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Kang v Saena Company Limited [2022] NZEmpC 19 (10 February 2022)

Last Updated: 16 February 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 19](#)

EMPC 199/2021

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority
AND IN THE MATTER OF an application for leave to file
amended pleadings
AND IN THE MATTER OF an objection to the inclusion of a
document in the common bundle
AND IN THE MATTER OF admissibility of evidence
BETWEEN HUNMO KANG
Plaintiff
AND SAENA COMPANY LIMITED
Defendant

Hearing: On the papers

Appearances: S Kang, counsel for the plaintiff
M Kim, counsel for the
defendant

Judgment: 10 February 2022

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for leave to file amended pleadings) (Objection to inclusion of document in common bundle) (Admissibility of evidence)

[1] This judgment resolves three outstanding interlocutory issues in these proceedings. Counsel were agreed that the issues could be dealt with on the papers filed, and in light of oral submissions advanced during the course of a telephone conference on 4 February 2022. The three applications are: an application by the

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plaintiff for leave to amend their statement of claim; an application by the plaintiff to exclude a document from the bundle; and an application by the plaintiff to exclude two paragraphs from a witness's brief of evidence on the basis that they contain inadmissible statements. I deal with each in turn.

Application for leave to amend statement of claim to increase quantum of compensation

[2] The plaintiff is pursuing a challenge against a determination of the Employment Relations Authority.¹ The challenge is being heard de novo. That means that the Court will decide the claim afresh. The original statement of claim sought

\$15,000 compensation by way of relief under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#). The plaintiff has applied for leave to

amend the quantum sought to \$20,000. Leave is necessary because the proceedings have been set down for hearing.²

[3] The defendant opposes the application. It says that the increase is sought because of comments that were said to have been made by the presiding Judge during the course of an unsuccessful judicial settlement conference; that it is at odds with the privilege attaching to communications in such a forum; and that the Court should not allow the breach to manifest in an amended pleading.

[4] What is said during a judicial settlement conference is privileged and cannot be relied on elsewhere.³ But what is alleged to have been said during the settlement conference is not included in the amended pleading. Rather, the application for leave refers to the alleged observations to explain why an increase in quantum was being sought. That is regrettable, but the key point is that the plaintiff now considers that the quantum identified in the original claim does not reflect the amount that might appropriately be awarded in his favour in the event that the challenge succeeds.

[5] While the application is not assisted by the reference to comments allegedly made during the judicial settlement conference, I do not consider it in the overall

1 *Kang v Saena Company Ltd* [2021] NZERA 196 (Member Campbell).

2 *High Court Rules 2016*, r 7.7. See *Employment Court Regulations 2000*, reg 6(2)(a)(ii).

3 *High Court Rules 2016*, r 7.79(6). See also *Evidence Act 2006*, s 57(1).

interests of justice to decline the application. If the plaintiff succeeds in establishing a grievance, and satisfies the Court that compensation for non-pecuniary loss is appropriate, it is desirable that he is not unnecessarily constrained in terms of the quantum sought. There is no discernible prejudice to the defendant - but for the reference to the settlement conference, the application would likely not have been opposed.

[6] In the circumstances the application for leave to file the draft amended statement of claim is granted. The draft amended statement of claim is to be accepted for filing. The defendant will have five working days from the date of this judgment to file and serve any amended statement of defence.

Application to exclude document from bundle

[7] The defendant proposes the inclusion of a document (a translation) in the bundle for hearing which the plaintiff takes issue with. The plaintiff's objection centres on a direction from the Court that no documents were to be included in the bundle unnecessarily and unless they were to be referred to by a witness or in submissions. It is submitted that because none of the defendant's witness statements refer to the document, it should not be included. Beyond this point of objection, counsel for the plaintiff made it clear that the plaintiff was content to leave the matter in the Court's hands.

[8] The defendant says that the translation is likely to assist the Court and forms part of its overall case.

[9] The document may be included in the bundle for hearing. If the translation and/or any other documents in the bundle prove to be unnecessary, then that can be taken into account when assessing costs.

Admissibility of evidence

[10] There are two sequential paragraphs in a witness statement filed on behalf of

the defendant which the plaintiff takes issue with. The plaintiff says that the paragraphs should be ruled inadmissible on the basis that they make reference to mediation. The defendant says that the paragraphs are unobjectionable.

[11] [Section 148](#) of the Act requires that any "statement, admission or document" created or made for the purpose of mediation must be kept confidential. Mr Hwang is the managing director of the defendant company. Mr Hwang's witness statement refers to another witness's alleged knowledge of his telephone number and why he believes the witness was being dishonest about this to the mediator. Mr Kim, counsel for the defendant, submits that the proposed evidence is directed at drawing out what are said to be inconsistencies in another witness's proposed evidence and that it does not fall foul of [s 148](#).

[12] I do not consider that [22] of the brief of evidence of Mr Hwang (filed on 7 January 2022) is objectionable. It refers to what another witness is said to have believed and done in respect of a telephone number "until he attended mediation." The mere reference to attendance at mediation does not fall foul of [s 148](#). Paragraph

[23] contains irrelevant observations about what another witness is said to have attempted to do at mediation. That paragraph is clearly at odds with [s 148](#) and is not admissible. It is to be redacted and is not to be read into evidence.

Summary of orders

[13] The application for leave to file an amended statement of claim is granted. Any statement of defence to the amended statement of claim is to be filed and served within five working days of the date of this judgment.

[14] The application to exclude a document from the bundle is dismissed.

[15] The application to strike out paragraphs [22] and [23] of Mr Hwang's witness statement succeeds in part: [23] is to be redacted; [22] is unobjectionable and can remain in.

[16] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 3.40 pm on 10 February 2022

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