IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 23
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 part of the proceedings
BETWEEN	GEORGINA RACHELLE Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: On the papers

Appearances: G Rachelle, plaintiff in person
P Caisley, counsel for defendant

Judgment: 5 March 2019

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE K G SMITH
(Application to strike out part of the proceeding)

---

[1] On 30 October 2018 Air New Zealand Ltd applied to strike out two of the remaining five causes of action pleaded against it by Georgina Rachelle.

[2] Ms Rachelle filed a fifth amended statement of claim, dated 18 June 2018, alleging eight causes of action against Air NZ. Those causes of action were:

(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;

(f) several breaches of policies and procedures carried out within the workforce;

(g) defamation of character; and

(h) sexual harassment.

[3] Air NZ successfully applied to strike out three of those causes of action, namely those alleging workplace discrimination, defamation and sexual harassment.[1]

[4] Subsequently, Air NZ applied for orders requiring Ms Rachelle to provide further and better particulars of the remaining five causes of action. That application was granted, in part, for those pleadings alleging harassment and bullying within the workplace, breaches of 12 workplace "codes and conducts", and where there was an allegation of several breaches of policies and procedures. The application for further and better particulars for the alleged breaches of privacy and "unlawful dismissal" (meaning unjustified dismissal) was declined.[2]

[5] This application to strike out is about the two causes of action where orders for further and better particulars were declined. Air NZ now seeks to strike out the pleadings about breaches of the "Privacy Law Act within the workplace" and "unlawful dismissal". Ms Rachelle opposed this application. In doing so, her submissions included a request that the causes of action previously struck out be reinstated.

[6] The grounds of this application are that, in relation to both pleadings, the personal grievances to which they relate were not raised within 90 days as is required

---

1 *Rachelle v Air New Zealand Ltd (No 2)* [2018] NZEmpC 75.
2 *Rachelle v Air New Zealand Ltd (No 3)* [2018] NZEmpC 102.

by s 114(1) of the Employment Relations Act 2000 (the Act). Air NZ maintains that these pleadings are out of time, that it has not consented to those personal grievances being raised out of time and it has not otherwise waived compliance with s 114(1). Ms Rachelle's response was that both of those personal grievances were raised within time, because of a letter written on her behalf by her then lawyer to Air NZ.

Jurisdiction to strike out

[7] The Court has jurisdiction to strike out all or part of a pleading.[3] The criteria to apply are well known:[4]

(a) Pleaded 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.

[8] In this case a further consideration is the Court's ability to take into account the content of affidavits filed by Air NZ in support of its application to strike out parts of the statement of claim. In *Attorney-General v McVeagh* the Court of Appeal held that a court is entitled to receive affidavit evidence on a strike out application and may

---

3 Employment Court Regulations 2000, reg 6(2)(a)(ii); High Court Rules 2016, r 15.1.

4 See *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

do so in a proper case. However, the Court would not attempt to resolve genuinely disputed issues of fact. That means the evidence in an affidavit will generally be limited to that which is undisputed. Furthermore, that evidence will not be considered if it is inconsistent with a pleading, because a strike out application is dealt with on the basis that the pleaded facts can be proved.[5]

[9] The two affidavits Air NZ relied on were by Jeremy Holman, who was at relevant times employed as its Head of Regional Airports, and Christina Guthrie, who is employed as its Senior Manager Customer – Auckland Airport and was previously its Airport Manager – Queenstown. Before being employed by Air NZ Ms Guthrie was employed by Mt Cook Airline as Airport Manager – Queenstown.

[10] Mr Holman produced a copy of a letter written to Air NZ by Ms Rachelle's lawyer dated 15 August 2016, raising personal grievances on her behalf. Ms Guthrie's affidavit contained a brief work history for Ms Rachelle with Mt Cook Airline and Air NZ and provided some context for this application.

The pleadings

[11] Ms Rachelle's claim about breaches of privacy is in paragraph [1](a)(4) of her fifth amended statement of claim and is as follows:

> **Particulars of Claim: Case no: EMPC 250/2017**
>
> ***1 (a)***
>
> …
>
> 4) Breaches of Privacy Law Act within the workplace
>
> …

[12] It is common ground that the reference in the pleading is to the Privacy Act 1993.

[13] At paragraph [1](b), the pleading is explained in the following statement:

---

5 *Attorney-General v McVeagh* [1995] NZLR 558 (CA) at 566. Confirmed in *Pharmacy Care Systems Ltd v Attorney-General* (2001) 15 PRNZ 465 at [20].

> **Breaches of Privacy Law Act within the workplace**
> Facebook invasion and removal of personal items without permission consent
> ***(Mr Unno, Ms Joanne Kirker (2015)***
>
> (emphasis original)

[14] It follows from paragraph [1](b) that there are two parts to this pleading about privacy. The first part is an allegation of Facebook invasion. As explained by particulars elsewhere in the statement of claim, the second part is about removal of Ms Rachelle's personal items from a locker.

Facebook Invasion

[15] The pleading of an alleged Facebook invasion is supplemented by some particulars in paragraph [37] of the fifth amended statement of claim, alleging that an Air NZ employee:

> …friended the plaintiff's estranged husband on Facebook, which is once again against company policy for both Mount Cook Airlines and Air New Zealand and breaches the privacy Act in entering Ms Rachelle's personal life, …

[16] Mr Caisley did not concede that this pleading could give rise to a personal grievance. However, he submitted that the pleading was an alleged disadvantage personal grievance under s 103(1)(b) of the Act and, therefore, must relate to something that occurred during Ms Rachelle's employment.

[17] Mr Caisley's submission was that there were only two possible dates that could be used to calculate whether this part of Ms Rachelle's pleading was within time. Those dates were 20 February 2016 or 12 June 2016. The former was a date on which Air NZ maintained Ms Rachelle's employment with Mt Cook ended. The latter was the date on which Mr Holman had written to Ms Rachelle ending what Air NZ considered to be her casual employment.

[18] Mr Caisley submitted that the first occasion on which a personal grievance was raised with Air NZ was in Ms Rachelle's lawyer's letter of 15 August 2016. That letter was more than 90 days after 20 February 2016 and, therefore, did not comply with s 114(1). He also submitted that Ms Rachelle's claim about Facebook invasion was not saved by calculating time from 12 June 2016, because it was not referred to in the

letter to Air NZ. It followed that this alleged grievance did not comply with s 114(1) of the Act.

Personal items removed

[19] Particulars about the pleading that personal items had been removed from a locker without permission are contained in paragraphs [19] and [20] of the fifth amended statement of claim. In those paragraphs Ms Rachelle pleaded that she requested three weeks off work to assist her then husband with a new business venture. At paragraph [20] she pleaded returning to Queenstown Airport:

> …to attend to her locker and speak to her duty manager to only discover that her locker had been cleaned out without permission …

[20] In the balance of paragraph [20] she pleaded that she was informed that her position had been replaced after 20 new seasonal workers were recruited. The pleading is unclear about when Ms Rachelle says her locker was wrongly cleared and why that action amounts to a personal grievance.

[21] Mr Caisley adopted 31 May 2015 as the relevant date for assessing compliance with s 114(1) in relation to this aspect of the pleading, because Ms Guthrie said in her affidavit that the locker was needed and she gave an instruction for it to be cleared in late May 2015. Relying on that evidence he submitted that the last possible date on which Ms Rachelle could have raised a personal grievance arising from the pleaded events was 90 days after 31 May 2015. If this analysis is correct the claim is out of time.

Ms Rachelle's response

[22] Ms Rachelle's response to the application to strike out her claim about a breach of privacy did not dispute the chronology relied on by Air NZ but she submitted that it had used the wrong dates to calculate the time available to her to pursue this personal grievance as of right. She acknowledged that "her first legal documentation" was her lawyer's letter dated 15 August 2016, but submitted her grievance had been raised within time because she remained employed by Air NZ until 14 June 2016. That was the date on which she received Mr Holman's letter ending her employment. Her response to this part of the application, therefore, was that the lawyer's letter was sent

to Air NZ well within 90 days of the date her employment agreement was terminated and that was sufficient to satisfy s 114(1) of the Act.

Analysis

[23] The time within which a personal grievance must be raised is in s 114, the relevant parts of which read:

> **114 Raising personal grievance**
>
> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
>
> (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
>
> …

[24] The plain language of s 114(1) means that Ms Rachelle was entitled to raise a personal grievance with Air NZ within the 90-day period beginning with the date on which the action alleged to amount to that personal grievance occurred or came to her notice, whichever is the later.

[25] That means time ran from the date on which the alleged Facebook invasion or locker clearance occurred or came to Ms Rachelle's notice. They were not connected with Mr Holman's letter terminating the employment agreement and it is irrelevant. The timing of these alleged actions was not clearly stated in the pleading. While it is possible at least one of these events happened in May 2015, from Ms Rachelle's perspective the most generous reading of the pleading is that they occurred sometime in 2015. That conclusion is supported by the year being stated in brackets at the end of paragraph [1](b). Even on this generous reading both events were significantly more than 90 days before her lawyer wrote to Air NZ in August 2016. On any view of the matter these claims are out of time.

[26] There is a proviso in s 114(1). An employer may consent to a personal grievance being raised after the expiration of the 90-day period. Mr Caisley's submission was that Air NZ had not consented. Ms Guthrie said it had not consented. The Authority determination recorded that Air NZ had maintained during the investigation that no personal grievances were brought within time and, therefore, preserved its position to raise this issue now. For completeness, there is no pleading that Air NZ consented and Ms Rachelle has not attempted to argue that it did.[6] It follows that consent was not given to this personal grievance being raised after the time allowed by s 114(1).

[27] I conclude that the personal grievance pleaded in paragraph [1](a)(4) of the fifth amended statement of claim was not raised in the time allowed by s 114(1) of the Act.

Unjustified dismissal

[28] The second part of this application is about paragraph [1](a)(5) of the fifth amended statement of claim in which Ms Rachelle pleaded she was unjustifiably dismissed. Further particulars of this claim are provided at paragraph [1](b) which reads:

> **Unlawful dismissal**
> Wrongfully accused of swearing at a pilot as a result, the plaintiff Ms Rachelle's financial income has been lost as well as her career and future employment prospects. Please refer to **dated** Appendix 4. ***(Mr Naoto Unno, Ms Christina Guthrie, Mr Jeremy Holman (22nd Dec 2015-2016)***
>
> (emphasis original)

[29] This pleading was augmented in the statement of claim by a pleading that the incident referred to was mentioned to Ms Rachelle during a meeting on 22 December 2015, in which she was advised that she would not be offered permanent part time employment by Air NZ. Ms Guthrie's affidavit confirmed a meeting took place on that date at which a possible complaint was mentioned.

---

6 *Rachelle v Air New Zealand Ltd* [2017] NZERA Christchurch 140 at [4].

[30] Mr Caisley's submission was that the last possible date on which Ms Rachelle could have raised a grievance of any type arising from the meeting of 22 December 2015 expired well before her lawyer's letter of August 2016.

[31] In response Ms Rachelle repeated her earlier submissions, that Air NZ was relying on the wrong dates for computing time. Her submission was that she remained employed until Mr Holman sent her a letter terminating her employment and there was no reason to raise a personal grievance before then. She calculated time to raise a grievance as running from June 2016 not December 2015.

[32] If the analysis was confined to what happened on 22 December 2015 Ms Rachelle's pleading is out of time. That is not the end of the analysis. It is possible that the pleading intends to pursue a claim for unjustified dismissal that is not confined to the alleged swearing incident, as is shown by the subject heading in the pleading, the naming of several Air NZ employees in the brackets in the text and the broad statement of dates spanning part of December 2015 and 2016. That is consistent with the letter Ms Rachelle's lawyer wrote to Air NZ in which the alleged unjustified dismissal was not confined to the swearing incident. In that letter Ms Rachelle's claim was that she was Air NZ's permanent employee and her dismissal was procedurally and substantively unjustified.

[33] There are passages in Ms Rachelle's lawyer's letter which do not appear to differentiate between Mt Cook and Air NZ as separate legal entities. However, the letter did state that she had been working for Air NZ for over two years at the time of her dismissal. The letter also asserted that the true nature of the employment relationship was permanent employment, because she had a regular work pattern and an expectation of ongoing employment. Remedies were claimed. This letter contained sufficient information to adequately raise a personal grievance.

[34] If Ms Rachelle's claim is about a personal grievance for unjustified dismissal, based on the allegation that she was permanently employed and not a casual employee, her lawyer's letter was within time. If that is the case she wants to run, Air NZ's strike out application could not succeed. However, the statement of claim is far from clear on this point. The just outcome is to provide a further, brief, opportunity for Ms

Rachelle to consider if she wants to amend the pleading if this is the claim to be pursued.

[35] The final point is that there is no jurisdiction available to reinstate the causes of action previously struck out as requested by Ms Rachelle. Even if I was able to do so no basis has been made out to support such an outcome.

Conclusion

[36] Ms Rachelle's pleading at paragraph [1](a)(4) of the fifth amended statement of claim is struck out.

[37] Ms Rachelle may, within 20 working days of the date of this judgment, file a further amended statement of claim clarifying the pleading that she was unjustifiably dismissed by Air NZ. If an amended pleading is not filed an order dealing with Air NZ's application to strike out paragraph [1](a)(5) of the fifth amended statement of claim will be made without the need for a further application.

[38] Costs are reserved.

K G Smith
Judge

Judgment signed at 11.30 am on 5 March 2019