

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2014] NZEmpC 200  
ARC 74/13**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

AND IN THE MATTER    of an application to strike out

BETWEEN                TUI VAAI  
   Plaintiff

AND                        MOANA PACIFIC FISHERIES  
   LIMITED  
   Defendant

Hearing:                On the papers filed on 31 October 2014

Appearances:        P Swarbrick and T Oldfield, counsel for defendant

Judgment:            5 November 2014

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1] Mr Vaai was employed by Moana Pacific Fisheries Limited in 2002. His employment came to an end on 30 April 2012. He unsuccessfully pursued a grievance in the Employment Relations Authority. He subsequently filed a challenge to the Authority's determination. Timetabling orders were made to progress the challenge, none of which were complied with by the plaintiff.

[2] An application to strike out the plaintiff's claim was filed on 17 July 2014. The plaintiff has taken no steps in relation to the application, although being put on clear notice of the potential consequences of failing to do so. The defendant has filed written submissions in support of its application, which is dealt with on the papers.

[3] It is well accepted that the Court has the jurisdiction to strike out proceedings. Because no procedure is set out within the Employment Relations Act 2000 or the Employment Court Regulations 2000, the application is to be dealt with as nearly as practicable in accordance with the High Court Rules. The defendant refers to Rule 15.1, which provides that the Court may strike out a statement of claim, and dismiss a proceeding, if it discloses no reasonably arguable cause of action. In such a case the Court proceeds on the basis of the facts as pleaded. Rule 15.2(a) further provides that a proceeding may be dismissed if the plaintiff fails to prosecute it to trial and judgment.

[4] The plaintiff's claim is that he was constructively dismissed. As the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>1</sup> made clear, a claim of constructive dismissal may be made out where an employer gives the employee a choice of resigning or being dismissed. There is no allegation that the employer presented such a choice to the plaintiff. As pleaded, the plaintiff resigned following advice he received from his then representative that he had to resign or face dismissal in the context of a disciplinary process. The plaintiff subsequently signed a letter of resignation prepared by his representative. The facts as pleaded present an obvious stumbling block for the claim.

[5] It is, of course, important to prevent injustice to claimants. A degree of caution is required. However, the interests of both parties need to be weighed. The defendant should not be exposed to the cost of defending an untenable claim. Nor should it have proceedings, which the plaintiff initiated but has failed to prosecute, hanging over its head indefinitely.

[6] The claim is struck out and the proceeding dismissed.

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<sup>1</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136 at 139.

[7] There is no issue of costs, the defendant having elected not to seek them in the circumstances.

Christina Inglis  
Judge

Judgment signed at 11 am on 5 November 2014