

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 46/09  
ARC 64/09**

IN THE MATTER OF            a challenge to determination of the  
   Employment Relations Authority

AND IN THE MATTER OF    an application to strike out statement of  
   claim

BETWEEN                      LING ZHANG  
   Plaintiff

AND                              HOLLYWOOD BAKERY  
   (HOLDINGS) LIMITED  
   Defendant

Hearing:            13 November 2009  
   (Heard in Auckland)

Appearances: Mr Q Li, Advocate for Plaintiff (assisted by Mr Luke Lee, Mandarin  
   Interpreter)  
   Mr D L C Liu, Counsel for Defendant

Judgment:        3 December 2009

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**JUDGMENT OF JUDGE M E PERKINS**

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**Introduction**

[1] The plaintiff has filed a de novo challenge to the determination of the Employment Relations Authority (the Authority) dated 31 July 2009. The original statement of claim filed in this Court attached a copy of that determination. Following objection being taken to the form of the pleadings contained within the statement of claim, time was extended to the plaintiff to file an amended statement of claim. This was filed on 12 October 2009, by which time the Authority had issued a further determination in respect of costs and a challenge is made to that determination in addition to the substantive decision.

[2] Following the filing of the first statement of claim in this Court, the defendant made an interlocutory application for an order striking out the plaintiff's statement of claim. Despite the amended pleadings, it wishes to pursue that application.

[3] In addition to the filing of the amended statement of claim on 12 October 2009, the plaintiff also filed an application for stay of proceedings. It is unclear exactly what stay is being sought. However, I am presuming that the application for stay relates to the order for costs, which was made against the plaintiff in the second determination by the Authority.

[4] In support of the application for an order striking out the plaintiff's statement of claim, there is an affidavit from Mr Ka Yen Kenneth Choi, who is the general manager of the defendant company. Documents, which have been filed by the plaintiff in answer to the application to strike out, include a notice of opposition signed by the plaintiff. This is almost incomprehensible. However, I am taking it to mean that the plaintiff opposes the application for strike out. In addition to the notice of opposition, there is an affidavit from the plaintiff, Ling Zhang. This is described as being an affidavit "*in support of an interlocutory application by plaintiff for order striking out the defendant's statement of claim.*" That is clearly incorrect as only the defendant has filed such an application. I am presuming that Ms Zhang's affidavit supports the notice of opposition and is in answer to Mr Choi's affidavit. There are other problems with this affidavit. The jurat does not appear to have been signed by the plaintiff, although her signature does appear at the foot of the final page, which contains the jurat. She has signed every other page, including the intitling page. The affidavit has been sworn before a Justice of the Peace.

[5] In submissions, which had been filed in advance, Mr Liu, for the defendant applicant, took objection to the Court reading this affidavit from Ms Zhang. This was in view of the defects and also on the basis that in the body of the document, Ms Zhang stated that she did not understand and could not read English. Accordingly, Mr Liu submitted that there are serious doubts about the validity of the affidavit, which is expressed entirely in English and is unaccompanied by any certificate or affidavit of translation.

[6] At the hearing and despite the objections to the affidavit, which he had set out in his earlier filed written submissions, Mr Liu withdrew his objection to the affidavit being read. I have proceeded with this matter on the basis that the affidavit should be read despite the irregularities. The Justice of the Peace, Mr Sydney Eric Smith, who took the oath from Ms Zhang, appears on the face of the jurat to have been satisfied as to her comprehension, as the oath would have been taken in English.

[7] At the hearing of the strike out application, Mr Liu spoke to his two sets of written submissions and in particular, those dated 10 November 2009. Mr Li, the advocate for Ms Zhang, also spoke to me through an interpreter. He had, the day before the hearing, filed a document which is titled "*Memorandum of counsel for Plaintiff*". This document is also signed by Mr Li purporting to be counsel for the plaintiff. Mr Li, of course, could not be counsel for the plaintiff as he conceded at the hearing that he is not legally qualified. However, in view of the language difficulties, I accepted submissions from him as an advocate for Ms Zhang. Mr Liu had not read the memorandum as he had not been served with it. I therefore allowed him some opportunity at the hearing to read it and make further submissions if he wished. He chose not to make any further submissions. The memorandum contains matters, which appear to me to be totally irrelevant to the strike out application. It incorporates what appear to be political statements. Again they are very difficult to comprehend.

[8] Before turning from introductory matters I deal with one issue, which appears to have originally been a point of confusion in this matter. It is now resolved. Originally, Ms Zhang described her employer as Hollywood Bakery Limited. It has become clear that the true name of the employer is Hollywood Bakery (Holdings) Limited. Hollywood Bakery Limited is a company, which was struck from the register some considerable time ago and clearly was never the employer of Ms Zhang. Mr Choi has annexed to his affidavit, documents confirming the present existence of Hollywood Bakery (Holdings) Limited and the striking from the register of Hollywood Bakery Limited. The documents emanating from Ms Zhang in respect of the present proceedings seem to suggest that she continues to take some issue on that point. While it is difficult to ascertain exactly what point is being made, I accept

that the correct employer is Hollywood Bakery (Holdings) Limited. The determination of the Authority describes the defendant in that way and I note that in more recent documents filed on behalf of Ms Zhang that is the way the defendant is described.

### **Factual background**

[9] As the statement of facts contained in the statement of claim, amended statement of claim and affidavit of Ms Zhang are expressed in language difficult to understand, I have used the affidavit of Mr Choi and the brief statement of facts contained in the determination to summarise the factual position. I am not trying to be critical of the plaintiff in this respect, but it is clear that as a result of language difficulties, her position has not been expressed as clearly as it might have been.

[10] The employment dispute between the parties arose when the plaintiff was a café assistant for the defendant's café in the Westgate Shopping Mall. In March 2009, the defendant company was considering implementing cost-cutting measures by reducing staff numbers and staff work hours. This was as a response to the downturn in the business caused by the economic recession. In an effort to gain feedback from the staff, the company set out proposals it was considering. This appears to have been misunderstood by Ms Zhang and she wrote to the company objecting to what she perceived to be the company's decision to reduce her hours. The company was a little taken aback by this as it had not made any decision and was merely in discussion with the staff as part of a consultation process. Despite assurances given to her by the company that her position was not to be altered at that stage, she was not content. She then raised issues concerning outstanding holiday pay and requested the company provide her with time and wage records for the entire period that she had worked for the company, which dated back over 11 years.

[11] At Ms Zhang's request, Mr Choi, along with the company's solicitor, attended a formal mediation with Ms Zhang and her advocate on 9 April 2009 to discuss her concerns and endeavour to resolve matters. At the conclusion of the mediation a formal settlement was reached pursuant to s149 of the Employment Relations Act 2000 ("the Act"). That settlement was recorded in writing, signed by the parties and endorsed by the certificate and signature of the

mediator. Mr Choi has attached a copy of the record of settlement to his affidavit. The agreement contained a provision that the terms of the settlement and all matters discussed at the mediation were to remain confidential to the parties. However, for the purposes of this decision, I need to refer to them because of the actions taken by the plaintiff following that settlement.

[12] The terms of the settlement agreement are as follows:

- a) That the company would provide the plaintiff, within seven working days of the agreement, all her time and wage records in the defendant's possession, for the previous six years and eight months from the date of the agreement.
- b) That within five working days of the plaintiff receiving her time and wage records the defendant would either:
  - i) provide her with evidence that all leave has been paid correctly;  
or
  - ii) pay her any outstanding wage and leave entitlements.
- c) That the plaintiff's work hours would remain 8.00am to 6.00pm Wednesday to Monday at the rate of \$15 per hour unless otherwise agreed in the future.
- d) The agreement was stated to be in full and final settlement of all matters discussed at the mediation between the parties arising out of the employment relationship between the plaintiff and the defendant to the date of the agreement.

[13] As I indicated earlier, the employer was described in the agreement as Hollywood Bakery Limited but Mr Choi in his affidavit has cleared up that point. He has now indicated that the employer was definitely Hollywood Bakery (Holdings) Limited.

[14] Once that agreement was reached there was an accord and satisfaction of the dispute. Mr Choi states that in compliance with the terms of the agreement on 22 April 2009, the plaintiff had her time and wage records hand delivered to her. There appears to be no dispute that she received these records. Mr Choi's letter enclosing the records is attached to his affidavit. He states that Ms Zhang admitted at the investigation hearing before the Authority on 21 July 2009 that she had received those documents. Indeed, in paragraph nine of her affidavit filed in this Court, she concedes that the documents were received by her.

[15] Mr Choi states that following the delivery of the records to Ms Zhang a review was made of her whole record and it was found that she was entitled to outstanding holiday pay and leave entitlement amounting to \$3,055 gross (\$2,361.52 net of PAYE). On 29 April 2009, in compliance with the terms of the settlement agreement, Mr Choi arranged for his letter of that date attaching the company's cheque for the amount of the net pay, together with her holiday pay and leave entitlement calculations to be delivered to Ms Zhang. Even though it was not a term of the settlement, apparently Ms Zhang had insisted on being provided with a written employment contract and this document was also included with the letter of 29 April. When Mr Choi's representative endeavoured to deliver the letter, cheque and agreement to Ms Zhang she refused to accept it because the company's trade logo was not imprinted on each page of the documents. Mr Choi visited her on 30 April 2009 to make another attempt to deliver the documents to her but again she refused to accept them unless the company's logo was imprinted on each page. While Mr Choi did not consider this request to be reasonable, he went back to the head office of the defendant company and arranged for the company's trade logo to be imprinted on each and every page of the documents. He then returned to the Westgate café on 3 May 2009 and again asked Ms Zhang to accept the documents. Ms Zhang told him that it was out of time and that she had already commenced proceedings in the Authority.

[16] Mr Choi, being faced with this position, then prepared a fresh letter dated 4 May 2009 recording the sequence of events and arranged for the documents, including the cheque, to be couriered to Ms Zhang's home address. Attached to his affidavit are documents confirming delivery of that couriered package to Ms Zhang.

There is no denial by Ms Zhang in her affidavit that the couriered pack was received by her and in any event this would appear to be confirmed by the fact that a copy of the cheque is attached as an exhibit to her affidavit.

[17] By this time the defendant would appear to have acted in clear compliance with the settlement. The plaintiff nevertheless stated a problem to the Authority. This was filed in early May 2009. In her affidavit Ms Zhang refers to it as her "*arbitration application*". A copy of the application is annexed to her affidavit. A perusal of the document reveals that she alleges that there had not been compliance with the agreement and she sought orders for compliance with the terms of the agreement. In addition, there was an application for costs in the total sum of \$7,380.53. This part of the application to the Authority appears to consist of a combination of the filing fee, legal fees of \$5,770.53 and compensation of \$1,000, which she refers to as "*psychological influence*".

[18] Following investigation by the Member of the Authority, determinations were issued confirming that compliance had already been made by the defendant company and ordering costs against Ms Zhang in the sum of \$4,000. As I have indicated, the present challenge to this Court arises from those determinations.

### **Principles applying**

[19] The grounds upon which the strike out order is sought are as follows:

- a) That the statement of claim (now the amended statement of claim) has wholly failed to articulate and assemble allegations in a way which amounts to a proper pleading and accordingly fails to comply with the requirements of reg 11 of the Employment Court Regulations 2000. That the statement of claim is beyond repair.
- b) The statement of claim discloses no reasonable cause of action.
- c) The proceeding is frivolous, vexatious and otherwise an abuse of process of the Court.

- d) None of the causes of action in the plaintiff's statement of claim is reasonably arguable or can succeed.
- e) Upon the further grounds appearing in the affidavit of Mr Choi.

[20] The defendant, as applicant in this matter, relies upon reg 6 of the Employment Court Regulations 2000 and rules 12.2 and 15.1 of the High Court Rules, together with the decision of *Woud v Department of Corrections*.<sup>1</sup> That was a decision where proceedings were struck out on the principle of *res judicata*.

[21] In *Sibly v Christchurch City Council*,<sup>2</sup> a judgment of the full Court of the Employment Court, the jurisdiction to strike out was confirmed. While the application in that case was unsuccessful the Court confirmed that the principles to be applied are those which were summarised in *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IOUW and Steiner and Spartan Engineering*<sup>3</sup> as follows:

- a) It must be demonstrated that the case pleaded is so clearly untenable that it cannot possibly succeed.
- b) The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied that it can reach a definite and certain conclusion.
- c) It is not a valid criticism of an application to strike out that extensive and complex argument and even evidence is necessary to demonstrate that the case is clear enough for the Court to exercise its summary powers of striking out.
- d) The Court will not strike out a proceeding if, on the way to doing so, it has to decide disputed questions of fact.
- e) Even if jurisdiction exists and the absence of a tenable case is established, the Court has a residual discretion to decline the application if the justice of the case so requires, but that discretion will often be exercised if the Court has been able to form a clear view of the case.

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<sup>1</sup> [2007] ERNZ 284

<sup>2</sup> [2002] 1 ERNZ 476

<sup>3</sup> (1989) ERNZ Sel Cas 516; [1989] 3 NZILR 284



[22] In *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc*<sup>4</sup> the Court of Appeal confirmed that the Employment Court is to approach strike out applications on the same basis as that applying to the High Court.

[23] In *Lloyd v Museum of New Zealand Te Papa Tongarewa*<sup>5</sup> Judge Shaw discussed similar issues. She confirmed that on the basis of s162 and 221 of the Act, reg 6 of the Employment Court Regulations 2000 and cl 15 of the third schedule of the Act and finally an inherent power of the Court to control its own processes, the Employment Court had power to strike out proceedings. The effect of cl 15 of the third schedule is to grant the Court a power to dismiss frivolous cases.

[24] Even though the Employment Court is to approach the matter on the same basis as that which would apply in civil actions in the High Court, the jurisdiction of the Employment Court in dealing with challenges to determinations of the Authority is analogous to an appellate jurisdiction. The forms prescribed for such a challenge contain in the pre-printed parts a good deal of information, which goes some way to inform the opposing party of the nature of the challenge. Nevertheless, reg 11 of the Employment Court Regulations 2000 describes what particulars must be specified, which includes a summary of the facts from which the challenge is based.

### **Counsel/advocate's submissions**

[25] Mr Liu relies on two main grounds for the application to strike out the statement of claim. The first is obviously that there has been a final and binding settlement between the parties in respect of the dispute between them and that accordingly the plaintiff is barred from suing by virtue of that settlement agreement and the defendant's compliance with it. The original statement of problem to the Authority effectively sought compliance orders of that settlement agreement. Even though the costs were sought, it must be implicit from the basis of that statement of problem that the plaintiff accepted and relied upon the settlement agreement. The Authority found the defendant had complied with it.

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<sup>4</sup> [2005] ERNZ 1053, 1057

<sup>5</sup> [2002] 2 ERNZ 356

[26] Mr Liu now relies upon the affidavit evidence to establish that there is evidence not only from the defendant but also from the plaintiff confirming compliance with the settlement agreement. So far as the payment is concerned a cheque has been tendered along with proper calculations, even though that cheque has apparently not been banked by the plaintiff.

[27] The second main ground relied upon by Mr Liu is that the amended statement of claim raises no cause of action, or that if there are purported causes of action contained in the document they cannot succeed. That is particularly so in relation to the claim which has now been added to what was originally before the Authority. Not only are costs now claimed against the defendant but a further claim for \$10,000 for mental suffering has been added. In respect of this new claim now before the Court, Mr Liu submits that such a claim is not tenable because the settlement agreement was a full and final settlement of all issues then outstanding between the parties. In any event, he submits, the amended statement of claim does not provide any basis justifying the making of an award of general damages and provides no basis for calculation for an award of costs in the sum sought.

[28] Mr Lui also submits that on the basis of reg 11 of the Employment Court Regulations 2000, there is simply a failure to provide the information, which would fully and fairly inform the defendant and the Court of the nature and details of the claim, the relief sought and the grounds upon which it is sought. It needs to be remembered in this context that following the initial statement of claim there was a Court direction that the plaintiff file an amended statement of claim in compliance with the regulation.

[29] Mr Li spoke to the memorandum, which was filed the day before the hearing. As I have indicated I find the written memorandum virtually incomprehensible. When speaking to me through the interpreter at the hearing in answer to Mr Liu's submissions he indicated that there was some tape-recorded evidence. He did not elucidate upon this but I am taking it that he is referring to the tape-recording which was mentioned in the determination of the Authority. Mr Li did not go on to explain how that might relate to the present application to strike out. He also submitted that the documents, which had been presented to the Court, are not the same as those

which were presented at mediation, that is, that the documents were in altered format. When I questioned him as to what documents he was referring to he confirmed that he was referring to the documents annexed as exhibits to Ms Zhang's affidavit. He did not go on to elucidate how those documents had been altered. My perusal of the material documents relating to the issues in question now, disclose that the documents as between those contained in Ms Zhang's affidavit and those contained in Mr Choi's affidavit are the same. There is no evidence that they have been altered as alleged.

[30] One further matter, which I raised with Mr Li, is the fact that there now appears in the amended statement of claim to be an allegation that Ms Zhang was "*illegally dismissed*" and has lost income. Mr Li, when questioned by me about this through the interpreter, confirmed that Ms Zhang's subsequent dismissal by the defendant is to be the subject of a separate proceeding to be lodged with the Authority. I took it from this that that particular part of the amended statement of claim does not present any new issue to be determined in the challenge.

[31] Apart from those issues, Mr Li did not deal specifically with the matters raised in the application to strike out or by Mr Liu in his submissions.

## **Findings**

[32] It is clear that the statement of problem to the Authority was an application for compliance orders to enforce the agreement in settlement, which had been reached at mediation. The Member of the Authority treated the matter that way and having investigated the matter, made findings that the defendant had complied with the agreement. In view of those findings Ms Zhang was ordered to pay costs of \$4,000 as a contribution towards the defendant's costs in respect of the proceeding before the Authority.

[33] The challenge now before the Court is virtually the same as the problem presented to the Authority, except that in addition to the further costs now being sought, there is the added claim for compensation. However, the affidavits, which have been filed both in support of the application now made to strike out and Ms Zhang's affidavit in answer, contain documents not only confirming the settlement

reached at mediation, but that the defendant has fully complied with the conditions of the settlement. Obviously, it is up to Ms Zhang as to whether or not she chooses to bank the cheque she has received. Her added requirements, first of a copy of her employment contract and secondly, that it be endorsed with the company's logo, appear to me to be unreasonable requirements and an attempt to add additional conditions to the settlement. Nevertheless, it is clear that the defendant has complied with those further requests also.

[34] So far as the claim now made for compensation is concerned, where it is accepted that there has been an agreement in full and final settlement of all outstanding issues relating to the employment contract, to add a claim for compensation is untenable. Quite apart from that, I accept Mr Liu's submissions that the amended statement of claim provides no basis for that added claim. Indeed, I find the allegations of fact contained in the amended statement of claim as confused and unfocused. That applies also to many parts of Ms Zhang's affidavit and the notice of opposition. The memorandum of Mr Li, filed the day before the hearing, is also virtually impossible to understand. It appears to present matters having no relevance whatsoever to the present application and contains material amounting to political statements.

[35] So far as any costs are concerned these are stated in the amended statement of claim to be "*lawyer's professional fee*"(sic). Mr Li is not legally qualified. There is no evidence before the Court that Ms Zhang has incurred legal fees of any nature. I perceive from what I have read in the documents presented and heard at the hearing that the so called legal fees are claimed for services rendered by Mr Li.

### **Disposition**

[36] Applying the principles enunciated in the *New Zealand (with exceptions) Shipwrights Union* case, while the jurisdiction must be exercised sparingly, it is clear that in this case, the claim made by Ms Zhang is clearly untenable. It cannot possibly succeed. There are no disputed questions of fact to be resolved as the settlement agreement has been confirmed. It is clear from the documents, which have been presented as exhibits, that the defendant has fully complied with that settlement agreement. Indeed, the defendant as employer has provided further

documents to Ms Zhang, which it did not need to provide, in order to satisfy her requests not specifically part of the settlement agreement.

[37] Having considered the matter fully I conclude that the plaintiff's challenge in this Court is a frivolous case of the kind specified in cl 15 of the third schedule to the Act, which should be dismissed. The defendant's application to strike out the statement of claim is granted. The proceedings are dismissed. The plaintiff is ordered to pay to the defendant the sum of \$4,000 by way of costs awarded by the Authority. In addition to that, the defendant is entitled to an award of costs in respect of the proceedings in this Court by way of the de novo challenge and on the successful application to strike out. Mr Liu and Mr Li have 14 days to enable them to file and serve memoranda as to costs. Such memoranda are to be filed simultaneously.

  
ME Perkins  
Judge

Judgment signed at 10 am on Thursday 3 December 2009