



# Employment Court of New Zealand

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## Rachelle v Air New Zealand Limited [2018] NZEmpC 75 (10 July 2018)

Last Updated: 18 July 2018

IN THE EMPLOYMENT COURT  
CHRISTCHURCH

[\[2018\] NZEmpC 75](#)  
EMPC 250/2017

IN THE MATTER OF      a challenge to a determination of  
                                 the Employment Relations  
                                 Authority  
AND IN THE MATTER    of an application to strike out  
                                 certain pleadings  
BETWEEN                GEORGINA RACHELLE  
                                 Plaintiff  
AND                        AIR NEW ZEALAND LIMITED  
                                 Defendant

Hearing:                On the papers filed 21, 25 and 29 June  
                                 2018  
Appearances:        Plaintiff, in person  
                                 P A Caisley, counsel for the defendant  
Judgment:             10 July 2018

### INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE K G SMITH STRIKE OUT

[1] Air New Zealand Ltd has applied to strike-out three causes of action in the fifth amended statement of claim by Georgina Rachelle. They are described in the pleadings as workplace discrimination, defamation and sexual harassment.

[2] Ms Rachelle maintains that none of these causes of action should be struck out.

#### Jurisdiction to strike out

[3] The Court has power to strike out all or part of a pleading.<sup>1</sup> The criteria to apply are well known and are as follows: 2  
1 [Employment Court Regulations 2000](#), reg 6(2)(a)(ii) and [High Court Rules 2016](#), r 15.1.

2. See *A G v Prince* [\[1997\] NZCA 349](#); [\[1998\] 1 NZLR 262](#) and *Couch v Attorney-General* [\[2008\] NZSC 45](#), [\[2008\] 3 NZLR 725](#) at [\[33\]](#).

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(a) Pleadings facts, whether or not they are admitted, are assumed to be true. That does not extend to pleaded allegations which are speculative and without foundation.

(b) The cause of action or defence must be clearly untenable, sometimes expressed as striking out a claim being inappropriate unless the Court can be certain it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases, reflecting a reluctance to terminate a claim, or defence, short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be slow to strike out a claim in a developing area of law.

[4] Air NZ's application is based on the causes of action being statute-barred or outside the Court's jurisdiction. Consequently, a further consideration emerges from the Supreme Court decision in *Murray v Morel & Co Ltd*; the proper approach is that to succeed the defendant has to satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the claim can properly be regarded as frivolous, vexatious or an abuse of process.<sup>3</sup>

### The plaintiff's case

[5] In this case the pleadings do not fully describe the circumstances leading up to the challenge in a way that makes it easy to create a narrative from them. Consequently, the following description is taken from the pleadings and the Employment Relations Authority determination.

[6] Ms Rachelle challenged an Authority determination dismissing all of her personal grievance claims against Air NZ.<sup>4</sup> She had initially worked for Mt Cook

<sup>3</sup> *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33].

<sup>4</sup> *Rachelle v Air New Zealand Ltd* [2017] NZERA Christchurch 140.

Airline. In a transition for managing airline ground operations in Queenstown, from Mt Cook to Air NZ, she signed an agreement for casual employment with Air NZ but, for some time, continued to work for Mt Cook.

[7] In the fifth amended statement of claim, she drew little, if any, distinction between those companies because they are related. The pleadings, therefore, sometimes attributed the alleged behaviour said to give rise to her personal grievances to persons who might have been employed by either company, or in ways that did not distinguish when an employee stopped working for one and began working for the other. In any event, after signing a casual employment agreement with Air NZ she applied unsuccessfully for a permanent part-time position with the company.

[8] On 12 June 2016 the casual employment agreement was terminated by Air NZ. The Authority dismissed her claim for unjustified dismissal arising from the termination of that agreement. Her claim for an unjustified action, based on an alleged unilateral variation to her hours of work, was also unsuccessful.<sup>5</sup> Her claim that a personal grievance arose from not being appointed to a permanent position was dismissed because it had not been raised within 90 days as provided for by [s 114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act). A claim of discrimination, based on marital status, was dismissed for the same reason.

[9] Ms Rachelle's fifth amended statement of claim in this challenge pleaded several causes of action against Air NZ as follows:

- (a) workplace discrimination;
- (b) harassment and bullying within the workplace;
- (c) breaches of 12 workplace codes and conducts;
- (d) breaches of privacy law act within the workplace;
- (e) unlawful dismissal;

<sup>5</sup> At [39].

(f) several breaches of policies and procedures;

(g) defamation of character; and

(h) sexual harassment.

[10] Not all of those pleadings were fully described in the amended statement of claim but further particulars of some of them were included in a separate section of it.

[11] The pleading of workplace discrimination was said to have arisen from an unjustified accusation that Ms Rachelle had sworn at a pilot. The accusation was retracted, but she was then informed that her divorce was "causing undue stress to her fellow work colleagues". Alongside this pleading was a reference to the name of the manager, and a work colleague, who were presumably the people to whom this behaviour was attributed, and the dates "22nd Dec 2015-2016".

[12] Her further particulars plead that, on 22 December 2015, she was informed by the same two named people, referred to as "Management at Queenstown Airport", that she was not being considered for a permanent part-time position:

...due to allegations of swearing at a pilot as well as her marital status.

[13] The pleading does not identify if the named people were employed by Air NZ or Mt Cook Airlines at the time when those events occurred.

[14] The pleading of defamation was further explained as:

The plaintiff, has been unable to seek employment for the last 3 years, due to the repercussions of Air New Zealand Limited and the managements influence on its employees. **(All involved employees of Air New Zealand Limited) (2016)**

(emphasis in the original)

[15] The claim of sexual harassment was expanded on in the following way:

- Sexual Harassment

The plaintiff was subjected to sexual harassment via the Head Office HR Department in **(2016). ([employee's name] from HR Air New Zealand Department)**

(emphasis in the original)

[16] The alleged harassment was a remark, or accusation, made to Ms Rachelle which she found offensive, humiliating and foul.

### **Workplace discrimination**

[17] Air NZ's application was based on the workplace discrimination cause of action being barred by [s 114\(1\)](#) of the Act. A personal grievance is required to be raised within 90 days from the date of the action giving rise to it having occurred or come to the employee's notice. Air NZ maintained this claim could not be considered because the section had not been complied with.

[18] Mr Caisley relied on the plaintiff's amended statement of claim stating she informed her employer of the personal grievance on 15 August 2016. That is the date on which her lawyer wrote to Air NZ raising personal grievances on her behalf. Air NZ does not accept the letter can be read as raising a personal grievance of discrimination but, regardless, more than 90 days elapsed between the date of the meeting, in December 2015, and the lawyer's letter.

[19] As pleaded the available time to raise a personal grievance, as of right, elapsed in mid-April so that her lawyer's letter was too late to comply with [s 114](#). Ms Rachelle's submissions, resisting this application, concentrated on defining discrimination. She did not seek to contradict the point made for the company, or refer to any part of the pleading to say the grievance was raised in time, or that the company otherwise consented to it being raised out of time.

[20] The tests referred to in paragraphs [3] and [4] earlier in this decision have been satisfied. Ms Rachelle did not raise a personal grievance based on workplace discrimination within 90 days and she cannot succeed in her claim based on it.

[21] The pleading alleging workplace discrimination in the fifth amended statement of claim is struck out.

### **Defamation**

[22] Air NZ's application to strike out those parts of the amended statement of claim referring to defamation rely on the Court's jurisdiction to hear claims based in tort being limited,<sup>6</sup> confined those actions resulting from, or relating to, a strike or lockout.<sup>7</sup>

[23] Ms Rachelle's response was to set out in her submissions definitions of defamation indicating that what she intended was an action based on damage allegedly sustained to her professional reputation. Her pleading, and submissions, make it clear that the intention was to bring an action relying on the tort of defamation and the [Defamation Act 1992](#).

[24] The Court does not have jurisdiction to hear and decide the claim for defamation.<sup>8</sup> The pleading claiming relief for alleged defamation is struck out.

### **Sexual harassment**

[25] Sexual harassment does give rise to a personal grievance: see s 103(1)(d). Before s 103(1)(d) applies, the behaviour

constituting the harassment must take place during the employee's employment.

[26] Air NZ's application was based on Ms Rachelle's cause of action containing pleadings that showed the section could not apply, regardless of the allegation, because the remark described occurred after her employment had ended.

[27] Ms Rachelle pleaded she received a letter from Air NZ dismissing her from her casual employment dated 14 June 2016. The letter was produced to the Court and is dated 12 June 2016, but the error in the pleading is not material; her employment ended in June. She was offended by a remark made in July 2016. No specific date in July was mentioned, but it was the month following her employment agreement ending.

6 See [Employment Relations Act 2000, s 187\(1\)\(h\)](#).

7 [Employment Relations Act 2000, ss 99, 161\(1\)\(r\), 187\(1\)\(a\), and 187\(1\)\(h\)](#).

8. See, as examples, *Candyland Ltd v Jarvis* [2012] NZEmpC 210 at [14] and *Bishop t/a Debtor Communications v Bennet* [2011] NZEmpC 127 at [63].

[28] In her submissions Ms Rachelle concentrated on providing a definition of sexual harassment. She made the point, in her opinion, that Air NZ's head office HR and legal team were out of their depth and added:

The foul and unprofessional comment was made by [named person] in July 2016, resulting in the plaintiff being quite disturbed, upset and immensely emotionally violated.

[29] These submissions repeated the pleading about the date on which the remark was made and do not contest what was said by Air NZ about the timing of what happened, or its bearing on her ability to raise a personal grievance. Even if Ms Rachelle was able to prove what she complained about amounted to sexual harassment, a personal grievance cannot have occurred because she was not employed by Air NZ at the time.

[30] This cause of action is struck out.

## Outcome

[31] Air NZ's application to strike out the three identified causes of action in the fifth amended statement of claim is successful and they are struck out accordingly.

[32] Costs are reserved.

K G Smith Judge

Judgment signed at 9.25 am on Tuesday 10 July 2018