

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 366
3203679

BETWEEN DONALD JEFFERY
Applicant

AND APPLIANCES GALORE & MORE
LIMITED T/A REFRESH
APPLIANCES
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Nick McKessar, counsel for the Respondent

Investigation Meeting: 31 May 2023 at Christchurch

Submissions Received: On the day from the Applicant and Respondent
Further Information Received: 11 July 2023 from the Respondent.

Date of Determination: 11 July 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Donald Jeffery was initially engaged by Appliances Galore & More Limited trading as Refresh Appliances (Refresh) by way of a letter of offer of 27 October 2021. The letter of offer described the role as “Trainee Service Technician, Sales, Promotion, Customer Acquisition” and that is consistent with what Mr Jeffery understood it, the prime intent of the role was expressed as to “support Donald’s Electrical Certification and Training.” However,

the description of the role also envisaged Mr Jeffery's would be trained in Refresh's product, sales and systems, customer acquisition and promotion work.

[2] Mr Jeffery has identified an unjustified disadvantage claim concerning the actions and omissions of Refresh that he considers caused him detriment. Broadly these included a suggestion that the job was misrepresented to him or he was misled; and once he commenced, he says he was given insufficient time and technical support to pursue his expressed goal of advancing his trade qualification and that led to him to resign. The description of the role and the extent of assurances made by Refresh to Mr Jeffery's about supporting his desire to pursue a qualified trade are at issue.

[3] As a remedy, Mr Jeffery seeks compensation for the distress and delayed opportunity he claims to have suffered. However, Mr Jeffery is not claiming he was constructively dismissed.

[4] Refresh by contrast, maintain, that before engaging in technical training, Mr Jeffery had to satisfactorily demonstrate a knowledge of Refresh's sales and promotional procedures and that he was later provided with support in technical areas. Refresh contend that Mr Jeffery 'voluntarily' resigned to pursue his trade qualification at a tertiary provider and therefore Mr Jeffery was not disadvantaged in his employment. Refresh's counsel suggests Mr Jeffery has not identified a viable cause of action and that the claims advanced are frivolous and should be struck out as lacking legal merit.

[5] There is another threshold issue of whether Mr Jeffery's personal grievance was raised within 90 days pursuant to s 114(1) of the Act. Then if it is found not to have been raised within 90 days there is the issue of whether the Authority should grant permission for the grievance to be raised out of time pursuant to s 115 of the Act .

The Authority investigation

[6] At the investigation meeting, I heard evidence from Mr Jeffery and Matthew Carpenter, sole director and co-shareholder of Appliances Galore & More Limited. Mr Carpenter recruited and managed Mr Jeffery.

[7] As permitted by s 174E the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence and submissions except to observe the parties assisted in giving evidence and submissions that I have carefully considered.

What caused Mr Jeffery's employment relationship problem?

[8] In late September 2021 Mr Carpenter engaged with the Ministry of Social Development (MSD) as he was seeking to engage a sales and marketing employee and an appliance service technician. An initial 1 October 2021 email from an MSD employment co-ordinator, introduced Mr Jeffery as interested in the latter role. The employment co-ordinator indicated: "He would be keen to get an apprenticeship" and with an Apprentice Boost where you as an employer can get government funding to take on an apprentice could be a good option for you. Mr Jeffery's Curriculum Vitae (CV) was attached to the email. The email also provided a personal promotional extract from Mr Jeffery in which he indicated he was "pretty handy with electrical stuff; he gave examples and he asked, "would they take on someone in an apprenticeship capacity?"

[9] Mr Jeffery disclosed he had just been accepted into an electrical engineering pre-trade course at a local tertiary trade training provider (Ara) that he envisaged commencing in mid-October 2021.

[10] Mr Jeffery's CV also detailed he had sales and customer service experience and a significant communication background gained while working for a security company.

[11] It was apparent that Mr Carpenter in expressing an interest in Mr Jeffery, believed he could use him in a joint role. Refresh did gain a subsidy of \$26 per week for Mr Jeffery's first 26 weeks of employment but did not disclose what category of subsidy this was. How this arrangement was communicated to Mr Jeffery is somewhat opaque. By email of 12 October 2021, Mr Carpenter indicated to Mr Jeffery, he was interested in interviewing him "for a position with our business".

[12] An interview took place on 15 October. Brief handwritten notes that Mr Carpenter disclosed for the investigation, show he had been advised Mr Jeffery was at Ara between 8

am – 5pm Monday to Wednesday, his end goal was to be a service technician or electrician and his sales and social media capabilities are mentioned. Mr Jeffery being eligible for an MSD wage subsidy is also noted. After a notation that he would do a first day trial on 22 October, the notes end with a series of points including:

- Can do Night Class's
- Whole end game Electrical Registration – electrical engineering pre – trade
- Matthew (Mr Carpenter) is committed to Donald being trained in all aspects of the business starting with sales and promotion.

[13] Afterwards, Mr Carpenter emailed Mr Jeffery on 17 October, with the subject heading “Service Tech Position – Refresh Appliances”. The email is discursive and platitude laden but it also did indicate in summary:

- Mr Carpenter was interested in Mr Jeffery’s aspiration to become a registered electrician and: “Certainly there is a need for qualified tradesmen and the training involved has its own merits in the disciplines you would develop” and “you will be supported at Refresh in building that future.”
- Understood that Mr Jeffery was available to work for Refresh on Thursdays, Fridays and possibly weekends – depending on how long his Ara course would last.
- Refresh were also interested in Mr Jeffery’s social media capability and sales background and his interest in wearing “multiple hats” would serve him well.
- Refresh was primarily “a sales and marketing company” but sales promotion had recently been neglected

[14] The letter concluded with an invite to meet with an existing experienced employee Mr Jeffery would impliedly be working with.

[15] Mr Jeffery responded on the same day lauding Mr Carpenter for being accepting of his aspiration to be an electrician. He advised his Ara pre-trade course would end in August 2022 and he offered to explore available MSD grants or subsidies with a contact he had. In an indication a job offer had already been secured, Mr Jeffery said he would arrange to meet the existing employee in the coming week. He also noted he had examined Refresh’s Facebook page and could make suggestions for improvement that he would discuss with Mr Carpenter “later on when you tell me what parameters you want me working within.”

[16] Mr Jeffery recalled having a day's trial on 22 October and then getting an email of 27 October from Mr Carpenter headed: "Employment Offer Draft – Donald Jeffery". The offer that was described as "a basis for Addition and Discussion" used the job title: "Trainee Service technician, Sales, Deliveries, Promotion (Outcall and Social Media)" and then stated in summary:

- Offer is for a minimum 30 hours/week (Days by Negotiation)
- Initial Training will be at 492 Moorhouse Ave to build Product and System Knowledge
- Prime intent is to support Donald's Electrical Certification (Specify)
- Job Plus Subsidy to be secured to support Donald's training for new position.
- Starting wage will be \$20/hour
- Standard Employment Contract to be Signed by Donald and Appliances Galore & More Ltd
- Start date on 4 November or on securing Job Plus Subsidy.

(**Note:** the reference to a Job Plus Subsidy is reference to a redundant pre-2012 subsidy).

[17] The above "terms" document was signed by both parties on 27 October 2021.

[18] In addition, by way of a further email of 2 November, Mr Carpenter indicated that: "We have an Appliance Service Technician (Registration being Renewed) starting simultaneously with you". Also (Mr Carpenter), alluded to a friend who was a fully registered electrician researching registration matters "with a view to overseeing what is required for you under the new regulations." Mr Carpenter also mentioned another registered electrician who previously had done work for Refresh "who if needed I believe would support in whatever manner is required." Mr Carpenter then invited Mr Jeffery, if he wished, to make an alternative arrangement for his training support needs. Mr Carpenter closed the email by acknowledging he may need to take a "bit of a left field thinking" approach to come up with support to get Mr Jeffery certificated but he would "bring whatever is required to make that happen for you and for Refresh Appliances."

[19] A further email from Mr Carpenter of 8 November indicated vigorous support for Mr Jeffery's ambition to become a registered electrician "and the plan I covered in my last email

is falling into place, you will be partnered (by an) Appliance Technician and have the further support of a Registered Technician who has qualified and practiced in 5 other trades.”

[20] I observe the above exchanges demonstrate that Mr Carpenter, although enthusiastic in promoting the service technician role to Mr Jeffery, clearly had not arranged, or had in place, adequate training, and support mechanisms. It was also not abundantly clear from the documentation that the role on offer was a service technician. In fact, this transpired to be the case, as the expectations became that Mr Jeffery occupy a hybrid role that initially was sales and promotion focused. This premise is reinforced by a 10 November email Mr Carpenter sent to MSD, in which he indicated that he was awaiting surgery and that his existing staff would have to ‘step up’ in the interim and:

Refresh Appliances works on a policy of role interchangeability Sales people must clean sweep and deliver and Techs also are trained to Sell but this level of versatility requires Time and Training.

[21] A further piece of the puzzle to determine what was offered to Mr Jeffery and what role was envisaged, is a letter disclosed from the MSD Employment Co-ordinator to Studylink of 7 December 2022 that confirms the offer was brokered by MSD and that:

The employer came to me to advertise a position as an electrical assistant in their workshop. The belief was that they would put him through an apprenticeship as his goal was to become a fully qualified electrician.

Mr Jeffery’s employment commences

[22] Mr Jeffery commenced employment with Refresh on or around 10 January 2022 at this point no employment agreement was provided.

[23] Documentation disclosed the first month of employment did not go well and after ten days (23 January 2022) Mr Carpenter emailed MSD indicating Mr Jeffery: “Needs Lots of Training” and suggested Refresh be given a “substantial increase in the Flexi wage Subsidy”.

[24] However, an individual employment agreement was executed on 17 February 2022, with a position description and the job title: “Sales, Service, Promotion, Sales Support”. Clause 8 of the agreement noted the employment purported to be based on a three months’ trial basis. While the trial period was invalid as it was not entered into prior to Mr Jeffery

commencing employment, it stated during the first six weeks Mr Jeffery was expected to “gain competency in each facet of the position requirements” (that were not set out in the attached position description). The second six weeks was described as a “consolidation period” in which Mr Jeffery was to “demonstrate and maintain the level of competency required.” Thereafter, Mr Jeffery was expected to be “fully trained and competent to manage the designated function.” To achieve these stated objectives the agreement noted regular appraisal meetings would occur and that: “Full training and encouragement will be given to ensure competency is achieved.”

[25] Unfortunately, despite Refresh committing itself to such support, Mr Jeffery asserted his experience was a lack of encouragement and structured training and that several assurances of technical training from qualified sources did not materialise.

[26] An example of the tone of early communication and objectively lack of constructive feedback, was a 23 January email from Mr Carpenter to Mr Jeffery, addressing the temporary absence of a co-worker (Paul), reproduced in full and at the time copied to Paul, was as follows:

In other words – You need To “Cause Your Commitment”, Days, Times, that you will be “Reliable For!”.

And then with me and Paul “Actions For You” to take “Forward Your Training” and “To Have You become A Reliable and Effective Team Member at Refresh Appliances”

Please be clear that, until you have learned “The BASICS of how We Do It at Refresh Appliances,” there will be no possibility of your flair being harnessed in any area that will benefit the business.

I am not prepared to have your Training be a Convolutd Drawn Out, Messy Interruption To Other Team Members!

You will realize when, “You Are A Demand On Yourself To Be Trained”, that others will step up and “Contribute To You”. Until then you will Occur As An Irritation and a Pain in the Arse rather than a Contribution to the Refresh Team.

I look forward to your enrolment and vigorous participation within the above parameters.

Yours Regards

Matthew Carpenter

[27] Mr Carpenter's perspective as expressed to MSD, was that Mr Jeffery was in his first ten days although personable and having ability, - "relatively unproductive" and "challenging, and distracting to others in the team". Mr Carpenter claimed that because Mr Jeffery was not noticing the basics of sales and promotion tasks, he chose not to focus on providing technical training during January and February. Mr Carpenter also underwent orthopaedic surgery in December 2021 and during an enforced recovery period, he says was tired and not completely focused on work issues.

[28] In addition, Mr Jeffery says he was having difficulty balancing up working for Refresh and attending his Ara pre-trade training course. He disclosed he was latterly only attending Ara on Mondays as he felt he needed to spend more time at Refresh to be available for training earlier in the week for sales and promotion work. This meant he was missing practical assessments as part of his Ara course.

[29] Matters came 'to a head' when on Tuesday 15 March, Mr Jeffery emailed Mr Carpenter to indicate he would not be at work "the next few days" as he had been advised the previous day, Ara had declined to allow him to continue with his "level 3 electrical engineering theory course" for "lack of engagement". Mr Jeffery assured he thought this would get sorted in the next few days and then proceeded to highlight communication issues he was experiencing with Mr Carpenter while working for Refresh.

[30] In ending the email, Mr Jeffery raised a concern that Refresh's expressed commitment to his gaining an electrical trade qualification and getting qualified trainer support was not happening. Mr Jeffery noted he had done approximately one hour service work in seven weeks and sarcastically noted that at that rate, it would be 750 years before he was qualified.

[31] Mr Carpenter responded to Mr Jeffery by email: first chastising him for copying his email to the general office address as being an inappropriate medium to raise personal matters, before responding in extensive detail to points raised. Mr Carpenter was then personally critical of Mr Jeffery.

[32] Mr Carpenter's response then proceeded to suggest in respect to supporting a pathway to an electrical qualification, that he was consulting two qualified people and another friend

who may be able to assist. He then held out the possibility of Mr Jeffery working in Refresh's workshop alongside an unqualified technician but then stated:

I just need to crush your EGO a bit more and be clear you will bring constructive support to him, not fill the space with your dominant need to indulge in verbosity just for the sake of it. Most normal people find it irritating!

[33] Mr Jeffery conceded he was placed in the workshop during March/April and the unqualified repair person was of assistance but nothing came of any structured training by qualified people as Mr Carpenter had alluded to.

[34] Mr Jeffery says he met with Mr Carpenter in early April to raise concerns about his lack of qualified support for his technical training and in response he was given an assurance an electrician would be engaged to assist but says nothing came of this.

[35] Mr Carpenter says he became very frustrated that Mr Jeffery was not noticing the promotional aspect of his job and in a 1 May email he set out his various expectations on what Mr Jeffery should focus upon. The email does not mention any aspects of Mr Jeffery's technical role and it sought feedback in writing by 10 am, 3 May. Mr Jeffery responded on 3 May indicating he was not going to be at work but would respond later to the 1 May email.

[36] I was not provided with any earlier response than Mr Jeffery emailed Mr Carpenter on 13 June, setting out observations on operational and pricing matters and Mr Carpenter responded in critical terms. This exchange did not touch upon Mr Jeffery's training needs.

[37] Also in June, Mr Jeffery says he raised a concern about being asked to assist in installing a washing machine that he declined due to him feeling he was not technically qualified. He recalled this prompted another discussion with Mr Carpenter about getting him more appropriate training but says again he was 'left hanging.'

[38] In mid-July, Mr Jeffery says he entered discussion with Ara about returning to a trade course and that he discussed this with Mr Carpenter including once again raising his lack of training at Refresh being at issue. He says further offers of technical support were offered but again nothing came of it.

Ending of employment relationship

[39] By email of Friday 5 August 2022 Mr Jeffery using the office email, announced to his team of co-workers that he had confirmed he was able to return to study at Ara the following week and that he was now effectively unavailable to Refresh “Monday to Wednesday” and at that point was unsure of the training end date.

[40] In a response email of 9 August, Mr Carpenter indicated it was “inconvenient you are taking this action without consulting me as your employer”. He then said after briefly reviewing Mr Jeffery’s “terms and Conditions of Employment,” that Refresh was prepared to offer 15 hours work on Thursdays and Fridays between the hours of 9.30 am to 5.00pm. He suggested a meeting on 11 August “for a brief chat”. I note that this was a unilateral breach of Mr Jeffery’s employment agreement that entitled him to a minimum of 30 hours per week but acknowledge that Mr Jeffery had signalled his available days were changing. Unfortunately, the employment agreement was silent on days to be worked.

Resignation

[41] Mr Jeffery responded on 10 August saying he believed he had consulted Mr Carpenter numerous times about his intention to return to study and he reiterated that promised technical training by qualified people had not been provided in the last 8 months. In what turned out to be an ambiguous resignation, Mr Jeffery stated: “Truth is, it’s impossible for me to maintain employment at Refresh Appliances and be serious about getting trade certified...”. He then suggested the lack of progress on getting him properly supervised was an impediment to his time at Refresh as counting for anything toward a future qualification. Mr Jeffery finished by indicating he was not available to meet Mr Carpenter on 11 August saying his course ran over five days and not three (contradicting what he told co-workers in his 5 August email).

[42] I observe that the combination of the wording used above and lack of reciprocity to the offer of ongoing employment (albeit on altered terms) coupled with the decision to return to study, objectively, amounted to an effective resignation.

Personal grievance

[43] No further contact occurred until Mr Jeffery says he became aware that his student allowance application had been declined on the ground he had not completed over 50% of his previous study course. Mr Jeffery raised a personal grievance with Mr Carpenter by email of 14 August 2022 “due to my employment at Refresh Appliances”. The remedy initially identified that Mr Jeffery was seeking was reimbursement of his lost student allowance. The email ended with reference to him having previously raised issues of the lack of training by appropriately qualified people during his employment at Refresh.

[44] Mr Jeffery suggested a legal basis for his grievance was pre-employment misrepresentation by Refresh’s Mr Carpenter (citing an email of 8 November 2021) suggesting a core condition of his acceptance of employment at Refresh was the offer of advancing his technical qualification and that he had also been misled by representations made.

[45] Further correspondence and mediation failed to resolve matters and Mr Jeffery, unrepresented, filed an application in the Authority on 7 December 2022, broadly seeking “compensation due to my lost time spent working for Refresh appliances”.

[46] Given Mr Jeffery’s has not raised a claim he was constructively dismissed I focus below on whether legally his concerns were properly identified and raised in a timely fashion and whether if I deem that to be the case, they could potentially amount to a disadvantage claim under s 103(1)(b) of the Act.

Preliminary issues – is the personal grievance insufficiently identified and raised out of time and/or are the claims sufficiently frivolous to be dismissed?

Timeliness of identifying and raising the personal grievance.

[47] The first legal issue before determining timing issues, is did Mr Jeffery pursuant to s 114 of the Act (Raising personal grievance), validly raise a grievance and particularise it.

[48] Counsel for Refresh cites a passage from *Creedy v Commissioner of Police* where the Employment Court noted a person identifying a grievance needs to provide the employer with

“sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving soon and informally, at least in the first instance”.¹ The focus on early intervention by open communication was detailed in a schedule B attached to Mr Jeffery’s employment agreement (“Employment Relationship Resolution Process”) that encouraged open communication to resolve concerns at the earliest juncture and identified who to raise concerns with including an encouragement to specifically approach Mr Carpenter. The resolution process also contains an exposition of reciprocal good faith requirements and then states:

Our pledge to you is to train you and empower you to allow you to have a happy and safe work environment and to take ownership and responsibility for the work you do.

[49] On the evidence I was provided at the investigation meeting it was apparent that Mr Jeffery used the employment problem resolution process in his employment agreement and he properly identified his issue as access to training by a qualified person. Mr Jeffery first raised the issue in writing with Mr Carpenter on 15 March 2022 and he says on several occasions thereafter, both orally and in writing. Because of Mr Carpenter’s admitted failure to address this issue it became a continuing grievance and at the point Mr Jeffery ended his employment on 10 August 2022 the issue was still extant and Mr Jeffery cited it (lack of appropriate training support) as a reason for his employment ending. There was no doubt that Mr Carpenter was aware that this was a continuing concern. In raising a personal grievance on 14 August 2022, I find Mr Jeffery described the circumstances of his grievance and alluded to what he considered to be misrepresentation.

[50] Counsel for Refresh attempting to make *Creedy* a valid comparison has suggested Mr Jeffery could not rely on “the ongoing lack of training” as it was clear this would occur later, once he had been “assimilated” into the business or completed basic training. The problem with this assertion which Mr Carpenter also claimed to be the case is twofold – first the documentation and exchanges show technical training was to be provided from the onset and secondly it was not clear that Mr Jeffery had not completed the ‘assimilation’ training. On the latter I acknowledge Refresh had legitimate concerns but it was evident in Mr Carpenter creating a hybrid role that he brought much of that upon himself by setting unrealistic

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517.

expectations beyond the core employment offer that was to assist Mr Jeffery in a technical role to support his goal of registration in a trade.

[51] I consider *Creedy* can be distinguished as a situation where the grievance was initially raised in an anticipatory fashion and then a significant amount of time beyond 90 days elapsed.

[52] In terms of whether the substance of the grievance was properly identified and raised within time, my finding is it clearly was. I accept that Mr Jeffery categorised the grievance and identified remedies in an ill-informed manner (given he was self-represented) but the core grievance was objectively, easily understandable - it was the ongoing failure of Refresh to provide appropriate technical training - that was the unjustified omission or lack of action by his employer.

[53] I accept evidence that Mr Jeffery raised this grievance on several occasions and by the time he resigned it had still not been addressed. I find Refresh had sufficiently been altered to an ongoing grievance and I consider that Mr Jeffery's resignation email was even sufficient to identify the grievance. The proposition I find this to be the case is based upon the premise that it is possible to have regard to the circumstances and context involved rather than reliance on an explicit phrase such as "I am raising a personal grievance that my employment or one or more conditions has caused me to suffer a disadvantage."

[54] The test is an objective one but it is, as the Employment Court in *Urban Décor Ltd v Yu* notes "not ignorant to context" and the totality of the circumstances.² I must consider in all the circumstances whether a reasonable person could have appreciated that Mr Jeffery was raising a personal grievance about his lack of appropriate training and that this was potentially causing him disadvantage. I consider that Mr Carpenter who gave evidence of his considerable business experience, was aware of Mr Jeffery's specific concern and this is reinforced by the evidence of Mr Carpenter having created the expectation of training in the first place and that he took personal responsibility to ensure it was delivered.

² *Urban Décor Ltd v Yu* [2022] NZEmpC 56 at [30]. See also *Maynard v Bay of Plenty District Health Board* [2011] NZEmpC 175.

Finding

[55] I find Mr Jeffery raised his personal grievance within time so I do not need to consider any exceptional circumstances as per s 115 of the Act.

Should the claims be dismissed?

[56] The Authority's Directions Notice of 28 March 2023, notes that if it was determined that the grievance was raised in time the next issue is consideration of whether the grievance be dismissed as "it is frivolous and/or vexatious?".

[57] Normally this consideration would be undertaken at a preliminary stage with only affidavit evidence and documentation being available. However, the Authority under s 12A(1) Schedule 2 of the Act has the discretion, provided grounds of frivolous or vexatious are established, to dismiss a matter "at any time in any proceedings before it". In any event, hearing Mr Jeffery's and Mr Carpenter's evidence has assisted me to determine whether grounds for dismissal of the claims exist.

[58] At the investigation meeting, Refresh's counsel advanced a submission impliedly pursuant to s 12A, Schedule 2 of the Act, seeking that Mr Jeffery's claims be dismissed as frivolous.

[59] The approach the Authority takes is well established³ and stems from the Employment Court first considering the matter in *Lumsden v Sky City Management Limited*⁴ a decision that made it clear that the Authority's 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 success⁵ 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.⁶

³ 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.

⁴ *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.

⁵ At [37].

⁶ At [39].

[60] In addition, in *Lumsden*, Judge Inglis noted that the Authority has no discretion to dismiss based on part of a matter as under s 12A of the Act it can only dismiss a matter in its entirety.⁷

[61] Helpful guidance on assessing such claims 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.
- 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.⁸

The case for dismissal

[62] Counsel for Refresh's submission solely concentrated on an assertion that Mr Jeffery's claims were frivolous and not ill motivated. After traversing the formation of the employment relationship, Counsel proceeded to address the substance of Mr Jeffery's disadvantage claim (a ground counsel conceded existed) suggesting Mr Jeffery's claim lacked merit on three grounds. These in summary are:

- 1) There being no unjustified actions by the employer and they acted in accordance with the employment agreement.
- 2) Any claimed initial misrepresentation has no caused loss to Mr Jeffery.

⁷ At [21].

⁸ *Newick v Working In Limited* [2012] NZEmpC 156

- 3) A general assertion that the remedies sought for identified wrongs could not succeed and the claims lack legal merit.

[63] In suggesting the claims advanced are frivolous Refresh's counsel detailed the legal test the Authority should apply including how the Employment Court put the matter in *Gapuzan v Pratt & Whitney Air New Zealand Services* where after extensively traversing relevant authorities, Judge Corkill stated:

The underlying theme of these statements is that there must be significant lack of legal merit so that it is impossible for the claim to be taken seriously.⁹

[64] Put another way, counsel drew to the Authority's attention that the Labour Court has succinctly noted "there must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously."¹⁰

The case against dismissal

[65] Mr Jeffery did not make a submission per se other than to imply the circumstances and contextual matters he expanded upon demonstrate that his grievance was not trivial.

Assessment

[66] Having had the unusual benefit in a preliminary matter of hearing both parties on substantive issues and having had the ability to question both parties and examine documentation disclosed I conclude Mr Jeffery's case is not trivial and cannot be dismissed.

Outcome

[67] I determine that:

- Donald Jeffery's personal grievance claim was raised within 90 days pursuant to s 114(3) Employment Relations Act 2000, and:

⁹ *Gapuzan v Pratt & Whitney Air New Zealand Services (T/A Christchurch Engine Centre)* [2014] NZEmpC 206 at [58].

¹⁰ *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZLR 1055 (LC).

- Appliances Galore & More Limited t/a Refresh Appliances' application to have Donald Jeffery's claims dismissed on the grounds that they are frivolous under s 12A, Schedule 2 of the Employment Relations Act 2000, fails.

Next steps

[68] Utilising s 159(1)(b)(c) Employment Relations Act 2000, I direct the parties to attend further mediation to explore resolution. Should the matter not resolve itself at mediation Mr Jeffery is to inform the Authority and a case management conference will be set up to determine how the matter proceeds. If the matter proceeds I serve notice that I have categorised Mr Jeffery's disadvantage claim as whether Refresh took sufficient steps to address identified ongoing concerns and signal s 160(3) of the Act applies. That allows the Authority to not be bound:

.... to treat a matter as being a matter of the type described by the parties, and may in investigating the matter, concentrate on resolving the employment relationship problem, however described. ¹¹ .

Costs

[69] As Donald Jeffery was not represented and was the successful party, there are no issues as to costs.

David G Beck
Member of the Employment Relations Authority

¹¹ Section 160 Employment Relations Act 2000.