IN THE COURT OF APPEAL OF NEW ZEALAND

CA406/2015
[2015] NZCA 359

BETWEEN	SHABEENA SHAREEN NISHA (NISHA ALIM) Applicant
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Respondent

Hearing:	29 July 2015
Court:	Ellen France P, Miller and Winkelmann JJ
Counsel:	M W O'Brien for Applicant J Douglas and C M Meechan QC for Respondent
Judgment:	29 July 2015 at 3.00pm
Reasons:	7 August 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent's costs on the application for leave calculated on the basis of a 40 per cent uplift on band A, plus usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

Introduction

[1] The applicant, Ms Nisha, has brought proceedings in the Employment Court challenging a determination of the Employment Relations Authority in connection with claims for a constructive dismissal, personal grievance and arrears of wages and other employment entitlements. The proceeding in the Employment Court is set down for a five day fixture on 10 August 2015. In a judgment dated 15 July 2015 Chief Judge Colgan declined Ms Nisha's application for adjournment of the fixture.[1] Ms Nisha sought leave under s 214 of the Employment Relations Act to appeal two questions of law she claimed arose out of that decision. The application was opposed by the respondent, LSG Sky Chefs. At the conclusion of the hearing of the application we refused leave. These are our reasons for doing so.

Background

[2] The proceeding before the Employment Court has a long procedural history set out to some extent in the 15 July judgment. The application for adjournment was made on the grounds that there were interlocutory matters between the parties, some filed but undecided, with other potential applications yet to be filed. Ms Nisha said that it would be unjust for her to have to file briefs of evidence-in-chief, and otherwise prepare for a hearing without the benefit of the additional material and information she sought through those applications. If she was required to do so, she claimed this would be likely to inflate trial time meaning that the five days allocated for hearing would not be sufficient and would add to the cost of the proceeding.

[3] When considering the application for adjournment the Chief Judge took into account that the claim concerned events that had occurred between 2010 and 2012 and that it was not disputed about $30,000 at most was at issue between the parties. He said that there had been a plethora of interlocutory applications made by Ms Nisha since late 2014, with the 15 July judgment comprising the eleventh interlocutory judgment issued, with numerous minutes also issued giving directions in the case.[2] The Chief Judge said that in several judgments he had referred to the need for a sensible proportionality approach, particularly in relation to the disclosure

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1 *Nisha v LSG Sky Chefs New Zealand Limited (No 11)* [2015] NZEmpC 113.
2 At [8].

of documents.[3] The Chief Judge said that when the fixture was allocated with the agreement of the parties, the Court directed there would be no more interlocutory applications filed without leave, but a number of applications for leave had been made.

[4] The Chief Judge noted that LSG Sky Chefs was entitled to expect an end to the litigation and that the cost to both parties must well and truly exceed any best possible substantive outcome either way.[4] As to the concern regarding outstanding applications, the Judge noted that the parties had been granted an extension of the timetable within which to file and serve briefs and:[5]

> … for its part, the Court is committed to attempting to deal with those interlocutory applications which had been granted leave and had been heard, for the most part, on papers filed but also, on at least one occasion, in person.

[5] The Chief Judge rejected an argument that the Employment Court had expanded the scope of the hearing unilaterally through its assessment of issues and said that:[6]

> For this and other reasons of proportionality, the Court is not prepared to extend the allocated hearing time of five days and will probably direct the application of its hearing management regime to confine, within reasonable bounds, the issues and evidence at trial.

[6] The next paragraph of the judgment is that which is the subject of the application for leave. The Chief Judge said:

> [16] The plaintiff relies on the observations of the High Court about the process of document disclosure in *West Harbour Holdings Ltd (in liq) v Tamihere.*[7] This is not, however, commercial litigation in the High Court. It began life and is before this Court in an appellate capacity (albeit by hearing de novo) as a relatively modest claim for monetary relief, although containing some novel and challenging legal issues.

[7] The Chief Judge dismissed the application for adjournment as unsustainable. However, he reserved leave for Ms Nisha to reapply for an adjournment should circumstances change before trial.

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3 *Nisha v LSG Sky Chefs New Zealand Limited (No 11)* at [7].
4 At [14].
5 At [14].
6 At [15].
7 *West Harbour Holdings Ltd (in liq) v Tamihere* [2014] NZHC 716.

Application for leave

[8] The grant of leave in this case is governed by s 214(3) of the Employment Relations Act which provides:

> (3) The Court of Appeal may grant leave accordingly if, in the opinion of that court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[9] Ms Nisha seeks leave to appeal the following two questions of law she says arise from the judgment. Was the decision of the Employment Court wrong in law in holding:

(1) That discovery obligations in the Employment Court are narrower than in the High Court?

(2) That, as a matter of general principle, a party's discovery obligations are limited proportionally to the quantum of remedies sought?

[10] Ms Nisha contends that the s 214(3) criteria are met because these questions of law have not previously been considered by this Court and raise matters of general or public importance with application beyond the circumstances of the present case, affecting all litigants in the employment jurisdiction. The appeal would clarify the jurisdictional issue as to whether the High Court's discovery obligations apply to parties in the Employment Court. Further, the appeal would give expression to Parliament's intention in the Act to address the inherent inequality of power in employment relationships.

Discussion

[11] We do not consider that either of the proposed questions of law arise from the judgment in respect of which leave is sought. The first observation we make is that the judgment was not a judgment in relation to discovery, but was rather addressing Ms Nisha's application for adjournment. The Chief Judge had dealt with discovery obligations in earlier judgments, but Ms Nisha did not seek to appeal those.

[12] As to the first question of law said to arise, the Judge does not say that discovery obligations in the Employment Court are narrower than the High Court. His observation (it is not a finding) is no more than that different considerations inform the assessment of appropriate disclosure in this proceeding than was the case in *West Harbour Holdings Ltd v Tamihere*.[8]

[13] As to the second question of law there is nothing in the judgment approaching a finding that a party's discovery obligations are limited proportionally to the quantum of remedies sought. The Chief Judge said that in several judgments he had referred to the need for a sensible proportionality approach, particularly in relation to the disclosure of documents.[9] As noted, Ms Nisha did not seek to appeal those judgments. Civil procedure must incorporate some concept of proportionality unless the administration of justice is to be allowed to be brought into disrepute. This finds express recognition in the discovery regime in the High Court Rules at r 8.2 which requires the parties to co-operate to ensure that the processes of discovery inspection are "proportionate to the subject matter of the proceeding."[10] While it is correct that the concept of the "subject matter" of the proceeding can encompass more than the quantum of the claim, the Judge here did not suggest otherwise.

[14] For these reasons we are satisfied that the s 214(3) criteria have not been met. As LSG Sky Chefs submits, the judgment the subject of the application is essentially a judgment of the Employment Court regulating its process through the refusal of an adjournment. The application for leave is without merit; the questions in respect of which leave are sought do not arise from that judgment.

[15] At the conclusion of the hearing we sought submissions on the issue of increased costs, in light of our view that the application for leave was without merit. Jurisdiction to award increased costs on an application for leave exists where the party opposing costs has taken a step that lacks merit.[11]

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8 *West Harbour Holdings Ltd (in liq) v Tamihere*, above n 7.
9 *Nisha v LSG Sky Chefs (No 11)*, above n 1, at [7].
10 High Court Rules, r 8.2(1)(a).
11 Court of Appeal (Civil) Rules 2005, r 53G and 53E(2) and see *C v C* [2009] NZCA 319 at [7].

[16] Counsel for LSG Sky Chefs argued that an increase of up to 50 per cent on the normal award would be appropriate in this case because the application for leave was in reality a tactical ploy to achieve the collateral objective of an adjournment in the substantive proceeding. Counsel for Ms Nisha disputes that Ms Nisha was pursuing a collateral objective and says that full disclosure is critical to her claim. Ms Nisha has proceeded promptly to make and advance the application for leave, a course of action not consistent with delay.

[17] The application was so palpably without merit that we infer it was pursued to achieve further delay. An increased order of costs in the order of 40 per cent is appropriate in light of this finding.

Result

[18] The application for leave to appeal is declined. Ms Nisha is to pay LSG Sky Chef's costs on the application for leave to appeal calculated on the basis of band A plus an uplift of 40 per cent, together with usual disbursements.

Solicitors:
Kensington Swan, Auckland for Applicant
Jo Douglas, Auckland for Respondent