

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 26
5640595

BETWEEN L
Applicant (responding party)

A N D W LTD
Respondent (applying party)

Member of Authority: Helen Doyle

Representatives: Kevin Murray, Advocate for Applicant
Katherine Dalziel and Amy Kennerley, Counsel for the Respondent

Submissions Received: On the papers
Submissions from Applicant 21 December 2017
Submissions from Respondent 29 November 2017

Date of Determination: 26 February 2018

**DETERMINATION NUMBER 2 OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A The applicant's wage claim is limited to the period from 7 September 2010 in accordance with s 142 of the Employment Relations Act 2000 (the Act).**
- B The applicant's claims under the Holidays Act 2003 are to be further clarified before determination of the period of limitation.**
- C The remaining claims are not dismissed on the grounds they are frivolous and/or vexatious under clause 12 A of the Act. They are to be investigated and determined.**
- D There is to be a telephone conference organised with the Authority to progress the matter.**

E Costs are reserved until after the substantive matter has been determined.

Prohibition from Publication

[1] The Authority determined an application for leave to raise a personal grievance after the expiration of the 90 day period in s 114 of the Employment Relations Act 2000 (“the Act”) in a determination dated 22 March 2017.¹ An order was made in that determination prohibiting from publication the names of the applicant and respondent.² The order for prohibition from publication continues to apply in this determination to the names of the applicant and the respondent.

Employment relationship problem

[2] The application for leave to raise a personal grievance after the expiry of the 90 day period was declined.

[3] This determination is to decide an application made by the respondent to strike out the remaining claims for determination on the following grounds which are the issues for determination:

- (a) the Authority does not have jurisdiction in relation to claims prior to 7 September 2010;
- (b) the applicant’s claim in relation to wages after 7 September 2010 is frivolous; and the remainder of the applicant’s claim is vexatious and the entire matter should be dismissed under clause 12A of the second schedule to the Act.

[4] The application to strike out the applicant’s claim is opposed.

[5] By agreement the application will be dealt with on the basis of the application to strike out, notice of opposition and affidavit evidence from a director of the respondent and from the applicant together with submissions.

¹ [2017] NZERA Christchurch 41

² Above n1 at [1]

The second statement of problem

[6] The first statement of problem was lodged on 7 September 2016. There were then two amended statements of problem lodged. The remaining claims in the second amended statement of problem are:

- (a) That the respondent failed to comply with the provisions of the Holidays Act 2003 when calculating the rate of pay for “sick, statutory and annual leave days.”
- (b) That the respondent made unauthorised deductions from the applicants wages without consent breaching the Wages Protection Act 1983.
- (c) That the respondent entered into a course of action whereby they made underpayment of wages.
- (d) That the respondent unilaterally created debt against the applicant when there was no ability to do so in the employment agreement.
- (e) That there was a failure to have an employment agreement compliant with s 65 of the Act.
- (f) That the respondent created hazards in the work place by failing to comply with health and safety by refusing to permit the use of air conditioning in the work place vehicle.
- (g) That the respondent breached good faith obligations by:
 - (i) failing to be communicative and responsive and
 - (ii) entering into a course of action that was designed to mislead and deceive the applicant by using information gained by the involvement in a health-welfare programme and use the said information against the applicant in her employment.

Can the Authority hear claims lodged prior to 7 September 2010 that are not personal grievances?

Claim for underpayment/unauthorised deduction of wages

[7] The respondent refers to the limitation period in s 142 of the Act to support that the Authority cannot hear claims where an action is commenced more than 6 years after the date the cause of action arose. The focus by the respondent in submissions is on the wages claim. It is clear from Mr Murray’s submission that the

significant claim for the applicant is about the wages. I have separately and additionally considered the claims under the Holiday Act 2003.

[8] The original statement of problem was lodged on 7 September 2016 by the applicant herself. It refers to a claim that she was not paid correctly for annual leave and statutory holidays under the Holidays Act 2003. Further there is a claim she was underpaid for work performed including overtime and that there were unscheduled deductions from her wages.

[9] Mr Murray was instructed after the application to extend time for the personal grievance was determined. In his submissions he says that the applicant began her employment with the respondent in 2002 and ceased her employment on 13 April 2014. He refers to the claim then being lodged within three years of the applicant ending her employment. That is the period for commencing an action for a personal grievance in s 114 (6) of the Act.

[10] Section 142 of the Act provides a limitation period for actions other than personal grievances and states as follows:

No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[11] The remaining claims against the respondent are not personal grievances. A penalty is sought for the alleged good faith breaches.

[12] I turn firstly to the claim for wages. There was consideration by the Employment Court³ about whether the plaintiffs could recover lost remuneration for which liability may have arisen more than six years before proceedings were lodged. In that matter the cause of action was for recovering wages at the minimum rates under s 6 of the Minimum Wage Act 1983. The then Chief Judge Colgan found that the plaintiffs' causes of action arose on the date on which they claim they should have been paid minimum rates for sleepovers. The six year limitation period affected the right to issue proceedings even though it was a claim under s 6 of the Minimum Wage Act 1983.

³ *Law v Board of Trustees of Woodford House* [2014] ERNZ 576 at

[13] In this case I accept the cause of action for the applicant about wages arose on the date on which she says that she was underpaid wages and/or that there were unauthorised deductions under the Wages Protection Act 1983 and/or there was alleged unilateral creation of a debt.

[14] There is no application to extend the time within which the proceedings may have been brought under s 219 or 221 of the Act

[15] This means in accordance with the limitation period in s 142 of the Act the applicant's claims before 7 September 2010 are unable to be commenced and investigated as they relate to underpayment of wages, unauthorised deductions from wages and alleged unilateral creation of a debt.

Holiday pay claim

[16] This claim is less clear. It has been held by the Employment Court in *Vince Roberts Electrical Ltd v Carroll*⁴ when considering limitation under the Holidays Act 2003:

If at the time of the termination of employment there is accumulated leave, which has not been taken or paid for, then there are prescribed formulae for calculating the amount owing for such outstanding leave at that date. While limitation applies, it cannot commence to run until completion of the leave having been taken and not paid for during the employment; or, if it is accumulated leave owing at the date of termination, limitation runs from that date of termination of employment.⁵

[17] The claim under the Holidays Act 2003 needs to be further clarified to properly consider when limitation runs from.

Clause 12A in the second schedule to the Act

[18] The respondent has referred to clause 12A in the second schedule of the Act and the power of the Authority to dismiss frivolous or vexatious proceedings.

12A 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.

⁴ *Vince Roberts Electrical Ltd v Carroll* [2014] NZEmpC 112

⁵ Above n 4 at [26]

Claim that the wages claim and remainder of the claim after 7 September 2010 is frivolous and vexatious

[19] Clause 12A was considered for the first time by the Employment Court in *Lumsden v Sky City Management Limited*.⁶

[20] It is abundantly clear from the judgment that the power of the Authority to dismiss matters under this provision is very limited indeed. There is the additional difficulty for the respondent in that Judge Inglis, as Chief Judge Inglis was then, held that the Authority has no power under clause 12A to dismiss a part of a matter.⁷ The claim under the Holidays Act 2003 remains at this stage for clarification and investigation. It is difficult to see how a claim under the Holidays Act 2003 could be dismissed without investigation on the grounds it was frivolous and/or vexatious.

[21] The applicant and respondent clearly have very different views which are apparent from their respective affidavit evidence about the merits of the applicant's claim. It is important therefore to set out that in *Lumsden* it was found that something more was required for finding a matter frivolous than simply that it has no reasonable prospect of success. It needs to be something that "trifles with the Authority's processes" and something that cannot be taken seriously.⁸

[22] The respondent by its director states in his affidavit that he is confused by the basis for the claim and what the applicant is "hoping to achieve" even after three statements of problem. Those are matters that the Authority can clarify with the applicant's representative before the matter proceeds to an investigation meeting. A lack of clarity does not enable the Authority to dismiss the whole matter on the basis that it is frivolous and/or vexatious.

[23] It is unclear whether the claims other than those for wages and under the Holidays Act 2003 will be pursued at this stage but again that is something that can be clarified. In *Lumsden*⁹ there was reference to the special characteristic of the jurisdiction and the underlying policy of the Act. The Authority is tasked with investigating and determining matters on their substantive merits without undue regard to legalities and technicalities. It was stated in *Lumsden* that "Dismissing

⁶ *Lumsden v Sky City Management Ltd* [2015] NZEmpC 225

⁷ *Lumsden v Sky City* above n 6 at [21]

⁸ *Lumsden v Sky City* above n 6 at [37]

⁹ *Lumsden v Sky City* above n 6 at [38]

claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.”

[24] I do not find that the wages claim by the applicant is frivolous. It does not lack seriousness. The applicant’s affidavit supports that she is serious in her claim. Whilst there was some delay by the applicant in compiling information relating to the wages claim it was done eventually.

[25] I further do not consider the proceeding vexatious simply because it requires clarification. In concluding the claim is not vexatious I have had regard to the Employment Court judgment in *Gapuzan v Pratt & Whitney Air New Zealand Services (T/A Christchurch Engine Centre)*.¹⁰ I do not conclude that the matter is without any basis or that there is an improper purpose in commencing proceedings.

Determination

[26] In conclusion the wages claim is limited to the period after 7 September 2010. The Holidays Act 2003 claim is to be clarified before the Authority can determine when the limitation period runs from. The remaining claims are not dismissed under clause 12A of schedule 2 of the Act.

Telephone Conference

[27] The Authority officer is to organise a further telephone conference to progress the matter towards an investigation meeting.

Costs

[28] Costs are reserved until after the substantive matter has been determined.

Helen Doyle
Member of the Employment Relations Authority

¹⁰ *Gapuzan v Pratt & Whitney Air New Zealand Services, (T/A Christchurch Engine Centre)* [2014] NZEmpC 206