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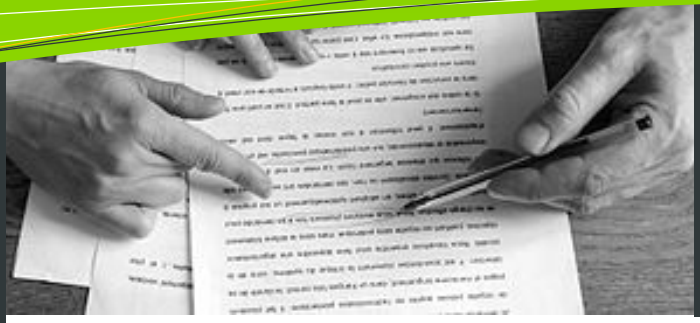
THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 251

February 2016



A Vexing Question

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

We were recently asked by a client to respond to their ex-employee's claim by arguing that the claim was frivolous and vexatious. In response we attempted to explain to the client the difference between these terms in normal usage and in the law. A very recent Employment Court decision; ***Lumsden v. SkyCity*** (December 2015) has clarified this distinction and in passing considered the sanctity of full and final settlements.

By way of background, the employee, Mr Lumsden, entered into a mediated settlement with SkyCity a term of which stated that he would resign and included the following provision:

"11.This is the full and final settlement of all matters between the [sic] David Lumsden and Sky City Food & Beverage arising out of their employment relationship including termination thereof."

Within a month of settling Mr Lumsden initiated a dispute against SkyCity which, among other things included claims that SkyCity had not followed the terms of the settlement, that he had signed under duress and that he had been duped into signing by misleading statements.

SkyCity applied to the Authority to have these parts of his claim dismissed on the basis that they were frivolous because they related to elements of the full and final settlement, and were therefore covered by s.149 of the Employment Relations Act which things provides that:

"except for enforcement purposes, no party may seek to bring those terms before the Authority or Court, whether by action, appeal, jurisdiction for review or otherwise."

The Authority considered and accepted this application under the provisions of clause 12A of Schedule 2 of the Act:

"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."

Mr Lumsden challenged that dismissal to the Employment Court.

Matter

The Court firstly held that the Challenge must succeed because the Authority had exercised its right under clause 12A to dismiss elements of Mr Lumsden's case and that it did not have the right to do so. Clause 12A provides for the ability to dismiss '*a matter*'. Mr Lumsden argued that there was no authority to dismiss part of a matter. The Court accepted this argument, because clause 12A does not provide for dealing with parts of a claim in the same way that other parts of the Act does. For example, s.178 and 179B both refer to a '*matter, or part of it*'. The Court concluded that this omission was intentional on the part of Parliament because it met the aim of the Act to provide for resolution of matters by the Authority in an efficient, low level, cost-effective way. Restricting the rights of challenges at a preliminary stage satisfied these aims.

Frivolous

The Court went on to conclude that even if it had not supported the challenge on this basis, it did not accept the Authority finding that the claims were frivolous. In doing so it considered a series of decisions in light of the jurisdiction of the Authority to dismiss a case (under clause 12A) without an investigation.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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SkyCity argued that '*frivolous'* meant *'lacking legal merit'* and on the basis of the restriction of s.149 the claim to review the settlement had no legal merit and was therefore frivolous.

The Court considered a series of cases that drew a distinction between a case lacking legal merit and a frivolous one:

- ***NZ Shipwrights v. NZ Amalgamated Engineering IUOW*** 1989

  "Frivolous cases are more than just cases which disclose no cause of action. A frivolous case is one . . .

  'which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court.

  "It is one which it is impossible to take seriously. A trivial case is one in which the plaintiff is relying on an empty technicality or can at most secure a result devoid of importance, so that it can be truly said that he or she is trifling with the Court in initiating the proceeding in the first place."

- ***Creser v. Tourist Hotel Corporation of New Zealand & Anor*** 1990

  "[T]o 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 the wrong motives. It is sufficient if, as a result of some patent and glaring error or law, the plaintiff or applicant has brought a case which is entirely misconceived."

- ***Gapuzan v. Pratt & Whitney Air New Zealand Services*** 2014

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

- In ***Deliu v. Hong*** 2011, the Court distinguished a frivolous claim from one which was legally untenable; *"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."*

  The Court concluded that this matter did not meet the threshold of being frivolous.

  In reaching this conclusion the Court considered (as above) the fact that Parliament had intentionally chosen to limit the Authority's ability to dismiss a proceeding without investigating it, again stressing the special characteristics of the jurisdiction empowering employees to pursue claims and have them determined '*without undue regard to legalities in an efficient, non-technical manner'*.

Full and Final

The Court went on to make additional comments on the effect of full and final settlements. Raising at first instance the apparent conflict between s.149 of the Employment Relations Act (as above, this prevents appeals of mediated settlements) and s.238 which provides that 'the provisions of this Act have effect despite any provision to the contrary in any contract or agreement'. The Court reflected that:

"While it is true that s 149 restricts a party's ability to revisit a settlement agreement, it may not provide an impermeable barrier. There may be circumstances, which have not been fully explored by the Court, where it is permissible to go behind a settlement agreement. One such example may be in cases of duress. And, as the provision itself makes clear, a party seeking to enforce the terms of an agreement is at liberty to do so."

Although no binding decision was made on this point, the Court considered Mr Lumsden's arguments in which he claimed to have been induced to enter into the agreement on the basis of assurances that SkyCity then breached. He further claimed to have resigned in anticipation of promises (regarding a safe return to work) which were not kept. He finally claimed to have been duped into signing the settlement by these promises.

The significant issue here was that having considered Mr Lumsden's pleas the Court did *". . . not accept that the fact that Mr Lumsden entered into a full and final settlement agreement which was signed off by a mediator means that his claim is frivolous in the sense required by cl 12A."*

The matter was referred back to the Authority to consider.

This case provides a thorough consideration of the concepts surrounding the meaning of frivolous insofar as it relates to challenges to Employment Relations Authority cases. Furthermore, it seems clear that the Court may not dismiss a challenge to a mediated settlement simply on the basis of the apparent bar to such an action in s.149.