] The issue for determination is whether or not the claims against HFL are frivolous and vexatious pursuant to s.12A, Schedule 2 to the Employment Relations Act 2000 (the Act) and should be dismissed.

Brief Background Facts

[7] HFL is a boutique legal firm based in Auckland. It provides legal services to the Chinese community and others, concentrating on residential and commercial conveyancing services. It has employees who are fluent in Chinese, Mandarin, Japanese and Korean

[8] Ms Deng applied for employment and was appointed as a full-time Law Clerk on 29 February 2016.

[9] Ms Deng stated that she had not been subject to any formal performance management process during her employment.

[10] Shortly after she commenced employment she claimed that she was subjected to bullying and inappropriate behaviour on the part of Mr Henry Feng, Principle and Director.

[11] Ms Deng stated that she received an email from Mr Feng on 15 September 2016 asking when she was to be admitted to the Bar. Ms Deng replied that it would be in April 2017. The following day, 16 September 2016, she received an email from Mr Feng terminating her employment with two weeks' notice.

[12] HFL states that Ms Deng was not qualified for the position offered of a Staff Solicitor and that her performance was poor as a result of which she received oral and written warnings during her employment with HFL.

[13] HFL claims that Ms Deng resigned, and after being given notice, abandoned her employment.

Determination

[14] HFL is seeking to have Ms Deng's claims dismissed in their entirety on the basis that they are frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act.

[15] In the Employment Court case *Newick v Working In Limited*(*Newick*)¹ Judge Inglis outlined the criteria to be applied in the case of strike out applications as:

[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 a claim 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.

Facts as pleaded

[5] On a strike out application the Court proceeds on the assumption that the facts as pleaded are true. Whether or not they can be established is an issue that will be determined at the substantive hearing. [Footnotes omitted]

[16] The Authority has the power under clause 12A, Schedule 2 of the Act to dismiss frivolous or vexatious proceedings, and may do so at any time in a proceeding where the Authority considers that matter to be frivolous or vexatious:

12A Power to dismiss frivolous or vexatious proceedings

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.*
- (2) In such a case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.*

¹ [2012] NZEmpC 156

[17] In *New Zealand (with exceptions) Shipwrights etc Union v New Zealand Amalgamated Engineering etc IUOW & Ors*², Chief Judge Goddard cited with approval the words of Lush J in *Norman v Mathews*³ in which the English Judge said that a frivolous case was one which: “no reasonable person could properly treat as bona fide”

[18] In *Creser v Tourist Hotel Corp of New Zealand (Cresor)*⁴ (Chief Judge Goddard observed⁵ at 1069:

I would add only this: to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.

[19] Her Honour Judge Inglis stated in *Lumsden v Skycity Management Ltd*⁶ that:

[37] ... the scope of cl 12A is usefully informed by the judicial discussion I have referred to. 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's 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.

...

[39] I conclude that 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 a 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. This is not one of them.

[20] In *AFT v BCM*⁷ Chief Judge Colgan, agreeing with the analysis of Judge Inglis in *Lumsden*, considered the meaning of a ‘frivolous’ case as being one in which there was a significant lack of legal merit so that it is impossible for the claim to be taken seriously. Vexatious meant conduct without reasonable or probable cause or excuse; harassing; or annoying. His Honour stated in paragraph {78}:

² 23 November 1989, WLC111/89)

³ [1916] 85 LJKB 857

⁴ (1990) 1NZILR 1055 (LC)

⁵ Ibid at 1069

⁶ [2015] NZEmpC 225.

⁷ [2015] NZEmpC 234

... cl 12A of sch 2 contains quite specific powers to be exercised in unusual circumstances and, in particular, should not be used by the Authority to dismiss, without consideration of their merits, proceedings which impress the Authority as having low or no expectations of success.

[21] I observe that the judgments cited above have set the threshold very high to justify dismissing an applicant's claims on the basis that they are frivolous and vexatious. I note by way of illustration the phrases: "*clearly untenable ... cannot possibly succeed*", "*futile*", *no reasonable person could treat as bona fide*".

[22] Ms Deng is claiming unjustifiable dismissal and unjustifiable disadvantage, both are based upon the behaviour of Mr Feng towards her during her employment; behaviour which she claims was bullying and inappropriate, and from which her dismissal arose.

[23] These are not on their face claims which cannot succeed, or which are futile, although that is not to opine at this stage that they will or will not succeed when tested in a substantive hearing.

Submissions of the Respondent

[24] The Respondent submits that Ms Deng's claims are outrageous and scandalous, and unsupported by any evidence of any kind or by witnesses and have no prospect of success.

[25] In support the Respondent submits in particular that Ms Deng:

- was offered employment contingent upon her oral and written representations at interview and in subsequent correspondence that she had graduated from university; would begin her professional studies in March 2016; and be admitted as a Barrister and Solicitor in September 2016. These representations were false;
- her performance throughout the period February to September 2016 was substandard and the subject of repeated oral and written warnings;
- refused to adapt to the company culture with respect to dress code or conduct while at work;
- failed to respect directions from her employer leading to the firm's legal and financial exposure;
- abandoned her employment;

- was terminated with due process and after she had already resigned.

Submissions of the Applicant

[26] The Applicant submits in support of its opposition to the strike out application:

- HFL has not provided the Authority with satisfactory argument or any evidence to support its application that the proceedings be struck out.
- The Respondent denied having dismissed the Applicant despite written evidence to the contrary.
- The Respondent offered three different explanations for the termination of the Applicant's employment, such inconsistent evidence warrants investigation by the Authority.
- The Respondent's denials of the Applicants claims are insufficient grounds for them to be struck out.

[27] In a strike out application, I must assume that the facts as pleaded are true; it will be for Ms Deng to establish them at the substantive hearing in order to succeed on this claim. Ms Deng will have to prove that the termination of her employment was unjustifiably effected by HFL. She will also have to establish the grounds to support a disadvantage grievance pursuant to s103(1)(b) of the Act.

[28] As stated in *Newick*, a claim should not be summarily struck out unless I can be certain it cannot succeed. Whilst at this preliminary stage I can have no certainty as to the strength of Ms Deng's claims because there has been no testing of witness or documentary evidence, I cannot be certain that she will not succeed in her claim of unjustifiable dismissal, or of unjustifiable disadvantage.

[29] Nor do I find that the claims are futile, or that no reasonable person could treat them as bona fide. I find that the issues raised by Ms Deng are issues to be explored at the substantive investigation meeting and not a reason to strike out on the basis that they are as frivolous or vexatious.

[30] I determine that the claims against HFL made by Ms Deng are not frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act and should not be dismissed.

Next Steps

[31] The Authority will contact the parties shortly for a telephone conference to progress the matter.

Costs

[32] Costs are reserved pending the final resolution of the matter.

Eleanor Robinson
Member of the Employment Relations Authority