

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 315
5559576**

BETWEEN EMMA GRIFFITHS
 Applicant

AND WITCHERY FASHIONS (NZ)
 LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Jane Traynor, Counsel for Applicant
 Persia Templeton, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 11 September 2015 from Applicant
 28 August 2015 from Respondent

Determination: 08 October 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Ms Emma Griffiths, is claiming that she was unjustifiably constructively dismissed by the Respondent, Witchery Fashions (NZ) Limited (Witchery).

[2] Ms Griffiths also claims that she was unjustifiably disadvantaged by Witchery as a result of unacceptable behaviour on the part of some members of the management team towards her.

[3] Witchery denies that it unjustifiably dismissed or disadvantaged Ms Griffiths.

[4] The preliminary matter which is before the Authority for determination is whether or not the claim against Witchery 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 Witchery are frivolous and vexatious pursuant to s.12A, Schedule 2 of the Employment Relations Act 2000 (the Act) and should be dismissed.

Brief Background Facts

[7] Witchery is an Australian retailer specialising in Womens clothing. It has several stores in New Zealand.

[8] Ms Griffiths was employed as a part-time sales assistant in 2013, and was subsequently appointed to the position of part-time Visual Merchandiser on 21 February 2014. Ms Griffiths reported to Ms Louise Ewart, Visual Merchandising Manager

[9] Ms Griffiths claims that in August 2014 she informed Ms Ewart that she was affected by the 'bullish and bullying' behaviour of Mr Webber, North Island Area Manager and by his constant criticism of her. Ms Ewart offered to intervene, but the bullying behaviour did not cease. From that date, Ms Griffiths claims that Ms Ewart began to micro-manage her.

[10] Following a meeting between Ms Ewart and Ms Griffiths on 28 August 2014, Ms Ewart emailed Ms Griffiths to suggest a further meeting the following week to create an action plan which would involve training.

[11] Shortly after this email was sent to Ms Griffiths, Ms Ewart received an email from Ms Griffiths stating:

Hi Lou

Thank you for your time this afternoon.

I'm sorry I got emotional during our meeting but I'm afraid it was a true representation of my confidence level & indicative frustration.

I'm not certain my ability is ever going to live up to Witchery's expectations & it is very obvious my inadequacies are causing frustration for both of us.

Please know that I respect you a great deal. I don't want our working or personal relationship to deteriorate any further, nor do I wish this job to continue to have a negative impact on my confidence.

So it is with sadness that I am handing in my resignation. I am happy to give one month's notice and finish before I go on holiday.

[12] Ms Ewart responded the following day, 29 August 2014, stating that she did not accept Ms Griffiths' resignation at that stage, and that she would like to discuss the matter with Ms Griffiths at a meeting to be held on 2 September 2014.

[13] At the meeting held on 2 September 2014 Ms Griffiths met with Ms Ewart and Ms Heather Polaschek, HR Manager. During the meeting Ms Griffiths confirmed that she wished to remain in her position with Witchery, provided that she was given support. Ms Griffiths also raised concerns about the behaviour of Mr Webber towards her. It was agreed at that meeting that Ms Polaschek would speak to Mr Webber, and ensure that any feedback to Ms Griffiths came via Ms Ewart.

[14] Following the meeting with Ms Ewart and Ms Polaschek, Ms Ewart and Ms Griffiths completed a development plan to assist Ms Griffiths in her role. The development plan was completed at the end of March 2015, and it was agreed at a review meeting to extend it until Ms Griffiths' annual review in August 2015.

[15] Ms Griffiths claims that the behaviour of Ms Ewart and Mr Webber towards her did not change. On 23 April 2015 she sent an email to Ms Ewart stating:

I need to have a chat with you tomorrow as I'm afraid that I'm going to have to hand in my resignation.

I'm struggling to juggle family life & work and it's starting to take its toll on my health. I'm exhausted and I don't feel I'm giving 100% to anything at the moment.

I've really enjoyed working with you & despite some challenges over the course of my time in this role, I have learnt a great deal & it has confirmed in my mind that I'd like to stay working in the fashion industry in some capacity in the future. But right now, I think my time in Witchery has run its course.

I hope you understand and I will put this in writing formally tomorrow. I'm also happy to work one month's notice to assist you in finding a replacement if it helps!

[16] Almost immediately Ms Griffiths received an email sent by Ms Ewart which stated: “Hi Sarah, See below, might make your weekend ;)”. Ms Murtha is an employee of Witchery.

[17] Ms Griffiths responded to Ms Ewart's email stating:

I'm assuming you didn't mean to send this to me and this was meant for Sarah Murtha.

It is inappropriate and unfair and under the circumstances, I think the only course of action would be for me to speak with HR.

[18] Ms Ewart telephoned Ms Griffiths on 24 April 2015 to discuss the email but Ms Griffiths claims that she did not apologise or try to dissuade her from resigning. From that date, Ms Griffiths claims that Ms Ewart refused to have further contact with her.

[19] Ms Griffiths had subsequently contacted Ms Polaschek who sought responses about the email from Ms Ewart and Ms Murtha. Ms Griffiths emailed Ms Polaschek on 24 April 2015 stating:

As you are aware, I received a communication last night from Louise that was unprofessional and inappropriate.

After several weeks of enduring more criticism & contradiction, I recently decided that I no longer wished to work for Witchery. The impact of the actions of some senior management has caused me ongoing stress, undermined my confidence & I felt I could no longer tolerate working for them.

I wished to discuss my resignation with Louise today after sending her a personal email ... so to receive the very sarcastic and hurtful email that was meant for Sarah Murtha was very disappointing. It is also very intimidation to yet again discover that senior staff seemingly have clear intentions to undermine my position in the company.

As yet, I have not formally tendered my resignation and I will not until I have full transparency as to what Louise was eluding to in her email to Sarah.

[20] On 28 April 2015 Ms Griffiths and Ms Polaschek discussed by telephone Ms Ewart's email to Ms Murtha and Ms Griffiths' resignation. Following the conversation Ms Griffiths sent an email to Ms Polaschek stating in the email that she believed:

...the sentiment of Louise's email & the ongoing behaviour of senior managers equates to constructive dismissal due to breach of duty. Excessive criticism and undermining my ability to do the role has had a very negative impact on my psychological welfare and eroded my trust & confidence in my superiors, to the point I can no longer do my job."

[21] In a subsequent email dated 29 April 2015 Ms Griffiths reiterated her view that Ms Ewart's behaviour had constituted a breach of duty, and that: "*I cannot continue to work in my current role due to the direct actions of my manager and this constitutes constructive dismissal*"

[22] Ms Polaschek accompanied by Ms Jacinta McIntyre, Country Road Regional Manager, met on 4 May 2015 with Ms Griffiths and her solicitor, Ms Traynor, however the meeting ended without a resolution. On 5 May 2015 Ms Griffiths raised a personal grievance with Witchery for unjustifiable disadvantage.

[23] The parties subsequently attended mediation but this did not resolve the matter, and on 11 May 2015 Ms Traynor wrote to Witchery stating: "*please treat this letter as Mrs Griffiths' resignation from her role as Visual Merchandiser at Witchery, effective immediately.*

[24] On 28 May 2015 Ms Griffiths lodged a Statement of Problem with the Authority claiming unjustifiable constructive dismissal and unjustifiable disadvantage.

[25] On 18 June 2015 Witchery lodged a Statement in Reply containing an application to strike out pursuant to s.12A, Schedule 2 of the Act.

Determination

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

[27] 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]

[28] The Authority has the power under clause 12A of 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

[29] In *STAMS v MM Metals Ltd (STAMS)*² the Employment Court considered whether the attempt of an employee to pursue a personal grievance where a settlement agreement existed was frivolous. Judge Finnegan stated:³ “*To attempt to proceed would be frivolous, is futile.*”

[30] In *New Zealand (with exceptions) Shipwrights etc Union v New Zealand Amalgamated Engineering etc IUOW & Ors*⁴, Chief Judge Goddard cited with approval the words of Lush J in *Norman v Mathews*⁵ in which the English Judge said that a frivolous case was one which: “*no reasonable person could properly treat as bona fide*”

[31] In [*Creser v Tourist Hotel Corp of New Zealand*](#) (*Cresor*)⁶ (Chief Judge Goddard observed⁷ 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.

[32] 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*”.

[33] Ms Griffiths is claiming unjustifiable constructive dismissal and unjustifiable disadvantage, both are based upon the behaviour of the management team towards her which she alleges amounted to serious breaches of the employment relationship and left her with no option but to resign. 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

[34] The Respondent submits that Ms Griffiths has failed to provide a single tenable pleading under her claim of constructive dismissal, and as both claims are based on the same factual scenario, to her claim of unjustifiable disadvantage.

² [1993] 1 ERNZ 115

³ Ibid at pages 10 and 11

⁴ 23 November 1989, WLC111/89)

⁵ [1916] 85 LKJB 857

⁶ (1990) 1NZILR 1055 (LC)

⁷ Ibid at 1069

[35] In support the Respondent submits in particular that:

- Ms Griffiths resigned of her own free will on 23 April 2015;
- The breach of duty alleged by Ms Griffiths is not at the level of sufficient seriousness to support a claim of constructive dismissal based upon a breach of duty;
- Ms Griffiths' Statement of Problem is misleading and excessively litigious;
- Following Ms Griffiths' proffered resignation in August 2014, Witchery actively provided her with coaching and support; and
- Ms Griffiths prayers for relief without reasons at the level sought is further indication of the excessively litigious nature of her claim.

Submissions of the Applicant

[36] The Applicant submits that whilst the onus of proof rests upon it in a constructive dismissal claim, that onus is to be discharged at an investigation meeting.

[37] The Applicant submits in support of her opposition to the strike out application:

- It is not unusual in claims that an employer has committed a breach of duty, to also plead a breach of various implied duties;
- Issues of degree of seriousness and reasonable foreseeability are a matter of fact and degree in each case and cannot be grounds for justifying an application to strike out;
- On 23 April 2015 Ms Griffiths had only an intention to resign, but did not in fact resign as evidenced by the fact that she continued to be employed by Witchery and paid sick leave;
- Ms Griffiths was entitled to claim on 23 April 2015 that she had no option but to resign, but that Witchery's email of the same date reinforced her view;
- In respect of the submission regarding resignation of her own free will, an employee may provide a different reason for the resignation to 'save-face'⁸;

⁸ *Bhana v Creative Field Marketing New Zealand Ltd* ERA Auckland AA 128/09

- the key elements of the cause of action have been properly pleaded;
- As regards the disadvantage claim, Ms Griffiths has pleaded the necessary actions she claims as a disadvantage. The claim can only be determined on the basis of evidence provided at an investigation meeting.

[38] In a strike out application, I must assume that the facts as pleaded are true; it will be for Ms Griffiths to establish them at the substantive hearing in order to succeed on this claim. Ms Griffiths will have to prove that the behaviour of the Witchery management team was sufficiently serious to effect a repudiation of the employment agreement, and to prompt her resignation. She will also have to establish the grounds to support a disadvantage grievance pursuant to s.103(1)(b) of the Act. that

[39] 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 Griffith's claim because there has been no testing of witness or documentary evidence, I cannot be certain that she will not succeed in her claim of constructive dismissal, or of unjustifiable disadvantage.

[40] Nor do I find that the claims are futile, or that no reasonable person could treat them as bona fide. For example I note that in respect of the submissions regarding the email dated 23 April 2015 that an intention to perform an act is not the same as the act itself. I find that this is an issue to be explored at the substantive investigation meeting and not a reason to strike out

[41] I determine that the claims against Witchery are not frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act and should not be dismissed.

Request for Further and Particulars

[42] I have considered the request for further and better particulars, however I consider what is being requested by the Respondent will form part of what will need to be submitted by the Applicant if she is to succeed in her claims by way of witness statements and supporting documentation, where appropriate, for the investigation meeting.

[43] The scheduling for the investigation meeting will ensure that the Respondent will have a timely opportunity at that witness submission stage to make a request for further and particulars if necessary.

Next Steps

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

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority