

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 355
3200119

BETWEEN REBECCA NYBERG
First Applicant

AND CHRISTINA NYBERG
Second Applicant

AND TAI TAPU HOTEL LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Peter Moore, advocate for the Applicants
Amanda Douglas and Jessica Hayes, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions Received: 15 May 2023 from the Applicants
28 April and 6 June 2023 from the Respondent

Date of Determination: 4 July 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The sisters, Rebecca and Christina Nyberg (the Nybergs) are seeking to raise various personal grievances against their former employer, Tai Tapu Hotel Limited (TTH) including an alleged unjustified dismissal by reason of redundancy. The employment of the Nybergs ended in May 2020.

[2] TTH deny all claims and seek that they be dismissed as out of time, frivolous and/or vexatious.

[3] The preliminary matter the Authority must decide is an application by TTH to dismiss the Nybergs' claims on the basis they are either made out of time and that they are frivolous and/or vexatious.

The Authority Process

[4] The parties have agreed that the preliminary issue be determined on "the papers" being the statement of problem, amended statement of problem and statement in reply and submissions and affidavit evidence from both parties.

[5] Pursuant to s 174E of the Employment Relations Act 2000 (the Act) I make findings of fact and law and outline conclusions on matters to resolve the disputed preliminary issues and make orders but I do not record all evidence and submissions received.

[6] I need to initially clarify that the application to dismiss or effectively 'strike out' the Nybergs' claims cannot proceed on the basis that they are out of time. That is a jurisdictional issue that the Authority will deal with as a further matter. The Nybergs amended statement of problem has sought to have the grievances including the alleged unjustified dismissal by reason of a 'sham' redundancy, heard out of time (pursuant to s 114(3) of the Act) citing the alleged existence of extraordinary circumstances. I take this to mean exceptional circumstances pursuant to s 115 of the Act. That is a separate issue.

Issue

[7] The narrow issue for this preliminary determination is whether the claims against TTH are frivolous and/or vexatious and potentially should be dismissed pursuant to s 12 A, Schedule 2 of the Act.

How this employment relationship dispute arose

[8] It was agreed by both parties that Rebecca Nyberg commenced employment in April 2018, initially working in TTH's bar and restaurant as a Duty Manager then shortly thereafter as a Functions and Restaurant Manager. The employment was complicated by Rebecca, entering a personal relationship with the sole director of TTH. The relationship was described by both the director and Rebecca as 'on and off' up to the end of 2019 and thereafter, fraught. The director claims Rebecca resigned in February 2020; whereas Rebecca claims the director dismissed her on two separate occasions in November 2019 and February 2020. The director says they then agreed to Rebecca returning to work for TTH in early March 2020 for 25 hours per week and she was then made redundant with effect on 10 May 2020 due to the negative impact of Covid-19 on the business.

[9] Christina Nyberg started working for TTH in October 2019 progressing to become a 'front of house' duty manager. The employment ended when she was also made redundant on 10 May 2020.

Claims at issue

[10] The following claims are identified in the Nybergs amended Statement of Problem received by the Authority on 15 May 2023:

- 1) An assertion that the director verbally abused Rebecca Nyberg in front of other workers on 15 November 2019.
- 2) A grievance arising from Rebecca Nyberg allegedly being dismissed on 18 November 2019.
- 3) A further dismissal grievance of Rebecca Nyberg with effect "on or about 10 February 2020".

- 4) Just prior to the relationship ending by way of a letter of 4 May 2020, a Canterbury Community Law Centre lawyer wrote to the director highlighting the following concerns as personal grievances:
- Underpayment of wages during the previous 5 weeks due to Covid-19 restrictions on the hotel opening.
 - A suggestion that there was a dispute over whether Rebecca Nyberg had previously resigned and agreed to be re-hired on different terms (hours of work was raised as a term being at issue).
 - A claim that TTH did not properly consult with the Nyberg's on what health and safety measures would be in place on their return to work (noting both had medical issues).
 - A claim that when both did not return to work for health reasons they were threatened by the director.
 - A request was made for wage, time and leave records and the Nybergs' personal files.
- 5) Personal grievances for Rebecca and Christina Nyberg raised on 12 November 2020 by their advocate that they were allegedly unjustifiably dismissed by reason of redundancy on 10 May 2020 in a manner that also breached good faith obligations.

TTH's initial responses

[11] TTH's counsel asserts the above claims be dismissed suggesting they were not raised at the time and were first identified in the statement of problem and that the issue of disputed wages in April 2020 was resolved by agreement at the time.

Suggestion that claims are frivolous or vexatious

[12] Setting aside the timeliness or otherwise of the claims, TTH is seeking to have the Nybergs' claims dismissed in their entirety on the basis that they are frivolous or vexatious pursuant to s 12A, Schedule 2 of the Act.

[13] The approach the Authority takes is well established¹ and stems from the Employment Court first considering the matter in *Lumsden v Sky City Management Limited*² a decision that made it clear that the Authority discretion to dismiss a matter is very limited in scope. In *Lumsden* Judge Inglis found that something more was required to deem a matter frivolous than simply that it has no reasonable prospect of success³ and concluded:

...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 the 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.⁴

[14] In addition, in *Lumsden*, Judge Inglis noted that the Authority has no discretion to dismiss an application based on part of a matter as under s 12A of the Act it can only dismiss a matter in its entirety.⁵

[15] Assistance is found in *Newick v Working In Limited* where the Employment Court outlined the following guidance:

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.

¹ A detailed summary of the Authority's legal approach is set out in Member Robinson's determination *Qiang Deng v Henry Feng Lawyers Ltd* [2017] NZERA Auckland 118, 19 April 2017.

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

³ At [37].

⁴ At [39].

⁵ At [21].

- 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 claims 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.⁶

The case for dismissal

[16] As a starting point TTH's counsel suggests the Nybergs have failed to properly set out their claims and articulate the basis for such. However, the substance of this concern is directed to the timing of when the grievances were raised as opposed to whether there is substance to the claims raised. Counsel then suggests the claims are frivolous but then seeks to rely on the same lack of specificity and documentation as advanced in the contention around timeliness. TTH's counsel, however, make a valid observation that the claims advanced do not concern a novel or developing area of the law nor are they legally complex.

[17] In suggesting the claims advanced are vexatious TTH's counsel expounds upon the legal principles the Authority should apply and a series of premises from reported cases but then cites the Nybergs' advocate's deficiency in pleadings regarding specificity and timeliness. Counsel then suggests on the Nybergs central claim that they were dismissed because of a 'sham' redundancy process, that they have not provided a truthful account of the facts and have no basis for their claims. Further, counsel suggests the Nybergs' conduct of the proceedings and alleged failure to constructively engage in resolution attempts over the past three years is a factor the Authority must consider. This included a claim of tardiness by the

⁶ *Newick v Working In Limited* [2012] NZEmpC 156

Nybergs' advocate in not filing, as directed, an amended statement of problem in a timely fashion.

[18] In concluding the submission on the alleged vexatiousness of the Nybergs' claim counsel suggests it is being advanced for an improper purpose to use a public forum to advance ill will toward TTH's director by making "scandalous and unjustified" allegations without supporting documentation that impugn the director's character and the claims are allegedly retaliatory.

The case opposing dismissal

[19] Mr Moore, as I understand his submission, is contending that generally the grounds for a dismissal of the Nybergs' claims have not been made out and that any issues of their claims being unclear have been resolved by their amended statement of problem. Mr Moore then alludes to disclosed correspondence and text messaging in the affidavit of the director of TTH being sufficiently relevant to render the claim for dismissal under s 12 A of the Act redundant. Overall, Mr Moore asserts that: "A strike out application is simply not an appropriate response to a lack of knowledge of the fine details of a case".

Assessment

[20] In an application to dismiss a claim I must assume that the facts as pleaded are true. It will be up to the Nybergs to establish their veracity at an investigation meeting (if it proceeds) and to prove their claims that the ending of their employment relationship was unjustified and/or they were the subject of actions that caused them to be disadvantaged during the employment period. As expounded in *Newick* a claim should not be summarily dismissed or 'struck out' unless the Authority is convinced with a degree of certainty that it cannot succeed.

[21] At this preliminary stage, I can have no certainty as to the strength of the Nybergs' claims without testing their evidence by questioning it and contrasting such with disclosed

documentation and TTH's evidence. Setting aside timeliness issues, I am unconvinced that the claims are futile. I find that the totality of the documentation before the Authority at this stage, does not dissuade me from the need to explore matters further by exchanges of evidential briefs and oral evidence at an investigation meeting. I have no cause to consider the claims to be frivolous or vexatious.

[22] I, however, caution the Nybergs that proceeding to pursue their claims is now dependent on their application made under a 114(3) of the Act to have them heard out of time.

Outcome

[23] I determine that Tai Tapu Hotel Limited's claim to have Rebecca Nyberg and Christina Nyberg's claim dismissed on the grounds that they are frivolous and/or vexatious under s 12A, Schedule 2 of the Act, fails.

Next Steps

[24] The Authority will contact the parties shortly to progress the matter regarding dealing with progressing the Nybergs' application to have their claims dealt with out of time pursuant to s 114(3) of the Act.

Costs

[25] Costs are reserved pending resolution of the application to hear this matter out of time and if that application is successful, the substantive proceedings.

David G Beck
Member of the Employment Relations Authority