

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 41
EMPC 289/2018
EMPC 323/2018**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER of an application to strike out proceedings

BETWEEN RENAISSANCE ASSETS
MANAGEMENT LIMITED
Plaintiff

AND JINQI GE
Defendant

Hearing: On the papers

Appearances: G Pollak, counsel for plaintiff
J Moore, counsel for defendant

Judgment: 5 April 2019

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application to strike out proceedings)**

[1] On 24 August 2018 the Employment Relations Authority determined that Jinqi Ge:¹

- (a) was unjustifiably dismissed from his employment as a Market Researcher/Data Analyst with Renaissance Assets Management Ltd; and

¹ *Ge v Renaissance Assets Management Ltd* [2018] NZERA Auckland 272.

- (b) had been unlawfully required to pay a premium to Renaissance Assets in breach of s 12A of the Wages Protection Act 1983.

[2] The Authority held that in dismissing Mr Ge on 20 December 2016, for serious misconduct, Renaissance Assets had failed to satisfy s 103A of the Employment Relations Act 2000 (the Act). The Authority considered and rejected the company's stated grounds for dismissing Mr Ge involving allegations he had:

- (a) been dishonest in relation to claims he held a PhD;
- (b) harassed a shareholder and director of Renaissance Assets, Ziming Li, by preventing and obstructing him from leaving the company's premises; and
- (c) threatened to damage the company's reputation.

[3] According to the Authority's determination, Mr Ge denied all of Renaissance Assets' allegations and linked the company's disciplinary action against him to retribution for his insistence on being repaid a premium he said had been required to pay in exchange for his employment.

[4] The Authority held that Mr Ge had not misrepresented his academic qualifications when he sought employment or otherwise, did not harass Mr Li or threaten to damage the company. It found as a fact that Renaissance Assets required Mr Ge to pay a premium of RMB¥161,000 to secure his employment by depositing that sum into a bank account in China. According to the Authority, to comply with this requirement, Mr Ge made arrangements for his father to pay this amount on his behalf. As a result of a miscommunication, RMB¥165,000 was paid into the bank account.²

[5] Mr Ge was awarded compensation of six months lost remuneration, and \$12,000 for humiliation, loss of dignity and injury to feelings. Renaissance Assets was ordered to reimburse him for the amount paid into the Chinese bank account, in

² At the time approximately NZ\$35,000.

the equivalent New Zealand dollars, based on the foreign exchange rate being advertised by the Bank of New Zealand on the date of the determination.

[6] In a subsequent determination, on 1 October 2018, a penalty was imposed on Renaissance Assets for seeking the premium.³ It was ordered to pay \$10,000, half of which was to be paid to Mr Ge.

The Challenge

[7] Renaissance Assets has challenged both determinations and seeks to have them set aside. In relation to the first determination, the company pleaded that its actions were justifiable, essentially repeating its case in the Authority, and denying obtaining a premium from Mr Ge. In its challenge to the second determination the company pleaded that, because it did not seek a premium, a penalty should not have been imposed. The statements of claim in each challenge are largely repetitive, containing common pleadings, except in relation to the relief sought by them.

[8] Mr Ge has applied to strike out both proceedings and has supported his application with an affidavit.

Jurisdiction to strike out

[9] The Court has jurisdiction to strike out all or part of a pleading.⁴ The criteria to apply are well known:⁵

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

³ *Ge v Renaissance Assets Management Ltd* [2018] NZERA Auckland 304.

⁴ Employment Court Regulations 2000, reg 6(2)(a)(ii); High Court Rules 2016, r 15.1.

⁵ See *Attorney-General v Prince* [1998] 1 NZLR 262 (CA); *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] and *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152.

- (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 particularly slow to strike out a claim in a developing area of law.

[10] The Court of Appeal dealt with the use of evidence in a strike-out application in *Attorney-General v McVeagh*, holding that a court is entitled to receive it in an appropriate case. The Court went on to say that evidence will generally be limited to what is undisputed, meaning it will not attempt to resolve genuinely disputed issues of fact in this type of application. That also means the Court will not normally consider evidence inconsistent with the pleadings, because a strike-out application is dealt with on the basis that the pleaded facts can be proved. However, the Court of Appeal acknowledged that there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.⁶

[11] Mr Ge's affidavit explained the circumstances leading to him accepting an offer of employment, the content of his curriculum vitae, what happened at the job interview and what happened before his dismissal. He also gave evidence about being required to pay a premium for the job.

⁶ *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566. Confirmed in *Pharmacy Care Systems Ltd v Attorney-General* (2001) 15 PRNZ 465 (CA) at [19].

The application

[12] The application relies on the same grounds to strike out both proceedings. The crux of the application is that Mr Ge did not misrepresent his qualifications but, in any event, the alleged misrepresentation of them cannot succeed in law. That was because the company did not rely on any misrepresentation and suffered no loss.

[13] The application was also based on the alleged misrepresentation being a vexatious and frivolous claim and was said to disclose no reasonable cause of action. As to the challenge to the determination that a premium was paid, the application repeated the Authority's findings and stating that the evidence clearly established that one had been paid.

[14] Renaissance Assets opposed the application on the grounds that:

- (a) it was based on disputed facts that remain contentious;
- (b) the company did not rely on Mr Ge having a PhD to offer him a job, but he held himself out as having been awarded one, which embarrassed the company when it discovered he did not have the degree, causing a loss of trust and confidence in him;
- (c) the dismissal was only partly reliant on the alleged misrepresentation. It also relied on him being abusive and threatening to its Managing Director and refused to attend a disciplinary meeting; and
- (d) it denied requiring or receiving a premium.

Analysis

[15] The application relied on r 15.1 of the High Court Rules 2016, which provides that the Court may strike out all or part of a pleading if it:⁷

...

⁷ The High Court Rules apply because of reg 6 of the Employment Court Regulations 2000.

- (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
- (b) is likely to cause prejudice or delay; or
- (c) is frivolous or vexatious; or
- (d) is otherwise an abuse of the process of the court.

...

[16] While part of the application used the expression “vexatious and frivolous”, it did not rely on cl 15 in sch 3 to the Act and no submissions about that provision were made by counsel.⁸

[17] Ms Moore’s submissions in support of Mr Ge’s application stated four issues considered to be necessary to resolve as follows:

Did the defendant misrepresent his qualifications and if so, did the plaintiff act in reliance [on] these qualifications when employing the defendant in the position of Data Analyst / researcher?

Did the plaintiff claim a premium from the defendant in breach of the Wages Protection Act?

Did the plaintiff unjustifiably dismiss the defendant?

Is the plaintiff’s cause of action in the statement of claim untenable and cannot succeed? Does the defendant have a complete defence to the plaintiff’s claims?

[18] In developing these issues, Ms Moore’s submissions addressed the facts as she distilled them from Mr Ge’s affidavit and the Authority’s determination. She emphasised that Mr Ge’s employment difficulties did not begin, on his evidence of what had happened, until he asked for the premium to be repaid. She pointed out that the vacancy Mr Ge applied for did not specify that the successful person would need to hold a PhD and that his CV did not claim that he had been awarded that degree. If that is correct, it follows that the company did not rely on any alleged misrepresentation when offering employment to him.⁹

⁸ See cases such as *Gapuzan v Pratt & Whitney Air New Zealand Services* [2014] NZEmpC 206; *Lumsden v Sky City Management Ltd* [2015] NZEmpC 225, [2015] ERNZ 389; and *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129.

⁹ Relying on s 35 of the Contract and Commercial Law Act 2017.

[19] Most of Mr Ge's argument concentrated on establishing that he did not misrepresent his qualifications. The remaining issues were addressed succinctly. His argument about the premium has already been noted and was not elaborated on any further in submissions. The application to strike out the challenge to the determination of unjustifiable dismissal was premised on the company not using any formal review process and failing to comply with "...the procedural fairness requirements under the provisions of s 103A(3)...". Supplementing that submission was that Renaissance Assets failed to provide Mr Ge with "the particulars and specific details" of its concerns.

[20] In summary, the application relied on Mr Ge having a complete answer to the claims that he misrepresented his qualifications, that he was justifiably dismissed and that a premium had not been required.

[21] Mr Pollak's submissions for Renaissance Assets concentrated on arguing that the grounds of the application were known to raise controversial evidential issues that could only be addressed at a hearing. The company's case was that the application could not succeed given the existence of these disputes about the facts.

[22] I have reached the conclusion that Mr Ge's application cannot be granted and have done so by taking a different starting position from the one Ms Moore used. The issue is whether each statement of claim discloses no reasonable cause of action so that the Court can be satisfied that it cannot succeed. The criteria require the Court to act sparingly and only in clear cases. By necessary default the criteria require an assumption that what the plaintiff pleads as facts can be established.

[23] There are significant disagreements between the parties about every aspect of the Authority determinations adverse to Renaissance Assets. The company pleaded that Mr Ge was involved in a pretence about holding a PhD throughout his employment. The statements of claim were capable of being read as if they pleaded he had misrepresented his academic qualifications before and at the job interview, as well as doing so subsequently when allowing himself to be held out to the company's staff, and others, as "Dr Ge". That pleading has been refined slightly, or at least there has been an indication of a refinement, in the notice of opposition. What is now to be

claimed by the company is that Mr Ge allowed himself to be represented to others, including to Mr Li, while in the company's employment as having a PhD and not correcting anyone when introduced as "Dr Ge". Mr Ge denies ever misrepresenting his qualifications to the company or allowing himself to be held out in that way.

[24] The company maintains in its statements of claim that Mr Ge behaved in a threatening manner to Mr Li, and that he threatened to damage its business. Mr Ge denies having done so.

[25] The Authority held that the company had required a premium to be paid. To reach that conclusion it heard from Mr Ge, and his father, about the alleged request and what steps were taken to pay money into a bank account in China. In the Authority the company denied requesting a premium. It maintained having no knowledge of the bank account into which the money was deposited or, for that matter, that there was any connection between the account holder and it. The statements of claim maintain this denial and seek to overturn the Authority's determinations on this point, maintaining that it was wrong.

[26] As to the remaining matters, about whether the company satisfied s 103A of the Act, its pleading was that it had grounds to dismiss and had taken appropriate steps to conduct an interview about them with Mr Ge. It pleaded inviting him to a meeting on 14 December 2016 and, when that meeting was cancelled, on other dates that month to discuss his qualifications, the alleged conduct towards Mr Li, and allegations that he threatened to cause damage to Renaissance Assets. The allegation was that he refused to attend a meeting and the company, therefore, acted on what was known to it. Those allegations were denied by Mr Ge.

[27] A further example of the sharp divergence between the parties is what is likely to be said about what happened at the job interview. There is a disagreement about such fundamental things as who was present at the interview and what information was available during it. Mr Ge's evidence was that he sent a copy of his CV to the company electronically before the interview and that it was being used by Mr Li, and another person who was present, during it. The company says it was sent the CV

electronically, but it could not be opened, and that Mr Li was not present at the job interview.

[28] Those disputes cannot be resolved in a summary way in a strike-out application. The application assumes Mr Ge will achieve a favourable outcome by having the Court accept his evidence. In contrast, if Renaissance Assets proves what it has pleaded it may, as a result, establish that its dismissal of Mr Ge was justifiable. The outcome of this case will be entirely dependent on findings that the Court will have to make, which will inevitably involve resolving issues of credibility. It follows that the company's pleadings cannot be described as disclosing no reasonably arguable cause of action or as being untenable.

Conclusion

[29] Mr Ge's application seeking to strike out the proceedings is dismissed.

[30] Costs are reserved.

K G Smith
Judge

Judgment signed at 4.10 pm on 5 April 2019