

BETWEEN	ADMIRAL MANGANDA Applicant
AND	WAIKATO ETHIC FAMILY SERVICES TRUST & OTHERS First Respondent
	SONIA OFSTED Second Respondant

Member of Authority:	Eleanor Robinson
Representatives:	Hamish Burdon, Advocate for Applicant Nick Wilkinson, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	9 February 2018 from Applicant 5 February 2018 from Respondent
Determination:	21 February 2018

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1] The Applicant, Mr Admiral Manganda, is claiming that he was unjustifiably dismissed and unjustifiably disadvantaged as a result of suspension by the Respondent, Waikato Ethic Family Services Trust (WEFST).

[2] WEFST denies that Mr Manganda was unjustifiably dismissed or disadvantaged and claims that he was justifiably dismissed for serious misconduct.

[3] The preliminary matter which is before the Authority for determination is whether or not the claim against WEFST is frivolous and vexatious and should be dismissed.

[4] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties.

## **Issues**

[5] The issue for determination is whether or not the claims against WEFST are frivolous and vexatious pursuant to s.12A, Schedule 2 to the Employment Relations Act 2000 (the Act) and should be dismissed.

## **Brief Background Facts**

[6] WEFST is a small charitable trust set up to assist people in need, primarily migrant and refugee people although its services are available to anyone.

[7] Mr Manganda was employed on 7 October 2016 as Administrator.

[8] During December 2016 Ms Sonia Banafsheh, Director and Founder of WEFST and Mr Manganda's manager, reported the serious concerns she had about Mr Manganda's performance to the WEFST Board (the Board). The concerns were regarding Mr Manganda's attitude and unacceptable performance.

[9] The Board initiated an investigation which was carried out and the results of which were presented to the Board.

[10] Following the conclusion of the investigation, the Board reached a decision to terminate Mr Manganda's employment with WEFST.

## *Applicant's Submissions*

[11] Mr Manganda submits that:

- His suspension at the meeting on 20 February 2017 was procedurally at fault;
- Although he requested minutes of the meeting, these were never provided;
- The allegations against him were not clarified at the meeting;
- There was no subsequent meeting prior to making the decision to dismiss him; and
- The decision to dismiss him was procedurally flawed and unjustifiable as a result.

### *Respondents' Submissions*

[12] WEFST denies that the procedure and disciplinary process it followed were unjustifiable, and claims in response that the process and investigation had been conducted thoroughly, appropriately and with transparency. Specifically:

- Mr Manganda had been advised in the letter dated 17 February 2017 of a meeting to be held on 20 February 2017 and that it would form part of the disciplinary process and its possible outcomes;
- He was invited to have support people present if he wished to do so;
- There was a contractual entitlement to suspend in clause 23.4 of the individual employment agreement provided to Mr Manganda (the Employment Agreement);
- At the meeting held on 20 February 2017 Mr Manganda and Mr Burdon his representative agreed to Mr Manganda's suspension on full pay;
- Mr Manganda was provided with details of the allegations against him in the letter dated 23 February 2017 together with supporting evidence, and was invited to respond to the allegations at a meeting held on 2 March 2017 at which he was entitled to have support representatives present;
- Mr Manganda's responses were carefully considered prior to WEFST reaching a decision on an outcome, namely termination for serious misconduct; and
- WEFST gave Mr Manganda termination with notice although the Employment Agreement made provision at clause 23.2 for summary termination in the event of serious misconduct being found.

### **Determination**

[13] WEFST is seeking to have Mr Manganda's claims dismissed in their entirety on the basis that they are frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act.

[14] In the Employment Court case *Newick v Working In Limited*(*Newick*)<sup>1</sup> Judge Inglis outlined the criteria to be applied in the case of strike out applications as:

*[2] There is no dispute that the Employment Court has power to strike out all or part of a pleading. The criteria applying to strike out applications are well accepted, and can be summarised as follows:*

- a) It is assumed that facts pleaded are true;*
- b) The cause of action must be so clearly untenable that it cannot possibly succeed;*
- c) The jurisdiction is to be exercised sparingly;*
- d) The jurisdiction to strike out is not excluded where the claim includes difficult questions of law requiring extensive argument;*
- e) The Court should be slow to strike out a claim in a developing area of law.*

*[3] A claim should not be summarily struck out unless the Court can be certain that it cannot succeed.*

*[4] The Court can strike out a pleading where it constitutes an abuse of the Court's process.*

***Facts as pleaded***

*[5] On a strike out application the Court proceeds on the assumption that the facts as pleaded are true. Whether or not they can be established is an issue that will be determined at the substantive hearing. [Footnotes omitted]*

[15] The Authority has the power under clause 12A, Schedule 2 of the Act to dismiss frivolous or vexatious proceedings, and may do so at any time in a proceeding where the Authority considers that matter to be frivolous or vexatious:

***12A Power to dismiss frivolous or vexatious proceedings***

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.*
- (2) In such a case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.*

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<sup>1</sup> [2012] NZEmpC 156

[16] In *New Zealand (with exceptions) Shipwrights etc Union v New Zealand Amalgamated Engineering etc IUOW & Ors*<sup>2</sup>, the then Chief Judge Goddard cited with approval the words of Lush J in *Norman v Mathews*<sup>3</sup> in which the English Judge said that a frivolous case was one which: “no reasonable person could properly treat as bona fide”

[17] In *Creser v Tourist Hotel Corp of New Zealand (Cresor)*<sup>4</sup> Chief Judge Goddard observed<sup>5</sup> at 1069:

*I would add only this: to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.*

[18] Chief Judge Inglis stated in *Lumsden v Skycity Management Ltd*<sup>6</sup> that:

*[37] ... the scope of cl 12A is usefully informed by the judicial discussion I have referred to. It seems to me that a matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority's processes, lacking the degree of seriousness required to engage the attention of the Authority in the sense referred to in the Shipwrights case. A matter may be said to trifle with the Authority's process where it is, to use Chief Judge Goddard's terminology, impossible to take seriously.*

...

*[39] I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases. This is not one of them.*

[19] In *AFT v BCM*<sup>7</sup> former Chief Judge Colgan, agreeing with the analysis of Judge Inglis in *Lumsden*, considered the meaning of a ‘frivolous’ case as being one in which there was a significant lack of legal merit so that it is impossible for the claim to be taken seriously. Vexatious meant conduct without reasonable or probable cause or excuse; harassing; or annoying. His Honour stated in paragraph {78}:

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<sup>2</sup> 23 November 1989, WLC111/89)

<sup>3</sup> [1916] 85 LJKB 857

<sup>4</sup> (1990) 1NZILR 1055 (LC)

<sup>5</sup> Ibid at 1069

<sup>6</sup> [2015] NZEmpC 225.

<sup>7</sup> [2015] NZEmpC 234

*... cl 12A of sch 2 contains quite specific powers to be exercised in unusual circumstances and, in particular, should not be used by the Authority to dismiss, without consideration of their merits, proceedings which impress the Authority as having low or no expectations of success.*

[20] I observe that the judgments cited above have set the threshold very high to justify dismissing an applicant's claims on the basis that they are frivolous and vexatious. I note by way of illustration the phrases: "*clearly untenable ... cannot possibly succeed*", "*futile*", *no reasonable person could treat as bona fide*".

[21] Mr Manganda is claiming unjustifiable dismissal and unjustifiable disadvantage, although these claims are firmly denied by WEFST.

[22] Whilst I fully appreciate the concern of WEFST at having to defend claims which it believes are unjustified and defending which will deplete the meagre budget under which it strives to fulfil its charitable objectives, I find that Mr Manganda's claims are not on their face claims which cannot succeed, or which are futile, although that is not to opine at this stage that they will or will not succeed when tested in a substantive hearing.

[23] In a strike out application, I must assume that the facts as pleaded are true; it will be for Mr Manganda to establish them at the substantive hearing in order to succeed on this claim. Mr Manganda will have to prove that the termination of his employment was unjustifiably effected by WEFST. He will also have to establish the grounds to support a disadvantage grievance pursuant to s103(1)(b) of the Act.

[24] As stated in *Newick*, a claim should not be summarily struck out unless I can be certain it cannot succeed. Whilst at this preliminary stage I can have no certainty as to the strength of Mr Manganda's claims because there has been no testing of witness or documentary evidence, I cannot be certain that he will not succeed in his claim of unjustifiable dismissal, or of unjustifiable disadvantage.

[25] Nor do I find that the claims are futile, or that no reasonable person could treat them as bona fide. I find that the issues raised by Mr Manganda are issues to be explored at the substantive investigation meeting and not a reason to strike out on the basis that they are as frivolous or vexatious.

[26] I determine that the claims against WEFST made by Mr Manganda are not frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act and should not be dismissed.

## **Costs**

[27] Costs are reserved pending the final resolution of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**