

**IN THE DISTRICT COURT  
AT TAURANGA**

**I TE KŌTI-Ā-ROHE  
KI TAURANGA MOANA**

**CIV-2017-070-000531  
[2018] NZDC 25761**

BETWEEN

JOHN MATSUOKA  
Plaintiff

AND

ZAMBION LIMITED  
First Defendant

AND

ALLAN JOHN PUMPHREY  
Second Defendant

Hearing: 20 August 2018

Appearances: M O'Brien for the Plaintiff  
G Pollak for the First and Second Defendant

Judgment: 13 December 2018

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**RESERVED JUDGMENT OF JUDGE P G MABEY QC**

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[1] The plaintiff brings claims against the first defendant in tort alleging deceit and negligent misstatement and also under the Fair Trading Act 1986.

[2] The second defendant is sued under the Fair Trading Act on an allegation that he aided the first defendant's breach of that Act.

[3] The proceedings in this Court have a history which began in the Employment Court and the defendant sought to have them struck out. I declined that application in a reserved decision issued on 19 January 2018 noting at [25]:

... these proceedings involve amounts which do not justify the cost that will be incurred by engaging counsel and experts. I am also of the view that Court resources can be better utilised but all citizens are entitled to bring their disputes to the Court, no matter how minor or how apparently insignificant, and all citizens are entitled to access justice.

[4] Further at [27]:

The plaintiff may well be someone who has an obsessive interest in his Employment Court proceedings and may well be determined to make life difficult for the first and second defendants by pursuing a vexatious action for a collateral purpose, but I am not in a position at this point to say that the causes of action are not arguable or determine if the plaintiff's motivation in reality amounts to an abuse of process.

[5] After the strike out application was dismissed matters progressed through the discovery process.

[6] I issued a Minute on 22 August 2018 addressing matters relating to discovery and asked counsel to make submissions on the application of the *Jameel* principle applied by her Honour Justice Katz in *Opai v Culpan* as I was increasingly concerned that what was at stake at this litigation did not justify the cost, was a waste of Court resources and was thus an abuse of process.<sup>1</sup>

[7] Counsel responded with submissions and having received those submissions I am satisfied that this is not a case for proper application of the *Jameel* principle but I nonetheless intend to strike out the plaintiff's claims against both defendants as an abuse of process. I give my reasons in this judgment.

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<sup>1</sup> *Opai v Culpan* [2017] NZHC 1036.

[8] As I have noted the issues which join the parties in these proceedings began in the Employment Court.

[9] The plaintiff is a former employee of LSG Sky Chefs New Zealand Limited (LSG). He brought proceedings against that company alleging unjustified dismissal.

[10] In the course of dealing with those proceedings the plaintiff applied for preservation orders relating to documents held by the first defendant Zambion Limited.

[11] Zambion had been involved in providing payroll services to LSG and documents allegedly held by Zambion may have had relevance to the issues before the Employment Court.

[12] On 20 December 2016 his Honour Judge Perkins in the Employment Court made preservation orders directing the retrieval and storage of Zambion's payroll records that relate to the plaintiff.

[13] An aspect of that order was that any costs incurred by Zambion in complying, both as to retrieval and storage, are to be met by the plaintiff.

[14] The documents were provided and Zambion invoiced the plaintiff. However that was not the end of it.

[15] The plaintiff took issue with the amount of Zambion's invoice and engaged experts to assess Zambion's stated hourly rate. In an effort to resolve that dispute Zambion recalculated its charges at a reduced hourly rate but the reduced charge was also disputed by the plaintiff as unreasonable.

[16] That dispute came back before Judge Perkins. Both parties filed submissions and the Judge took the view that the issue needed resolution. He declined a formal hearing and resolved it on the papers. Ultimately, he arrived at a charge out rate of \$300 per hour noting in his judgment that:<sup>2</sup>

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<sup>2</sup> *Matsuoka v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 42 at [8].

... It is unusual that a trivial dispute such as this need be placed before the Court to resolve.

[17] The original invoice submitted by Zambion nominated a charge out rate of \$450/hour. The total invoice for 5.5 hours, including GST, was \$2869.27.

[18] The amended invoice issued in an attempt to resolve the dispute nominated a charge out rate of \$350/hour. The invoiced amount including GST was reduced to \$2236.77. It can immediately be seen that the Judge's reference to a trivial dispute was fully justified. The differences in the invoices was insignificant.

[19] The charge out rate adopted by the Judge of \$300/hour resulted in an equally insignificant further reduction to \$1920.50 including GST. The plaintiff paid that invoice in full.

[20] The Judge directed that in resolving the issue relating to the charge out rates that costs should lie where they fall.

[21] However the plaintiff, having received his ruling and having paid the resulting invoice was not prepared to leave matters where they were. He issued proceedings in this Court.

[22] The statement of claim (now amended) recites the employment relationship between the plaintiff and LSG and that Zambion provided payroll services to LSG.

[23] The claim recites the preservation orders made by Judge Perkins and the history of the invoicing between Zambion and the plaintiffs.

[24] The plaintiff pleads the tort of deceit alleging that Zambion through its director, the second defendant, made a false representation as to its hourly charge out rate, intending the plaintiff to accept the false representation as true and thereby improperly extracted money from the plaintiff.

[25] The claim asserts reliance by the plaintiff on the representations and that losses flowed in the form of expert costs to assess the hourly rate together with legal costs.

[26] In particularising the damage suffered as a result of Zambion's alleged deceit the claim states:

But for the false representations, the Employment Court would have ordered Mr Matsuoka to pay Zambion at its actual commercial hourly rate (i.e. below \$300/hour). Accordingly, Mr Matsuoka has suffered loss in an amount to be determined, being the difference between the amount Mr Matsuoka was ordered to pay Zambion being \$1920.50 and Zambion's actual commercial hourly rate.

[27] Special damages in the form of the expert fees (\$840.94) and the "difference between the amount Mr Matsuoka was ordered to pay Zambion being \$1920.50 and Zambion's actual commercial hourly rate are sought".

[28] Added to the special damages claim is a claim for general damages of \$25,000 for inconvenience. I comment that the claim for general damages in the context of this litigation is ambitious to say the least and may well be no more than padding to justify the cost and time in bringing a claim for minimal special damages.

[29] The plaintiff also pleads negligent misstatement reciting the above particulars.

[30] As a third cause of action the plaintiff sues Zambion under the Fair Trading Act 1986 arguing that Zambion was in trade and that its invoices at no stage reflected its actual commercial rate and thus the inflation of its actual hourly rate was misleading and deceptive. It is said that the second defendant Mr Pumphrey as director of Zambion aided and abetted that breach.

[31] Judge Perkins resolved the dispute over the hourly rate. He arrived at a figure which was included in Zambion's final invoice. The plaintiff paid in full. The plaintiff now asserts that if it were not for the alleged deceit, and/or negligent misstatement and/or breach of the Fair Trading Act Judge Perkins would have arrived at a different figure.

[32] To plead in one Court that a Judge in another Court in a separate jurisdiction would have acted differently if not for the defendants alleged wrongs demonstrates the true reality of the plaintiff's claims in this Court.

[33] The matters now raised by the plaintiff in this Court although in a “different garb” could have been, and should have been raised before Judge Perkins in the context of the proceedings that he was seized of.

[34] The Employment Court has no jurisdiction in tort or under the Fair Trading Act but that is not the point. In reality the plaintiff is saying Judge Perkins was misled. He could have asked for a rehearing of the decision when the \$300 per hour hourly rate was set or appealed it introducing fresh evidence. That was not done. Nor did the plaintiff seek to recover the cost of the experts incurred when the hourly rate was successfully challenged before Judge Perkins. He rather chooses to seek recovery in this Court.

[35] In *Dotcom v District Court at North Shore* his Honour Justice Brewer observed at [25]:<sup>3</sup>

It is well-established, therefore, that to relitigate matters already determined, including bringing proceedings dressed in different garb but having the same effect, is an abuse of process.

[36] I am conscious that I have already ruled upon an application to strike out the plaintiff’s proceedings and that in the course of his submissions Mr Pollak made the point that the matters now before this Court should have been raised in the Employment Court.

[37] That notwithstanding I do not consider there is any limit on this Court’s inherent power to prevent an abuse of its processes. There is no bar to me deciding to do now what I refused to do earlier. If the Court’s process is being abused that abuse must be stopped.

[38] The causes of action that the plaintiff brings in this Court may be justified on the law that underlies them and as they are pleaded but the reality of the matter is that the plaintiff is seeking to pursue the defendants in one Court when his issue properly lies in another. Manipulation of pleadings to engage the jurisdiction of a separate

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<sup>3</sup> *Dotcom v District Court at North Shore* [2017] NZHC 3158.

Court is an abuse of process when it is seen as just that. That is how I see it and for the reasons I give the plaintiff's claims against the defendants are struck out.

[39] Costs will be awarded to the defendants on a 2B basis. I invite memoranda by 30 January 2019.

P G Mabey QC  
District Court Judge