IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 225
EMPC 161/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID LUMSDEN Plaintiff
AND	SKYCITY MANAGEMENT LIMITED Defendant

Hearing:	22 October 2015, and by way of further submissions dated 30 October and 6 November 2015 (Heard at Auckland)
Appearances:	D Lumsden, plaintiff in person K Dunn, counsel for defendant
Judgment:	16 December 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff has challenged a determination of the Employment Relations Authority dismissing parts of an amended statement of problem he had filed in that forum.[1] The challenge raises issues about the scope and proper application of cl 12A of sch 2 of the Employment Relations Act 2000 (the Act), not previously examined by the Court. That provision enables the Authority to dismiss a matter on the basis that it is frivolous or vexatious.

[2] The factual context can be summarised fairly briefly. Mr Lumsden worked at SkyCity from 20 February 2013. Issues arose and the parties attended mediation. Both parties entered into a settlement agreement, which was signed by a mediator

[1] *Lumsden v SkyCity Management Ltd* [2015] NZERA Auckland 141.

pursuant to s 149 of the Act. One of the agreed terms of settlement was that Mr Lumsden would resign. He did so and his employment came to an end on 25 November 2014.

[3] The settlement agreement contained the following clause:

> 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.

[4] On 19 December 2014 Mr Lumsden filed a statement of problem. Mr Lumsden alleged that SkyCity had breached the settlement agreement. An amended statement of problem followed. It included claims which the defendant says were the subject of the settlement agreement between it and Mr Lumsden, and claims which it says were the subject of a settlement agreement with another former employee (Ms A).

[5] On 16 April 2015 SkyCity pursued an application under cl 12A to have five paragraphs of the amended statement of problem dismissed on the basis that they were frivolous and/or vexatious. The Authority dismissed each of the identified paragraphs, concluding that:[2]

> I accept Ms Dunn's submission that paras 1.1.1, 2, 3, 4.14 and 4.15 of the amended statement of problem have no prospect of success. They relate to allegations that have been dealt with, and settled, by the parties and recorded in the settlement agreement.

[6] It is convenient to set out the five paragraphs of the amended statement of problem at this point:

> 1.1.1 Skycity breached its obligation as expressed in clauses 2 and 11 of the agreement by treating matters arising out of the plaintiff's past employment with Skycity as not fully and finally settled. This was done by using allegations made against the plaintiff to his prejudice when considering his subsequent job application.
>
> …
>
> 2 Skycity breached its duty of good faith as provided by the Employment Relations Act, s 4(1). This was done by way of Skycity's agreement to clauses 10 and 14, followed by its breach of both clauses at the first

[2] At [24].

available opportunity. In light of the determinative influence the inclusion of these clauses had on the plaintiff's decision to enter the agreement, it is strongly implied that Skycity agreed to their inclusion with the intention of inducing the plaintiff to enter into the agreement, only to then render both clauses inoperative.

3 The plaintiff's resignation amounted to constructive dismissal. The reason for this is Skycity's failure to take reasonable measures to ensure a safe workplace for the plaintiff.

…

4.14 After having resigned on 31 December 2014, from her employment at Skycity, [Ms A] contacted Skycity with regards its past breach of her employment agreement, with regards its practice of not allocating breaks to her throughout her employment.

4.15 Skycity maintained in correspondence with her that compensation paid to her could only be in recognition of hurt and humiliation, not wages in arrears. The matter was of wages in arrears, and therefore concerned the Wages Protection Act, as well as the Employment Relations Act. Skycity stated that there was caselaw regarding the matter, and that the legal position was that matters regarding an employer inducing labour from an employee without pay could only be settled by way of compensation for hurt and humiliation. This was a deliberate attempt to mislead [Ms A] to a belief that Skycity had no obligation to compensate [Ms A] for wages lost due to Skycity's routine breach of their employment agreement.

Analysis

[7] Schedule 2 to the Act confers on the Authority a number of powers in respect of the conduct of proceedings in that forum. One such power relates to the dismissal of frivolous or vexatious proceedings. Clause 12A provides that:

> **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.

[8] There is an unqualified right to challenge a decision made under cl 12A to dismiss a matter. In this regard s 178A provides that:

178A Challenge in respect of dismissal of frivolous or vexatious proceedings

(1) A party to a matter before the Authority that was dismissed because the Authority determined it was frivolous or vexatious under clause 12A of Schedule 2 may challenge that determination in the court.

(2) A challenge under this section must be made in the prescribed manner within 28 days after the date that the matter is dismissed by the Authority.

(3) The court must decide whether it considers the matter to be frivolous or vexatious.

(4) If the court does not determine that the matter is frivolous or vexatious, it must order the Authority to investigate and determine the matter.

[9] As Ms Dunn, counsel for the defendant, pointed out, the Act does not specify how the Court is to approach its task, whether in accordance with cl 12A (the Authority's power to dismiss) or cl 15 of sch 3 (the Court's power to dismiss). I agree with her submission that on a challenge it is more logically the former rather than the latter. Ultimately it makes no difference, as the provisions are identical in material respects. Unlike s 179 (which also confers a right of challenge on "a party to a matter") s 178A does not make provision for a right of election by the challenging party. I approach the current challenge on the basis that I must be satisfied that the plaintiff's proceeding is frivolous or vexatious and if I am not so satisfied I must order the Authority to investigate and determine the matter.

[10] Although cl 12A was enacted in 2011, it has received no judicial attention. Clause 15 of sch 3 has.[3] There are a number of issues that arise on the face of cl 12A. What is "a matter"? Can only a part of a matter before the Authority be dismissed? What does "frivolous" mean for the purposes of the provision?

[3] *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206.

What is "a matter"?

[11] The question of what constitutes "a matter" for the purposes of cl 12A arises because the Authority dismissed certain parts (paragraphs) of the plaintiff's amended statement of problem.

[12] The title to cl 12A refers to the "[p]ower to dismiss frivolous or vexatious proceedings". A "proceeding" is not defined in the Act but is defined in the High Court Rules as meaning[4] "any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application." "A matter" is not defined in the Act either.

[13] As cl 12A(1) makes clear, it is "a matter or defence" that may be dismissed and, under cl 12A(2), costs and expenses may be awarded against a party "bringing the matter or defence". Similarly the heading to s 178A refers to the dismissal of frivolous or vexatious "proceedings", and the right to challenge as being conferred on a "party to a matter". The reference to "proceedings" in each heading suggests that a matter refers to the whole of a claim or defence rather than a part.[5]

[14] It is significant that in other provisions of the Act the term "a matter" is used to connote a proceeding. For example:[6]

- Section 174D provides that the Authority may "determine a matter without holding an investigation meeting";
- Section 174C provides that the Authority "may reserve its determination of a matter if it is satisfied that there are good reasons" to do so;
- Section 174B provides that the Authority (when giving an oral indication of its preliminary findings) must "give an indication of its likely conclusions on the matters or issues it considers require determination in order to dispose of *the matter*";
- Section 159, which provides that where "any matter" comes before the Authority for determination, the Authority must give

[4] High Court Rules, r 1.3.
[5] See Interpretation Act 1999, s 5, especially s 5(3) which includes "headings to Parts and sections".
[6] Emphasis added.

consideration to mediation and (under s 159A) the Authority has a duty to prioritise "a matter" that has been to mediation.

[15] It is also significant that the statute differentiates between a matter and part of a matter in a number of provisions but does not do so in cl 12A. For example:[7]

- Section 178 provides that the Authority may "order the removal of *the matter, or any part of it*, to the court to hear and determine the matter without the Authority investigating it";
- Section 179B provides that "[*n*]*o matter, or part of a matter*, may be removed to the court under s 178 if *the matter, or part of the matter*, arises under Part 6AA".

[16] There is a degree of inconsistency of expression in the Act. Clause 18 of sch 3 (which refers to the withdrawal of proceedings) contemplates that a matter may be part, but not the whole, of proceedings before the Court.

[17] Unlike r 15.1 of the High Court Rules, which specifically allows for the whole or part of a claim or defence to be struck out on the ground that it is frivolous or vexatious, cl 12A does not. It would have been a very easy matter for Parliament to have referred to part of a matter if the intention had been to enable the Authority to dismiss a part or parts of a matter, rather than the matter in its entirety. In making this observation I do not overlook the fact that this appears to have been the intention at an early stage of the legislative process, namely during the First Reading. However, the fact that another provision enacted with cl 12A and s 178A refers to "any part of" a matter[8] but these provisions do not, strongly suggests that any such intention was overtaken, or was not carried into the legislation for some reason.

[18] It is perhaps not surprising that the Act does not make provision for part of a matter to be dismissed, as it would likely give rise to the sort of disruptions to Authority investigations, and associated delays, which provisions such as s 179(5) and 184(1A) are designed to prevent. As the Court of Appeal in *Employment Relations Authority v Rawlings* observed with reference to s 179(5):[9]

---

[7] Emphasis added.
[8] See s 178(1).
[9] *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [26].

> We are satisfied that ss 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations. But once the investigation is over and a determination has been made, there is no reason for limiting the challenge and review jurisdictions of the Employment Court.

[19] Interpreting cl 12A as empowering the Authority to dismiss parts of a statement of problem, thereby giving rise to the unfettered right of challenge under s 178A, would be at odds with other provisions of the Act (including s 179(5) which restricts rights of challenge at an interlocutory stage) and would cut across the statutory scheme, which is designed to ensure the efficient, low-level, cost effective disposition of claims in the Authority without unnecessary judicial intervention. The reality is that many litigants represent themselves in the Authority and a number of representatives have no legal training; nor are they required to under the Act.

[20] As Mr Lumsden pointed out, the statutory intent was to shorten rather than lengthen the time it takes to dispose of matters in the Authority. Adopting the interpretation advanced on behalf of the defendant would not only arguably undermine this objective by encouraging challenges at an early stage but would increase costs for parties, including litigants without the benefit of significant resources.

[21] I conclude that the Authority has no power under cl 12A to dismiss part of a matter before it. Even if the identified paragraphs in Mr Lumsden's statement of problem can properly be characterised as frivolous (which I deal with below), it does not trigger the power of dismissal under cl 12A.

The meaning of "frivolous"

[22] It is clear, from the disjunctive wording of cl 12A, that "frivolous" and "vexatious" connote different things. The defendant did not suggest that the allegedly offending paragraphs of the plaintiff's amended statement of problem are vexatious. Rather, the submission was that they were frivolous because they could not succeed. Section 149 was said to be the stumbling block.

[23] Section 149(3) provides that:

> Where, following the affirmation … the agreed terms of settlement to which the request relates are signed by the person empowered to do so, -
>
> (a) those terms are final and binding on, and enforceable by, the parties; and
>
> …
>
> (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[24] Ms Dunn referred me to a number of previous judgments of this Court in support of the proposition that lack of legal merit was enough to warrant an application of the "frivolous" descriptor. I turn to consider those cases in chronological sequence.

[25] The first judgment (*NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW & Ors*) was decided in 1989.[10] It was not concerned with a statutory power but with the Court's implied power to strike out a proceeding. In considering whether the proceeding ought to be struck out, Chief Judge Goddard observed that:[11]

> *Frivolous cases are more than just cases which disclose no cause of action*. A frivolous case is one, to use the words of Lush, J in *Norman v Mathews* [1916] 85 LJKB 857, 859:
>
> "*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.

[26] It is immediately apparent that the Chief Judge was drawing a distinction between a case which lacked legal merit and one which was frivolous.

---

[10] *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IOUW* (1989) ERNZ Sel Cas 516, [1989] 3 NZILR 284 (LC).
[11] At 522, 289 (emphasis added).

[27] *Creser v Tourist Hotel Corporation of New Zealand & Anor*[12] was decided a year after *Shipwrights* and involved the Court's statutory power under s 293 of the Labour Relations Act 1987. That provision stated that:

> 293. **Court may dismiss frivolous cases** – The Labour Court may at any time dismiss any matter before it which it thinks frivolous or trivial; …

[28] In applying s 293 the earlier observations in *Shipwrights* were endorsed:[13]

> … I see no reason to depart from those observations. I would add only this: to 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*.

[29] In *STAMS v MM Metals Ltd* the Court dismissed a claim which was subject to a full and final settlement agreement, under s 121 of the Employment Contracts Act 1991 (which mirrored s 293 in its terms). In doing so Judge Finnigan found that the claim was frivolous because, by reason of patent error of law, it was entirely misconceived.[14]

[30] Clause 15 of sch 3 (which, as I have said, is in materially identical terms to cl 12A) was recently considered in *Gapuzan v Pratt & Whitney Air New Zealand Services.*[15] Parts of Mr Gapuzan's claims were dismissed on the basis that they were "entirely misconceived" and were "therefore frivolous in the legal sense". In reaching this conclusion Judge Corkill referred to the authorities cited above and also a decision of Associate Judge Bell in *Deliu v Hong.*[16] Judge Corkill concluded that:[17]

> 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.

[31] The Collins English Dictionary defines "frivolous" as:[18]

---

[12] *Creser v Tourist Hotel Corporation of New Zealand* [1990] 1 NZILR 1055 (LC).
[13] At [1069] (emphasis added).
[14] *STAMS v MM Metals Ltd* [1993] 1 ERNZ 115 (EmpC) at 121, 122.
[15] *Gapuzan v Pratt & Whitney Air New Zealand Services*, above n 3.
[16] *Deliu v Hong* [2011] NZAR 681 (HC).
[17] *Gapuzan* at [58].
[18] Italics in original.

> **1** not serious or sensible in content, attitude, or behaviour. **2** unworthy of serious or sensible treatment: *frivolous details*.

[32] The Shorter Oxford English Dictionary defines "frivolous" as:

> **1** Of little or no value or importance, paltry; (of a claim, charge, etc),
>
> **2** Lacking seriousness or sense; silly.

[33] Recently the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* considered the term "frivolous" in the context of a discussion of the grounds for strike out contained within the High Court Rules, which includes the power to strike out/dismiss frivolous or vexatious proceedings.[19] Rule 15.1 provides that:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it-
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> …

[34] The Court of Appeal drew a clear distinction between each of these grounds, observing that:[20]

> The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. *In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety*. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and

[19] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] 2 NZLR 679 (CA).
[20] At [89] (citations omitted, emphasis added).

> for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[35] The distinction between concepts of lack of legal merit, frivolity, and vexatiousness were reiterated in *Deliu v Hong*. As Associate Judge Bell observed, while these concepts may overlap to a certain degree they nevertheless bear essentially different characteristics. He said:[21]

> [21] Rule 15.1(1)(c) allows the Court to strike out a pleading if it is frivolous or vexatious. The frivolous ground is a stand-alone ground for striking out. That is clear from the disjunctive "frivolous or vexatious". While the frivolous ground may overlap with other grounds under r 15.1, a pleading may be struck out as frivolous, even if it does not fall within the other grounds under r 15.1(1). …
>
> [22] *The claims by Mr Deliu and by Mr Hong are frivolous. The parties are using the pleadings to direct insults at each other. This proceeding is not being used to uphold interests which the law of torts sets out to protect. In the eyes of the law, the matters in issue in this proceeding are trivial. This proceeding lacks the seriousness required of matters for the Court's determination.*
>
> [23] *This decision that the pleadings are frivolous does not turn on whether Mr Deliu or Mr Hong have tenable causes of action for their claims*, although that is a relevant consideration. This proceeding does not merit a detailed analysis to decide whether the causes of action are sustainable, but I propose to review the causes of action briefly.
>
> …
>
> [33] I do not say that all Mr Deliu's or Mr Hong's causes of action are completely untenable but their cases are very weak. They are contrived simply as vehicles in which to deliver attacks against each other. The point remains that this proceeding is not being run to serve any useful purpose.
>
> …
>
> [35] It is well established that the Court should exercise its power to strike out pleadings sparingly and only in clear cases. It is a serious step to rule at an interlocutory stage that a proceeding is not fit to be heard in this Court. But to allow this proceeding to continue would only prolong a dispute that should be put to rest. It is a dispute in which none of the parties can hope to obtain any advantage and in which they may do themselves harm.
>
> [36] I have given as grounds for my decision the fact that this proceeding is frivolous. Neither Mr Deliu nor Mr Banbrook referred to these matters in their submissions. That was understandable. Any argument that one of the parties might raise against the other's claim being frivolous would be a double-edged sword because the arguments directed against one party would also operate against the other. However, the Court cannot remain mute. The

[21] Emphasis added.

> Court has to ensure that its own time is not being wasted when proceedings are frivolous. The Court can exercise its own power to bring a proceeding to an end when the case is a frivolous proceeding.

[36] The judgment in *Deliu v Hong* was the subject of an application for review. On review,[22] Courtney J found that Mr Deliu's claims ought not to have been struck out (because he had not been heard) and that Mr Hong's claims ought not to have been struck out on the basis that they were frivolous; they should have been struck out on the basis that they had no reasonable prospect of success. In doing so she distinguished a frivolous claim from one which was untenable from a legal perspective, observing that:[23]

> [10] Mr Hong's application to strike out Amicus' claim was brought on the grounds that the pleading did not disclose a reasonably arguable cause of action, was likely to cause prejudice or delay, was frivolous or vexatious or otherwise an abuse of the Court process. The power to strike out a cause of action, and thereby preclude the issues arising from being tried, is to be used sparingly and only in clear cases.
>
> [11] Although the Associate Judge did consider whether the pleadings disclosed reasonably arguable causes of action, he did not base his decision on that assessment, but rather on r 15.1 (1)(c), the frivolous ground: …
>
> [12] *The Associate Judge's view that the claim and counterclaim were frivolous was entirely understandable*. However, it is not necessary to consider that aspect in any detail because, in my judgment, *the causes of action by Amicus were not tenable and should properly have been struck out on that ground*, without the need to consider the motivation of the parties.

[37] The present matter falls for determination under cl 12A, not r 15.1. However the scope of cl 12A is usefully informed by the judicial discussion I have referred to. 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 use Chief Judge Goddard's terminology, impossible to take seriously.

---

[22] *Deliu v Hong* HC Auckland CIV-2010-404-6349, 21 December 2011, Courtney J (footnotes omitted).
[23] Emphasis added.

[38] Relevantly, Parliament has chosen to limit the circumstances in which the Authority may dismiss a proceeding without investigating it under cl 12A, to matters which are either frivolous or vexatious. There is, for example, no reference to dismissal of a matter which discloses no reasonably arguable cause of action or defence. While the dismissal of cases with little or no merit appears to have been contemplated at a relatively early stage of the legislative process, the wording did not find its way into the section or clauses as enacted.[24] The rationale for limiting the scope for dismissal may well reflect the special characteristics of this jurisdiction and the underlying policy thrust of the Act, empowering employees to pursue claims and have them determined on their substantive merits, without undue regard to legalities, and in an efficient, non-technical manner.[25] Dismissing claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.

[39] I conclude that 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 a 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. This is not one of them.

[40] Whether a matter is frivolous is to be determined objectively. Even if I were to accept that the Authority may dismiss paragraphs in a statement of problem or reply under cl 12A (which I do not, for reasons set out above) I would not have concluded that each of the identified paragraphs is frivolous.

[41] Section 149(3) restricts a party's ability to revisit a settlement agreement. Mr Lumsden raised arguments (which did not find favour with the Authority) that s 149 must be read subject to s 238. That section provides that "[t]he provisions of this Act have effect despite any provision to the contrary in any contract or agreement". Ms

---

[24] Employment Relations Amendment Bill 2010 (No 2) (196-1) (explanatory note) at 9. The Explanatory Note to the Bill at first reading refers to "Filtering out frivolous or vexatious cases" and states that "This change would allow the Authority to dismiss frivolous or vexatious claims or defences of claims (or parts of a claim or a defence). This allows the Authority to dismiss cases with little or no merit…"

[25] Employment Relations Act 2000, ss 101(a), 157(1). See also *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

Dunn accepted that the two provisions did not sit altogether comfortably, and that there may be room for argument about the interrelationship between them, although the Court has not yet had the opportunity to do so.

[42] In *Roy v Board of Trustees of Tamaki College* Chief Judge Colgan observed that it was "arguable" whether full and final settlement agreements could contravene s 238 and described the effect of the section as a question that was both unclear and important.[26] The observation in *STAMS* that a claim that had been the subject of a full and final settlement was frivolous must accordingly be read with some caution. While *Roy* did not involve a s 149 settlement agreement, I do not accept that the mere fact that the agreement in the present case was executed under that provision constitutes the start and the end of the enquiry, or necessarily determines Mr Lumsden's prospects of success. 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.[27] And, as the provision itself makes clear, a party seeking to enforce the terms of an agreement is at liberty to do so.

[43] Mr Lumsden is seeking to argue that he was induced to enter into the settlement agreement on the basis of a number of assurances given by SkyCity which it then proceeded to breach. Paragraph 1.1.1 of the statement of problem refers to one such alleged breach. He contends that following the settlement agreement he sought employment with SkyCity but his application was thwarted, in breach of the agreement. SkyCity accepts that allegations of breach of its obligations about disparagement and future employment may be pursued but says that paragraph 1.1.1 cannot because it refers to allegations that were resolved in the full and final settlement agreement. The argument appears to me to be circular. It is difficult to see how Mr Lumsden can pursue an action based on an asserted breach unless he is permitted to refer to the matters which he says were the subject of a broken settlement. Section 149(4) makes it plain that a person who breaches an agreed term

[26] *Roy v Board of Trustees of Tamaki College* [2014] NZEmpC 153, [3014] ERNZ 332 at [57].
[27] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [20]; see also *Tinkler v Fugro PMS Pty Ltd and Pavement Management Services Ltd* [2012] NZEmpC 102 at [27].

of settlement to which s 149(3) applies is liable to a penalty. Mr Lumsden seeks the imposition of a penalty in his amended statement of problem.

[44] Similarly, paragraph 2 contains an allegation that SkyCity breached its obligation of good faith by inducing Mr Lumsden to sign the settlement agreement which it then promptly breached. SkyCity submits that this paragraph ought to be dismissed because Mr Lumsden fully and finally settled all issues he had in relation to his employment, and the agreement was signed off by a mediator. I do not consider, for the reasons already referred to, that the fact that a mediator signed off the settlement agreement, is necessarily conclusive. The underlying assumption, that no mediator would ever (unconsciously or otherwise) sign off an agreement entered into under (for example) duress, misrepresentation or inducement, is too sweeping at a dismissal stage.

[45] Paragraph 3 asserts that Mr Lumsden's resignation (which was one of the agreed terms of settlement) amounted to a constructive dismissal, because SkyCity had failed to take reasonable measures to ensure a safe system of work. This is linked to other allegations in the amended statement of problem which have not been dismissed. Mr Lumsden says that until he became aware of the breaches, there was no cause of action in constructive dismissal. That is because he claims to have resigned in anticipation of promises which, it is said, were not kept. This may engage an argument that the "full and final" wording of the agreement is limited to claims that both parties were aware of at the time they entered into the agreement.[28]

[46] Mr Lumsden's contention that he was effectively duped into resigning during the course of the mediation process and as an agreed term of settlement, raises issues about the scope of s 238 and the circumstances in which an employer can seek to protect itself against future claims (including via a s 149 agreement). As I have said, the scope of this provision and its interrelationship with s 238 is unsettled. I do 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.

---

[28] See, for example, *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206 (EmpC).

[47] I understood Ms Dunn to accept that the matters referred to at paragraphs 4.14 and 4.15 were factual in nature. As Mr Lumsden pointed out, they are relevant to an allegation in the amended statement of problem (at 1.1.4) that remains intact and has not been dismissed. I agree with him that it is unclear why facts pleaded in a statement of problem in support of what is effectively a cause of action would be regarded as frivolous when the cause of action itself is not. I do not accept (based on the material before the Court) that they are frivolous.

Conclusion

[48] There is no power to dismiss part of a statement of problem under cl 12A. That is sufficient to dispose of the challenge in this case. If I am wrong about that, I would not have concluded that the identified paragraphs in Mr Lumsden's statement of problem were frivolous. They do not trifle with the Authority's process, are not silly and do not lack seriousness. They may well face legal hurdles, as Ms Dunn suggests, but that will be dealt with during the course of the Authority's investigative process.

[49] The Authority must proceed with its investigation in the circumstances.

[50] It may well be that no issue of costs arises. If it does, memoranda may be exchanged, with the plaintiff filing and serving any memorandum and supporting material within 40 days of the date of this judgment and the defendant filing and serving any response within a further 20 days.

Christina Inglis
Judge

Judgment signed at 12.30pm on 16 December 2015