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Alkazaz v Enterprise IT Limited [2021] NZEmpC 78 (26 May 2021)

Last Updated: 2 June 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 78](#)

EMPC 100/2021

IN THE MATTER OF an application for leave to extend time
 to file a challenge to a determination of
 the
 Employment Relations Authority

AND IN THE MATTER of an application to exclude or strike out
 evidence

AND IN THE MATTER of an application to cross-examine the
 maker of an affidavit

BETWEEN AHMED ALKAZAZ
 Applicant

AND ENTERPRISE IT LIMITED
 Respondent

Hearing: On the papers

Appearances: A AlKazaz, applicant in person
 R Bryant, counsel for
 respondent

Judgment: 26 May 2021

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application to cross-examine the maker of an affidavit)

[1] Ahmed AlKazaz has applied to the Court for permission to cross-examine Stuart Speers, who swore an affidavit on behalf of Enterprise IT Ltd to support an interlocutory application to exclude or strike out evidence. Before describing that interlocutory application a brief review of the litigation between Mr AlKazaz and Enterprise IT is required.

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[2] In December 2017 Mr AlKazaz was successful in the Employment Relations Authority in establishing that he was unjustifiably dismissed by his former employer, Enterprise IT.¹ The Authority awarded him remedies of lost wages and compensation for humiliation, loss of dignity and injury to his feelings. However, the Authority reduced the remedies that would have been awarded because of Mr AlKazaz's contributory conduct, relating to his unwillingness to recognise performance inadequacies.² The remedies were reduced by 20 per cent.

[3] That determination was not challenged. About a year later, Mr AlKazaz unsuccessfully sought to have the Authority reopen its investigation.³ His challenge to that determination was also unsuccessful.⁴ His subsequent application for leave to appeal to the Court of Appeal was declined.⁵

[4] Mr AlKazaz has now applied to the Court for leave to extend the time to enable him to challenge the Authority's December 2017 determination. That application is supported by his affidavit that has, in turn, given rise to two interlocutory applications.

[5] The first of those applications was by Enterprise IT. The company has taken exception to one paragraph of Mr AlKazaz's affidavit and an exhibit. It has applied to exclude or strike out both of them from the affidavit so that they will not be considered as part of the decision on the application for an extension of time.

[6] Enterprise IT's application about Mr AlKazaz's affidavit was supported by an affidavit from Mr Speers. It is the content of Mr Speers' affidavit that has given rise to the second application, already referred to in this decision, by Mr AlKazaz seeking to cross-examine him. Mr AlKazaz's application must be dealt with first because it has ramifications for what is considered in Enterprise IT's application.

[7] The cause of both interlocutory applications is paragraph 26 in Mr AlKazaz's affidavit and exhibit 9. In the paragraph, Mr AlKazaz said that he had been willing to

1 *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig).

2 At [66].

3 *AlKazaz v Enterprise IT Ltd* [2019] NZERA 560 (Member Craig).

4 *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 171.

5 *AlKazaz v Enterprise IT Ltd* [2021] NZCA 13.

settle "this matter" for a stated sum of money, but that Enterprise IT had insisted on reserving its rights to "disparage" him and since then he had been dealing with the repercussions. Exhibit 9 comprised one letter and several emails between Mr AlKazaz's then lawyer and Enterprise IT's lawyer, dated from 3 April 2017 to 11 April 2017. The letter and emails are labelled "without prejudice save as to costs" no matter which lawyer wrote it. The amount Mr AlKazaz was willing to settle for is also stated in this correspondence.

[8] Enterprise IT considers paragraph 26 and exhibit 9 contain or refer to privileged information that has no bearing on Mr AlKazaz's application to extend time. Mr Speers' affidavit, supporting Enterprise IT's application to remove them from Mr AlKazaz's affidavit, is brief. After describing his position at Enterprise IT, it was separated into two parts under separate headings. One heading referred to the material Enterprise IT says is privileged. The other heading was "Ahmed's conduct". It did not contain anything that could be reasonably described as controversial.

[9] Under the first heading Mr Speers addressed exhibit 9, described who wrote the letter and emails and stated the obvious; that they were labelled without prejudice. Without elaboration he described that correspondence as being about settlement discussions occurring at that time. No other details were provided about those discussions or what lay behind them. In the second part of Mr Speers' affidavit he attributed certain knowledge to Mr AlKazaz about what can, and cannot, be included in an affidavit.

[10] The [Employment Court Regulations 2000](#) do not deal with applications for permission to cross-examine the maker of an affidavit, but the [High Court Rules 2016](#) do, in r 7.28. That rule reads:6

7.28 Cross-examination of maker of affidavit

A Judge may in special circumstances, on the application of a party, order the attendance for cross-examination of a person who has made an affidavit in support of, or in opposition to, an interlocutory application.

6 Relied on by virtue of [Employment Court Regulations 2000](#), reg 6.

[11] The special circumstances in r 7.28 are not defined but they were considered by the Court of Appeal in *Kidd v van Heeren*.⁷ That case involved contested affidavits filed in an interlocutory application seeking to dismiss or stay the proceeding. A document relied on by one of the parties was alleged to have settled all disputes.⁸ Serious allegations were made including claims of extortion and blackmailing behaviour, and matters of credibility, to justify the Judge looking behind the document including permitting cross-examination.⁹

[12] In *Kidd*, the Court held that the words "special circumstances" are wide, comprehensive, and flexible indicating something abnormal, uncommon or out of the ordinary, but something less than extraordinary or unique.¹⁰ It concluded that the central and only issue of importance to the interlocutory application was the authenticity and validity of the document and its interpretation.¹¹ It was unpersuaded that cross-examination should be permitted. That was because it was not unusual for issues of authenticity, or the validity of documents, to be the subject matter of competing affidavits in an interlocutory hearing. However, the Court held that conflicts between the makers of affidavits do not of themselves qualify as special circumstances within the meaning of the rule.¹²

[13] The Court was satisfied that issues such as claims of extortion and blackmail were more suitable for the substantive hearing and did not need to be determined when the interlocutory application was decided.

What are the special circumstances Mr AlKazaz relies on?

[14] Mr AlKazaz's application to cross-examine Mr Speers relied on what was described as a novel technical issue, namely that the dispute between him and Enterprise IT arose in May 2017. He referred to having found a document that proved the dispute did not occur until 22 May 2017, although no more information was

7 *Kidd v van Heeren* [1997] NZCA 384; [1997] 11 PRNZ 422.

8. At 424. The Court of Appeal discussed former r 254 which is materially the same as r 7.28. The former rule read: "The Court may, on the application of any party, order the attendance for cross-examination of any person making any affidavit in support of or in opposition to any interlocutory application; but such an order shall be made only in special circumstances".

9 At 425.

10 At 424.

11 At 425.

12 At 425.

supplied to support that statement such as by providing a copy of it. His application stated that one of the "main issues" he would cross-examine Mr Speers about was the nature of the dispute and the correspondence.

[15] The picture created by Mr AlKazaz's application was unclear and confusing, not least because it appeared he intended to contradict his affidavit and exhibits that, at face value at least, disclosed an unresolved dispute during April 2017. That lack of clarity led to him being given a further opportunity to state the special circumstances relied on to cross-examine Mr Speers.

[16] Mr AlKazaz took up that opportunity and filed a memorandum explaining them. Some of those grounds remain difficult to follow but in summary they are:

- (a) An unsupported claim that Enterprise IT has ceased to exist, either by liquidation or because it has been acquired in some way by another company (or companies).
- (b) Connected with (a) above, Mr Speers ceased to be an employee or director of Enterprise IT in November 2019 and could not instruct counsel.
- (c) If the company is in liquidation the liquidator has not consented to this litigation.
- (d) Mr Speers is aware of when the dispute actually arose; a ground linked to the unspecified but recently found a document about the dispute arising in May 2017 mentioned in the application to cross-examine.
- (e) Mr Speers contacted the Chief Executive of Mr AlKazaz's subsequent employer, jeopardising his ongoing employment with that other employer.

[17] A footnote in this memorandum was to the Companies Office website, presumably to supply information about Enterprise IT.

[18] These grounds were supplemented in Mr AlKazaz's submissions. His further explanation for seeking to cross-examine Mr Speers, was that it would assist the Court to establish if there was a dispute when the correspondence in his exhibit 9 was written. In turn, that would be relevant in deciding if the letter and emails were privileged.

[19] Nothing Mr AlKazaz has relied on could reasonably lead to a conclusion that special circumstances exist warranting cross-examination. There is nothing remarkable about what Mr Speers addressed in his affidavit. It was no more than an unnecessary commentary on what was already disclosed by Mr AlKazaz. He merely repeated what was in Mr AlKazaz's affidavit, in summary form, and stated the obvious about what was written on the letter and emails in exhibit 9. The correspondence was left to speak for itself.

[20] The ordinariness of Mr Speers' affidavit is the antithesis of special circumstances. Mr AlKazaz's statement about a recently found but undisclosed document, intending to show the dispute arose in May 2017, without more, does not move this application into the realm of special circumstances. The reality is that Mr AlKazaz seems to want to cross-examine Mr Speers either to contradict what his own affidavit disclosed or to supplement it in some way. That is not what is contemplated by r 7.28.

[21] If Mr AlKazaz now considers his own affidavit contains an error for some reason, such as because he made a mistake about an important matter he thinks is relevant to the application to extend time, or if it is necessary to correct or add to what he has said, he may be able to take steps to file a supplementary affidavit. However, it would be a misuse of r 7.28 to subject Mr Speers to cross-examination if what is intended is an attempt by Mr AlKazaz to better explain his own application to extend time. That not only fails to satisfy r 7.28 but would result in an unjustified inconvenience to Mr Speers for the time taken up in that exercise and a waste of Court resources.

[22] There is an aspect of Mr Speers' affidavit that does need to be touched on. He attributed to Mr AlKazaz knowledge of what can, and cannot, be included in an affidavit arising from previous communications between the parties. That information

was irrelevant to the application to extend time, Enterprise IT's subsequent application, and this application seeking to cross-examine Mr Speers. It can be put aside.

[23] I have not put aside Mr AlKazaz's other grounds, specifically that something untoward has gone on in the ownership structure of Enterprise IT, or that Mr Speers does not work for the company and cannot instruct counsel. The view I have formed of this part of Mr AlKazaz's application is that he has misunderstood information obtained from the Companies Office. Whether or not that is the situation, had permission been granted to cross-examine, Mr AlKazaz would not have been able to cover the extensive range of topics he now wants to explore. They are well beyond what could reasonably be said to be the scope of Mr Speers' affidavit.

[24] There are no special circumstances justifying Mr Speers being cross-examined about his affidavit. The application is unsuccessful and is dismissed.

K G Smith Judge

Judgment signed at 4.45 pm on 26 May 2021

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