

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 393  
3131738

BETWEEN	BELVEDERE LAW LIMITED (In liquidation) Applicant
AND	HAIMEI (LINDA) WANG Respondent

Member of Authority:	Peter Fuiava
Representatives:	Craig Sanson, liquidator for the Applicant Daniel Church, counsel for the Respondent
Investigation Meeting:	On the papers and by teleconference on 26 May 2021
Submissions received:	6 July 2021 from Applicant 14 June 2021 and 7 July 2021 from Respondent
Determination:	07 September 2021

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**A. I decline the respondent's application to dismiss this matter.**

**B. Costs are reserved.**

**Employment Relationship Problem**

[1] On 1 May 2017 Ms Wang commenced employment as a solicitor for Belvedere Law Limited (Belvedere Law). On 10 September 2019, she was granted approval by the New Zealand Law Society to commence practice on her account. Ms Wang's application was supported by Gareth Bodle, the principle of Belvedere Law.

[2] On 30 September 2019, Ms Wang gave notice to her employer that she was resigning. Her last day of work was 8 November 2019.

[3] On 15 November 2019, Ms Wang commenced trading as a solicitor on her account as Hobsonville Legal.

[4] On 2 February 2021, some 15 months after her departure, Belvedere Law lodged a statement of problem with the Authority alleging that whilst still in its employ, Ms Wang breached express and implied obligations of her employment. It was further alleged that she deleted all of her correspondence on WeChat, a messaging and social media application, which she used to promote Belvedere Law to her local Chinese community.

[5] Annexed to Belvedere Law's statement of problem were a number of documents including two emails both dated 26 September 2019. The first email was sent from Ms Wang's Belvedere Law email address to her Hobsonville Legal email address. Attached to that email was an authority to pay fees, deed of assignment by way of security, disclosure statement, drawdown request, instructions, settlement advice, solicitor certificate, term loan agreement and a waiver of independent legal advice.<sup>1</sup> Attached to the second email was a certified copy stamp and an affidavit stamp.<sup>2</sup>

[6] In its statement of problem, Belvedere Law requested discovery of all email correspondence to and from Ms Wang's and her husband's email address at Hobsonville Legal up until 15 November 2019.<sup>3</sup> Once that information was disclosed, Belvedere Law stated that it would be in a better position to establish misconduct and quantify its losses.<sup>4</sup> It may also lodge an amended statement of problem.

[7] Ms Wang subsequently lodged a statement in reply with the Authority in which she denied any wrong doing and opposed Belvedere Law's application for disclosure of her and her husband's work emails. In explanation for the deleted WeChat records, Ms Wang stated that the application had malfunctioned in mid-November 2019 and that when she reinstalled it, the messages she had sent prior to the malfunction were lost and could no longer be retrieved.

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<sup>1</sup> Annexure 4.1.9 of statement of problem.

<sup>2</sup> Annexure 4.1.10 of statement of problem.

<sup>3</sup> At paragraph 1.5 of statement of problem.

<sup>4</sup> Above at paragraph 3.1.

[8] Through her lawyer, Mr Church, Ms Wang also lodged a strikeout application of Belvedere Law's statement of problem which was opposed in a brief memorandum by Mr Paul Brown, Belvedere Law's now former counsel.

### **The Authority's investigation**

[9] On 26 May 2021 I held a case management conference with the representatives and made timetabling directions for the filing of further submissions.

[10] Mr Church's submissions and an affidavit from Ms Wang were lodged with the Authority on 14 June 2021. A few days later, Mr Brown notified the Authority that he was no longer acting for Belvedere Law and that all future contact should be referred to Mr Bodle.

[11] On 6 July 2021 the Authority received an email from Craig Sanson from PricewaterhouseCoopers advising that Belvedere Law had been put into liquidation on 18 June 2021 and that he and another associate had been appointed liquidators of the company. In the same email, Mr Sanson filed his submissions opposing Ms Wang's strikeout application. The following day, Mr Church lodged his submissions in reply. As I had previously indicated at the case management conference, the application was determined "on the papers".

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Ms Wang's case**

[13] Ms Wang's submissions for dismissing the present proceedings may be summarised as follows:

- (a) The proceedings have no reasonable prospect of success because Belvedere Law has not properly particularised its claims or cause of action and has failed to stipulate what it is seeking by way of remedies.
- (b) Ms Wang has not done anything wrong and it was not unlawful of her to set up her own firm while she was employed by her former employer. In any case, she did not start trading as a solicitor on her own account until after she had left Belvedere Law.

- (c) Documentary evidence provided in support of the statement in reply show that Belvedere Law was aware, as early as July 2019, that Ms Wang was starting her own firm and that it freely consented to her taking clients to her new firm.
- (d) Belvedere Law is attempting to use pleadings as a “*de facto* discovery request application” and is asking the Authority to go on a broad undefined ‘fishing’ expedition in the hope of gaining information it can use against Ms Wang.
- (e) Belvedere Law’s delay in lodging its statement of claim with the Authority, some 15 months after her departure, indicates that its proceedings are vexatious.

### **Belvedere Law’s case**

[14] Mr Sanson’s submissions may be summarised as follows:

- (a) Belvedere Law’s statement of problem was lodged in a timely manner. It initiated mediation with Ms Wang within five weeks of her resignation. Filing proceedings was delayed because there was a need to seek advice from a range of professionals and then Auckland had two COVID-19 lockdowns in 2020.
- (b) It has taken time for an IT expert to attempt to recover and reconstruct Ms Wang’s Outlook email. However, emails for the material period are either missing, continued on WeChat, or are on another email address.
- (c) Any delay in commencing proceedings arises directly from the loss of Ms Wang’s WeChat correspondence for the relevant period.
- (d) The statement of problem is a “pre-proceedings” application for discovery for which there is a clear basis. Ms Wang has acquired intellectual property and professional relationships from Belvedere Law without explanation, justification, express permission, or valuable consideration. The matter is neither frivolous nor vexatious.

### **Discussion**

[15] Pursuant to cl 12A of Schedule 2 of the Act, the Authority can dismiss cases that have little or no merit without them needing to be fully investigated. Clause 12A states:

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 any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[16] The power to dismiss under cl 12A is a significant departure from the principle of access to justice and the rule of law for it is a serious step to dismiss a matter or a defence at an early stage in the proceedings before it can be properly investigated.

[17] In *Lumsden v Sky City Management Ltd*, Judge Inglis judicially defined the words “matter”, “frivolous” and “vexatious” as they appear in cl 12A.<sup>5</sup> Those observations have been followed by the Authority in *Brown v Your Success Limited*<sup>6</sup> and more recently in *Aviation Workers Union Inc v Gate Gourmet New Zealand Ltd*.<sup>7</sup>

[18] The following principles emerge from the relevant case law:

- (i) The Authority has no power under cl 12A to dismiss part of a matter before it.
- (ii) Whether a matter is frivolous is to be determined objectively. A matter is not frivolous simply because it has no reasonable prospect of success, something more is required. The matter must trifle with the Authority’s processes and be impossible to take seriously. A pleading is vexatious if it contains an element of impropriety.
- (iii) The Authority’s power to dismiss is limited and the threshold is high.

[19] Ms Wang seeks to dismiss the statement of problem primarily because her former employer wishes to have access to her and her husband’s work emails at Hobsonville Legal up until 15 November 2019. Ms Wang submits that Belvedere Law is fishing for information in the vain hope it will find something it can use to craft a cause of action against her.

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<sup>5</sup> *Lumsden v SkyCity Management Ltd* [2015] ERNZ 389.

<sup>6</sup> *Brown v Your Success* [2017] NZERA Christchurch 36.

<sup>7</sup> *Aviation Workers Union Inc v Gate Gourmet New Zealand Ltd* [2021] NZERA 178.

[20] In his submissions, Mr Church referred to the High Court's decision in *Australian Mutual Provident Society v Architectural Windows Limited* where it was held:

It is clear that the Court will not order discovery or allow interrogatories where the applicant is doing no more than "fishing" ... an applicant is fishing when he seeks to obtain information or documents by interrogatories or discovery ... in order to discover circumstances which may or may not support a baseless or speculative cause of action.<sup>8</sup>

[21] If Belvedere Law is fishing for information or documents, Ms Wang appears to have good grounds to resist such an application. However, even so, that is a separate issue that should not be conflated with an application to dismiss under cl 12A.

[22] For Mr Sanson's benefit, there are three concerns that I have with Belvedere Law's request for the abovementioned emails. First, it is inevitable that significant portions of that information will be protected by solicitor client privilege and cannot be disclosed without a client waiver which Belvedere Law will not have. Second, the statement of problem does not explain what Belvedere Law hopes to find and why it expects to find this in Ms Wang's and her husband's emails. Third, it has not been shown how the emails will be relevant to the proceedings if at all.

[23] While Belvedere Law has much work to do before its request for discovery can get off the ground, this is not to say that its statement of problem is frivolous or vexatious and should be dismissed under cl 12A. The emails referred to at [5] above show *prima facie* that Ms Wang has emailed herself conveyancing templates and documents that appear to be the property of Belvedere Law.

[24] If this is the case and Ms Wang has not been given prior permission to use this material, this may constitute an implied or express breach of her employment agreement with Belvedere Law. If a breach of contract of some kind can be demonstrated, it would be necessary to explore issues around any loss suffered by Belvedere Law and compensation. The apparent unauthorised use by Ms Wang of conveyancing templates and documents that appear to belong to Belvedere Law is not a matter that trifles with the Authority's processes but one that requires further investigation.

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<sup>8</sup> *Australian Mutual Provident Society v Architectural Windows Limited* [1986] 2 NZLR 190 at 196.

[25] I accept Mr Sanson's explanation for the delay in filing proceedings in the Authority which I find were due to extraneous factors outside of Belvedere Law's control. I do not ascribe to the present matter before the Authority the epithet of being frivolous or vexatious. Accordingly, the application to dismiss must be declined. However, the outcome of this application should not be taken as an indication that Belvedere Law's request for discovery of Ms Wang's and her husband's emails will succeed.

[26] An Authority Officer will be in touch with the parties to arrange a case management conference to progress matters. If after considering my concerns regarding Belvedere Law's discovery request of the above emails, Mr Sanson decides not to proceed any further with this claim, this would be an appropriate case for costs to fall where they may.

Peter Fuiava  
Member of the Employment Relations Authority