

## Article Information

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# Can an employer sue its former employee for pre-employment misrepresentations?

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In an interesting twist, an employee in the process of suing his former employer has found himself the recipient of a counter claim for alleged misleading and deceptive representations made in applying for his job.

**Erin McCarthy, partner, and Emily Haar, associate,** reviews the interim decision of *Carr v Empirical Works Pty Ltd and Anor* [2017] FCCA 1813, where the Federal Circuit Court allowed the cross claim to proceed.

Peter Carr was employed as a salesperson for Empirical Works Pty Ltd (**Empirical Works**). His employment was terminated in circumstances that he contends were in breach of the general protections contained in the *Fair Work Act 2009* (Cth). He commenced proceedings in the Federal Circuit Court in 2016.

After a failed mediation, Mr Carr's former employer, Empirical Works, sought the leave of the Court to amend its Response in order to, in its submission, further particularise a counter claim against Mr Carr.

Empirical Works sought to bring a counter claim against Mr Carr for \$450,000 in loss and damage. This amount was comprised of a recruitment fee it paid to employ Mr Carr, loss of sales for Mr Carr's second, third and fourth months of employment and loss of sales following the end of Mr Carr's employment.

These losses were said to have occurred as a result of a number of misleading and deceptive representations made by Mr Carr during his recruitment, including in his resume and during interviews. The representations were that Mr Carr:

- worked as a sales director for a business management consultant firm;
- had more than a decade of experience in sales;
- worked as a sales director for six years;
- had substantial experience with large multinational companies;
- made \$2 million in sales in the last financial year; and
- had close business ties that were "guaranteed" to result in sales.

Mr Carr's representations were said to have given Empirical Works the impression that he was "highly skilled and successful", and led to him being offered a job and recruitment fees being incurred to secure his employment.

Empirical Works pleaded that shortly after Mr Carr was employed, it soon became apparent that he did not have connections that resulted in sales, could not identify any new business opportunities, failed to achieve his sales targets, and lacked the necessary technical knowledge or experience for the role.

Empirical Works brought its claim against Mr Carr under section 18 of the Australian Consumer Law, found in the *Competition and Consumer Act 2010* (Cth) which prohibits a "person" from engaging in misleading and deceptive conduct in "trade or commerce".

There is some authority that representations made by prospective *employers* to their prospective hires can be representations made in "trade or commerce", but this case is unusual in that it alleges that Mr Carr's representations, as a prospective *employee*, could be in "trade or commerce".

Mr Carr sought to have the amended counter claim struck out on the basis that statements made by him in the interview process could not be said to be representations made “in trade or commerce”.

This preliminary issue came before the Federal Circuit Court in April 2017 for determination.

In a judgment published in August 2017, Judge Nicholls allowed Empirical Works to amend its response to include the “misleading and deceptive conduct” counter claim. In making this decision, Judge Nicholls found it relevant that section 18 of the Act prohibits “persons” from engaging in misleading and deceptive conduct, as opposed to “corporations”, as was the case in predecessor legislation, the *Trade Practices Act 1974* (Cth). Empirical Works were able to successfully argue that cases dealing with the old legislation did not provide a complete basis on which to allow the Court to strike out their counter claim under the new legislation.

In allowing the counter claim to proceed, Judge Nicholls accepted that there was an arguable case against Mr Carr in circumstances where previous Court authority confirmed two things. First, that pre-employment negotiations can hold a “commercial character” for the purposes of misleading and deceptive conduct cases. Secondly, that for representations to occur in “trade and commerce”, they only need to occur within the scope of the trade of the person *receiving* the representation, not the person making the representation.

The dispute between Mr Carr and Empirical Works has not yet progressed to a final hearing. Whether the counter claim against Mr Carr is successful will remain to be seen. However, this interim decision is an important reminder that all parties to pre-employment negotiations should be very careful about the representations and promises made, because if they are false, or simply cannot be lived up to, they could form the basis of a misleading and deceptive conduct claim if the employment relationship breaks down.

*If your organisation would like some assistance with reviewing its pre-employment processes, please contact a member of Piper Alderman’s Employment Relations team.*