

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 32
EMPC 158/2018**

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 proceeding
BETWEEN	IBRAHIM KOCATÜRK AND GÜLER KOCATÜRK Plaintiffs
AND	ZARA'S TURKISH LIMITED Defendant

Hearing: 3 March 2020
(Heard at Christchurch via Audio Visual Link)

Appearances: A Sharma, counsel for plaintiffs
B Buckett and M Belesky, counsel for defendant

Judgment: 13 March 2020

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Applications to strike out part of the proceeding)**

[1] Zara's Turkish Ltd has applied to strike out several causes of action in an amended statement of claim filed by Ibrahim and Güler Kocatürk.

[2] The application is made on the basis that the Court does not have jurisdiction to consider the disputed pleadings, either because they fall outside s 187 of the

Employment Relations Act 2000 (the Act) or because they were not matters before the Employment Relations Authority when it issued the determination.¹

[3] Some context is required. Mr and Mrs Kocatürk lodged a proceeding in the Authority claiming that their employer, Zara's Turkish Ltd, had not paid wages and holiday pay due to them. They also claimed to have been unjustifiably dismissed.

[4] The Authority accepted some, but not all, of Mr and Mrs Kocatürk's claims. It found that Mr Kocatürk had not been paid properly and ordered Zara's Turkish to pay him arrears of wages and holiday pay but concluded he had not been unjustifiably dismissed. The Authority found that Mrs Kocatürk had been unjustifiably dismissed. The remedies granted to her were sums for arrears of wages, holiday pay, and compensation for having been unjustifiably dismissed.

[5] There were two challenges to the determination. The first challenge was filed by Zara's Turkish. It placed in issue the remedies awarded to Mrs Kocatürk and disputed that she had been unjustifiably dismissed but did not seek to disturb the Authority's conclusions about Mr Kocatürk's claim or the remedies he was awarded.

[6] The second challenge was initially brought by Mrs Kocatürk, seeking to increase the compensatory awards the Authority had ordered in her favour. Subsequently, as a result of a successful application seeking an extension of time, Mr Kocatürk also challenged the determination. He sought to increase the compensatory awards in his favour and to overturn the finding that he had not been unjustifiably dismissed.

[7] This application to strike out relates to an amended statement of claim filed by Mr and Mrs Kocatürk attempting to elucidate their claims. In this claim Mr Kocatürk's challenge included disputing the Authority's findings about his employment that:

- (a) he resigned rather than having been dismissed;

¹ *Kocatürk v Zara's Turkish Ltd* [2017] NZERA 145 (Member Appleton).

- (b) between 13 October 2009 and 15 March 2010, he was employed by Mirac Ltd not Zara's Turkish; and
- (c) his claim for unpaid wages from 10 October 2009 to 9 July 2010 was statute-barred.

[8] In separate sections of the amended statement of claim, under headings C and E (both labelled "Breaches of Employment Standards"), Mr and Mrs Kocatürk pleaded that Zara's Turkish breached the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the statutory duty of good faith. The common features of those pleadings are that they are not supported or explained by any particulars and do not seek remedies. Ms Sharma, who acts for Mr and Mrs Kocatürk, submitted that her clients were entitled to seek declarations of breaches and that was their intention.

[9] Zara's Turkish's sought to strike out the New Zealand Bill of Rights Act, Human Rights Act and good faith pleadings as well as all pleadings about the Limitation Act.

Jurisdiction to strike out

[10] The Court has jurisdiction to strike out all or part of a pleading.² Criteria usually applied are well known:³

- (a) Pledged 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, expressed sometimes as a strike out application being inappropriate unless the Court can be satisfied that it cannot succeed.

² Employment Court Regulations 2000, reg 6(2)(a)(ii), High Court Rules 2016, r 15.1; and see *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

³ *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267-268; *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, [2017] ERNZ 858 at [20].

- (c) The jurisdiction needs 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.

[11] While not relevant in this case, evidence can be considered in a strike out application in an appropriate case.⁴

Analysis

[12] The common theme developed by Ms Buckett, for Zara's Turkish, for all of the challenged pleadings was that they sought to place in issue causes of action outside the Court's jurisdiction and could not succeed. Alternatively, it was argued that they were claims that had not been raised in the Authority's determination and could not be pursued as challenges.

[13] Ms Sharma acknowledged the New Zealand Bill of Rights Act claim could not succeed and no further discussion about it is required.

[14] As to the Human Rights Act claim, the pleading as it relates to Mr Kocatürk was:

- 57. The defendant breached section 22(b) [sic] of the Human Rights Act 1993.
- 58. Between 13 October 2009 and 11 March 2010 the defendant subjected Mr Kocatürk to degrading and disproportionately severe treatment, denying him his lawful employment rights.
- 59. Between 11 March 2010 and August 2014 the defendant subjected Mr Kocatürk to degrading and unlawful work conditions and pay.

(emphasis original)

⁴ *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].

[15] The pleading as it relates to Mrs Kocatürk was:

73. The defendant subjected Mrs Kocatürk to degrading and unlawful work conditions and pay.

[16] There is no s 22(b) of the Human Rights Act but there are ss 22(1)(b) and 22(2) that read:

22 Employment

- (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—

...

- (b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

...

- (2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

[17] There are two sections of the Act which deal with discrimination in essentially the same way; ss 104 and 105. A personal grievance under s 103 is established if any of the prohibited grounds of discrimination referred to in ss 104 and 105 have taken place. However, employees in Mr and/or Mrs Kocatürk's position wishing to pursue a claim based on discrimination must make an election to begin a proceeding under the Human Rights Act or as a personal grievance.⁵ There is a further impediment to a personal grievance claim; it must be brought within 90 days.⁶

[18] Ms Buckett's submission was that this pleading suffered from an incurable combination of deficiencies. That was because the Court lacks jurisdiction and, in any event, the employment relationship problem the Authority considered was not about discrimination.

⁵ Employment Relations Act 2000, s 112.

⁶ Employment Relations Act 2000, s 114.

[19] Ms Sharma's response was that the issue was more nuanced than appeared in the pleadings and amended pleadings are required. She submitted the matters before the Authority could encompass claims of discrimination of the sort referred to in ss 104 and 105 of the Act, so an amendment could address any deficiency in the pleadings. An attempt was made to overcome the absence of any reference to discrimination in the statement of problem before the Authority by inviting some latitude to be given to Mr and Mrs Kocatürk because they were then representing themselves. Her argument was that, being lay people, a more generous approach is required in considering the matters they put before the Authority.

[20] I do not accept Ms Sharma's submissions about the Human Rights Act claim. The Court's jurisdiction does not extend to claims purporting to be brought under the Human Rights Act. That is sufficient to dispose of this part of the application, but even if jurisdiction had been established to consider discrimination under the Act, her argument was untenable. The matter before the Authority did not include anything that could be interpreted, even on the generous approach argued for, as touching on a personal grievance because of unlawful discrimination. The statement of problem was simple and straightforward. It placed in issue a claim of unjustified dismissal as well as for wages and holiday pay and those were the subjects the Authority dealt with. While I do not accept Ms Buckett's submission that the matter which is able to be challenged must be confined to what was in the determination, the reality is that the amended statement of claim ventured into areas that were not matters before the Authority.

[21] I am satisfied that the claims for breaches for the New Zealand Bill of Rights Act and Human Rights Act cannot succeed. That means all passages under those headings at paragraphs 56, 57, 58, 59, 71, 72 and 73 of the amended statement of claim are to be struck out.

[22] That leaves the pleadings referring to a breach of good faith and the Limitation Act. I agree with Ms Sharma that there are passages in the Authority's determination that could be read as touching on good faith, at least in so far as they were critical of the company over how it handled the wages claims and Mrs Kocatürk's dismissal. At this stage, given that the power to strike out is used sparingly, I am not persuaded that

Zara's Turkish has established that good faith was not a matter before the Authority. The claim, however, is not adequately pleaded.

[23] The final matter is the claim about the Limitation Act. In the amended statement of claim the pleading about unpaid wages for the period from 13 October 2009 to 15 March 2010 was followed by a separate paragraph reading:

14. The defendant is liable to Mr Kocatürk on grounds pursuant to sections 2, 16 and 48 of the Limitations [sic] Act 2010.

(emphasis original)

[24] While a connection between the wages claim and the Limitation Act 2010 was intended the information provided by this pleading is sparse. The only additional information supplied was in the passage immediately following paragraph 14 under a sub-heading "Background", providing a description of Mr Kocatürk arrival in New Zealand and being entitled to work because he had been issued with a visa authorising him to take up employment with a company called Mirac Ltd.

[25] During submissions it emerged that the pleading was an attempt to get around the Authority's decision that some of Mr Kocatürk's claim was more than six years old and, therefore, statute barred. While inadequately pleaded, the claim intended to be made was that the statutory limitation does not apply because dishonest or fraudulent concealment by Zara's Turkish occurred, within the meaning of s 4 of the Limitation Act. Not surprisingly, these allegations provoked a very strong response from Zara's Turkish challenging the bona fides of any such a pleading.

[26] Ms Sharma was asked to identify the passages in the amended statement of claim that were relied on as being sufficient to inform Zara's Turkish, and the Court, of the claim to be addressed. There are no paragraphs supplying that information, but her answer was that the claim of concealment stems from problems over the identity of Mr Kocatürk's employer during a time when he claims he was deliberately underpaid or not paid. The alleged concealment was said to also involve the way in which a variation to the work visa was handled.

[27] I have considerable sympathy for Ms Buckett's concern that this very serious pleading was not supported by any particulars and the issue remained elusive even

after Ms Sharma's explanation. However, I accept that there is a possibility that the present deficiency can be overcome by amended pleadings. If the claim that a statutory limitation does not apply is to be pursued, attention will need to be given to s 11 of the Wages Protection Act 1983 that was not discussed by either counsel in submissions.

[28] In the orders that follow a short timeframe is provided for an amended statement of claim and defence to be filed to enable the case to be finally allocated hearing dates.

Outcome

[29] The application by Zara's Turkish is partly successful as follows:

- (a) The pleadings claiming a breach of the New Zealand Bill of Rights Act 1990 and a breach of the Human Rights Act 1993 are struck out. For the avoidance of doubt the pleadings are those listed in paragraph [21] of this judgment.
- (b) Any further amended statement of claim is to be filed and served no later than 4 pm on 27 March 2020.
- (c) Any amended statement of defence is to be filed and served no later than 4 pm on 9 April 2020.

[30] Costs are reserved.

K G Smith
Judge

Judgment signed at 4.55 pm on 13 March 2020