

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 466
3063032

BETWEEN JIM WILSON
 (aka JIM SCHOFIELD)
 Applicant

AND M J B WHOLESALE LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person
 Philip Mitchell, counsel for the Respondent

Investigation meeting: On the papers with input up to an including
 12 November 2020

Determination: 13 November 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] By application dated 10 June 2019 Mr Wilson raised a number of allegations against three respondents. Included therein was M J B Wholesale Limited (MJB). The response, tendered on behalf of all three, was that it was unclear what the issues were.

[2] Subsequent discussions have attempted to add clarity with, it is fair to say, questionable success and that has led to an application lodged by MJB on 15 October 2020 asking that Mr Wilson's application be struck out as frivolous and vexatious.¹

[3] Specifically MJB asks the application be *struck out as being*:

a. Frivolous and vexatious; and

b. On the grounds that it is impossible to discern exactly what the Applicant is claiming; and

¹ Clause 12A of schedule 2 of the Employment Relations Act 2000

- c. Further that the Applicant has failed to comprehend the clear warnings of the hopelessness of his case from the Authority; and
- d. Failed / refused to comply with clear timetabling direction from the Authority; and
- e. When he eventually has filed documents they do not establish a cogent evidential base to prove his case against the Respondent

[4] Mr Wilson objected and on 21 October 2020 I sent an e-mail in which I suggested the application was pre-emptive given Mr Wilson then had till 27 October 2020 to furnish additional documentation which made it very difficult, indeed impossible, to draw any conclusion about whether or not his claim might be frivolous and vexatious.

[5] On 2 November 2020 Mr Mitchell, on MJB's behalf, wrote expressing the view Mr Wilson's latest effort mirrored his last and asking that the strike out application be addressed. Mr Wilson was given a further opportunity to provide comment but chose not to add to his previous comments.

[6] Given the comments I concluded it appropriate I determine this application on the papers. In doing so I am cognisant of the documents relating to the substantive claims, the arguments for and against strike out and, perhaps most importantly, the Courts decision in *Lumsden v Sky City Management Limited*.²

[7] The Authority's ability to strike out is limited to doing so on the basis a claim is frivolous and vexatious – there is no other ground.³ *Lumsden* was the Court's first consideration of the effect of this provision (cl 12A of schedule 2) and I conclude it contains two crucial points that mitigate against this application.

[8] The first is there is no such thing as a partial strike out - it's all or nothing.⁴ That raises the second point. The Court observed:

... 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

² *Lumsden v Sky City Management Limited* [2015] NZEmpC 225

³ n 2 above at [38]

⁴ n 2 above at [21]

use Chief Judge Goddard's terminology, impossible to take seriously.⁵

[9] While a colleague who originally dealt with this file did suggest to both parties some of the claims had little prospect of success that did not apply to all. There were elements of the claim which contain at least in part a tenable cause of action. Whether that remains the case will only be known after they face the test of an investigation but they are more than something it is impossible to take seriously. In any event I note one of Mr Wilson's allegations, albeit a relatively minor one, was conceded during an earlier telephone discussion. That means at least part of claim must be taken seriously and if one component stays the whole matter stays ([8] above).

[10] The other elements of this application are not allegations the claim is untenable but arguments that Mr Wilson's inability to follow directions or adequately explain his allegations means the application should be struck out. As already said that is not so as the Authority's ability to strike out is limited to *frivolous and vexatious*.

[11] Those allegations, if founded, may result in costs implications but they do not stop the claim proceeding. I am of the view there is sufficient indication of the general nature of the claims to allow the investigation to proceed which will, in turn, provide a forum for the detail to be added if that cannot occur prior. If something arises which gives cause for MJB to seek an adjournment to collect more evidence that can then be discussed. Put simply and given the investigation is now scheduled I say *let's get on with it*.

Conclusion

[12] For these reasons I decline the request I strike out Mr Wilson's application as frivolous and vexatious.

[13] Costs are reserved pending the substantive determination of Mr Wilson's claims.

Michael Loftus
Member of the Employment Relations Authority

⁵ n 2 above at [37]