IN THE COURT OF APPEAL OF NEW ZEALAND

CA147/2011
[2011] NZCA 208

BETWEEN	CLIFFORD LAMAR LIMITED Applicant
AND	EMMA JAN GYENGE Respondent

Hearing: 17 May 2011

Court: Arnold, Stevens and Wild JJ

Appearances: Mr Clifford Harris, as agent for the Applicant
Mrs Jan Gyenge as agent for the Respondent
(both appearing by leave of the Court)

Judgment: 23 May 2011 at 10:00 AM

JUDGMENT OF THE COURT

A The application for leave to appeal pursuant to s 214 of the Employment Relations Act 2000 is dismissed.

B The applicant is to pay the respondent the usual disbursements for a standard application.

REASONS OF THE COURT

(Given by Wild J)

[1] Pursuant to s 214 of the Employment Relations Act 2000, the applicant seeks leave to appeal from a judgment of the Employment Court. The judgment was delivered by Judge Ford on 10 January this year[1] with a supplementary judgment granting some additional relief on 10 February.[2]

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1 *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 1; ARC65/10.
2 *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 10; ARC65/10.

[2] Section 214 limits appeals to this Court to questions of law.[3] It was apparent from Mr Harris' submissions that the applicant wishes to challenge the Judge's factual findings, and his assessment of the credibility of key witnesses, in particular of Mr Harris himself and of the respondent. To a lesser extent, the applicant wishes to contend that the Employment Court had not given it a fair hearing. We revert in [6] below to the main allegations on the latter score.

[3] Given the factual focus of the application, we asked Mr Harris to formulate for us the proposed question or questions of law. Framed as a question, his response was: could Judge Ford reasonably have come to the conclusions he did on the available evidence?

[4] That is not a question of law. If the Employment Court had made findings of fact unsupported by any evidence that could give rise to a question of law.[4] But none of the findings the applicant wishes to challenge are in that category. Delivering the judgment of the Supreme Court in *Bryson*, Blanchard J emphasised:[5]

> ... that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. ...

[5] Having considered all the material put before us, we are well satisfied that the applicant comes nowhere near surmounting that "very high hurdle".

[6] We turn to the points made by Mr Harris in support of his contention that the Employment Court had not given the applicant a fair hearing. First, Mr Harris said the applicant wanted to challenge the authenticity of some of the documents relied upon by the Judge. One example was the letter containing the respondent's job description referred to by the Judge at [65] of his first judgment. When we inquired of Mr Harris whether he had made these points to the Judge, he said he had not. It is not open to the applicant to raise these points for the first time on appeal, and certainly not on an appeal pursuant to s 214.

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3 The relevant test is set out in s 214 (3).

4 *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34 at [25]-[28]; *Carter Holt Harvey Ltd v Yukich* [2005] ERNZ 300 (CA) at [21].

5 At [27].

[7] Secondly, Mr Harris asserted the applicant had been deprived of the opportunity to call two witnesses. Elaborating, he explained that the applicant had been expecting that the respondent would call the two witnesses on the third and final day of the hearing, 22 November 2010. But, on 16 and 18 November, he received email advice from the respondent that she would not be calling these witnesses. Mr Harris told us that, by that stage, it was too late for the applicant to call those witnesses. The short answer to that point is that the applicant should have issued subpoenas to those witnesses, if they were important to the applicant's case. It could not, and should not, have relied on its expectation that the respondent would call them. Litigation is a dynamic process. A party is entitled to change its mind about which witnesses to call. Indeed, it can even decide to call no evidence.

[8] Thirdly, Mr Harris contended that a lot of relevant documentation was not before the Employment Court. There was an indexed agreed bundle of documents for the hearing. If the applicant wanted a document before the Employment Court, it should have ensured that the document was included in that bundle, or have asked to adduce it separately.

[9] Fourthly, Mr Harris contended a key witness for the applicant was only able to give evidence for less than half an hour, as the Judge needed to catch a flight back to Auckland. He was referring to his wife, Mrs Anna Harris. Amplifying this point, Mr Harris asserted that he was left with only three and a half minutes to re-examine his wife. The transcript records that Mr Harris called Mrs Harris at 4.36 pm on the last day of the hearing, 22 November. Mrs Harris read her brief of evidence. She was then cross-examined, and re-examined by Mr Harris. The transcript does not record when cross-examination and re-examination began, but it does record (against the seventh answer Mrs Harris gave in re-examination) that the time was 5.18 pm. The re-examination ended as follows:[6]

> Q. And I have one more question for you Anna and it is to do with around the December period Emma took some records on 24 December and on those records it states roughly around the 30th that there was only 3 clients in the salon and there was no clients in my column Anna in your opinion knowing how busy I am and how

[6] Notes of evidence 284/35-44.

> many clients I process on a weekly basis would that have been a mistake or a lie?
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> A. A lie.
>
> Q. Thank you Your Honour no further questions.

The Judge then asked a few questions and Mrs Harris was stood down at 5.23 pm. The Judge then reminded counsel of the timetable for submissions, and adjourned at 5.23 pm. There is nothing in the transcript to give any credence to Mr Harris' assertion that his re-examination of Mrs Harris was cut short by the Court.

[10] To summarise, we see no basis for Mr Harris' contention that the applicant was denied a fair and full hearing in the Employment Court.

[11] We have deliberately not dealt with a number of procedural objections Mrs Gyenge took to this application. In particular, she submitted it had not been properly served, was out of time, and appealed only the second (supplementary) judgment, and not the first. We have not dealt with these points because the application fails on its merits, and we have preferred to deal with it on its merits.

Result

[12] The application is dismissed. As the respondent was represented by her mother, a lay person, she is not entitled to costs. But the applicant is to pay to the respondent the usual disbursements for a standard application.