

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 218
3015011

BETWEEN

LSG SKY CHEFS NEW
ZEALAND LIMITED

Applicant

A N D

JOHN TAKASHI MATSUOKA
Respondent

Member of Authority: Rachel Larmer

Representatives: Garry Pollak, Counsel for Respondent
Charlotte Parkhill, Counsel for Applicant

Investigation Meeting: On the papers

Submissions: 07 July 2017 from Applicant
20 July 2017 from Respondent
26 July 2017 from Applicant

Date of Determination: 27 July 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] On 07 July 2017 Mr Matsuoka applied to the Authority for a compliance order requiring LSG Sky Chefs New Zealand Limited (LSG) to provide him and his representatives with immediate access to his wage and time records and holiday and leave records.

[2] Mr Matsuoka also sought that penalties be imposed on LSG for breaches of s.130(2) of the Employment Relations Act 2000 (the Act) and under s.82 of the Holidays Act 2003 (HA03). Mr Matsuoka further seeks indemnity costs.

[3] Mr Matsuoka asked for urgency and that the requirement to attend mediation be waived.

[4] LSG responded on 11 July 2017 by filing an application for removal of the matter to the Employment Court pursuant to s.178 of the Act. LSG agreed that urgency should be granted and advised the Authority that the Employment Court would be holding a telephone conference on related litigation on 01 August 2017.

[5] LSG claims that Mr Matsuoka's claims in the Authority are an attempt to re-litigate applications for discovery before the Employment Court which he did not succeed on.

[6] LSG refers to Judge Perkin's findings, in the Employment Court's interlocutory judgment dated 15 February 2017 regarding Mr Matsuoka's discovery application as it relates to payroll information, that payroll records had either already been disclosed or did not exist.

[7] LSG also refers to the sixth cause of action in the Third Amended Statement of Claim which relates to various claims under the Wages Protection Act 1983. Mr Pollak says that claim will involve the Employment Court considering LSG's 'payroll conduct' in terms of what it did and did not record, what it paid Mr Matsuoka and the accuracy of its information.

[8] LSG agreed that mediation should not be directed and it asked that the requirement for it to file a statement in reply be dispensed with until the Authority had determined its removal application.

[9] Mr Matsuoka filed an affidavit and submissions on the removal application on 21 July 2017. He opposed removal on the grounds he had the right to access his wage and time records and holiday and leave records independent of the Employment Court proceedings and that removal would remove the right of challenge. He also believes that the Authority would investigate his substantive claim more speedily than the Employment Court.

[10] Ms Parkhill submits that the Employment Court's disclosure regime cannot be a substitute for Mr Matsuoka's right to access his employment records. She says that Mr Matsuoka disputes that he has been provided with his full wage and time record and he disputes the accuracy of the information LSG has disclosed to him. I consider

these submissions address the merits of the substantive matter rather than the grounds of removal.

[11] Clearly the parties are involved in ongoing Employment Court litigation under proceedings ARC23/12 and ARC102/13. These are longstanding matters which have involved a number of judgements having already been issued by the Employment Court. I therefore consider that the Employment Court is well versed in the issues between the parties and the background matters that lead to the current litigation.

[12] The originating Employment Court proceedings relate to a personal grievance claim by Mr Matsuoka which was removed by the Authority to the Employment Court in 2012.¹

[13] Mr Pollak advised the Authority that the background to the dispute had been traversed extensively in various judgments, most recently in the Court of Appeal decision of *Matsuoka v LSG Sky Chefs New Zealand Ltd*² in which the Court of Appeal recognised that “*bad blood has endured between Pacific Flight Catering and LSG*”.

[14] This case referred to the fact that Singapore Airlines accepted LSG’s tender to provide catering services to it thus displacing Pacific Flight Catering (PFC) as the airline’s caterer. Mr Matsuoka’s brother in law is apparently closely associated with PFC. Mr Matsuoka says he is litigating his claims personally and not as a surrogate for his brother in law.

[15] The transfer process of some 40 employees (including Mr Matsuoka) from PFC to LSG has been the subject of extensive litigation between LSG and PFC³.

[16] Mr Pollak says that the parties have been through a thorough and lengthy disclosure exercise in relation to the Employment Court proceedings. This has included wage and time records and related documentation being disclosed by LSG, copies of which have been provided to Mr Matsuoka accompanied by verifying affidavits of documents.

¹ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2012] NZERA Auckland 95.

² [2017] NZCA 266.

³ See *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering & Anor* [2012] NZHC 2810 and *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering & Anor* [2013] NZCA 386.

[17] Mr Pollak says that the Employment Court has extensively dealt with interlocutory issues, including challenges to the scope of disclosure since 2013⁴ in which LSG was ordered to provide payroll information.

[18] Mr Pollak says that the Employment Court has held that LSG's discovery was sufficient and he referred the Authority to the recent Employment Court judgments of 15 February 2017⁵. Mr Pollak notes that leave to appeal that decision was declined by the Court of Appeal on 27 June 2017⁶.

[19] Mr Pollak says that Mr Matsuoka has obtained a preservation order against LSG's payroll provider and documents preserved under that order are being held by the solicitor for those entities⁷.

[20] Mr Pollak says the Employment Court advised the parties on 06 July 2017 that it considered all interlocutory matters had been completed and it sought confirmation from counsel that the matter could proceed to a substantive hearing.

[21] Mr Pollak submits that the Authority should remove this matter in its entirety to the Employment Court to determine it in the first instance because he suggests that Mr Matsuoka has an ulterior motive in litigating in the manner in which he has done because his brother-in-law owns PFC. Mr Matsuoka denies that allegation and says he is merely attempting to exercise his statutory rights to access his employee records.

[22] In support of his submission regarding ulterior motives, Mr Pollak referred to the Court of Appeal's comments in *Matsuoka v LSG Sky Chefs New Zealand Ltd*⁸ which stated:

... The history of Mr Matsuoka's contested and unnecessary interlocutory applications supports the inference that he is acting as Mr Hay's surrogate and using the proceedings for an ulterior purpose.

[23] As the Court of Appeal observed, the proceedings have "*degenerated into an enormous fishing expedition for the discovery of documents by [Mr Matsuoka] in the hope that a smoking gun will be located*". There is concern that the current Authority proceedings are a continuation of that 'fishing expedition'.

⁴ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2014] NZEmpC 10.

⁵ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 11.

⁶ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZCA 266 and *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 68.

⁷ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 178.

⁸ [2017] NZCA 266

[24] Mr Pollak says that Mr Matsuoka has recently complained to the Privacy Commission and has also requested his wage records from Zambion Limited. The Privacy Commissioner by letter dated 05 July 2017 decided it was not appropriate to further consider Mr Matsuoka's complaint given the matters were currently before the Employment Court.

[25] Mr Pollak says that Mr Matsuoka has also filed proceedings in the District Court at Tauranga under file No CIV-2017-070-531 against LSG's payroll provider, Zambion Limited, and its principal personally which Mr Pollak claims is related to matters which should properly be put before the Employment Court.

[26] Mr Pollak says that LSG considers that the filing of Mr Matsuoka's current claim before the Authority is intended to further delay the Employment Court proceedings and to create another interlocutory matter to frustrate LSG and the Employment Court.

[27] LSG initially relied on s.178(2)(b) and (c) of the Act in support of its application for removal. In Mr Pollak's submissions dated 26 July 2017 he also stated that LSG sought to rely on s.178(2)(d) – removal on the basis the Authority considers that in all the circumstances the Employment Court should determine the matter.

[28] I do not consider this case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Employment Court. The removal ground under s.178(2)(b) of the Act has therefore not been established.

[29] However, it is clear that the Employment Court already has considerable litigation before it involving these parties which I am satisfied on the face of it appear to involve some of the same or similar or related issues. The removal ground under s.178(2)(c) of the Act has been established.

[30] Given the information that has been put before the Authority I am satisfied that this is a matter which may have considerable overlap with applications or claims that the Employment Court has issued or will be issuing judgements on. I therefore consider that in all the circumstances this is a matter which the Employment Court is best placed to determine in the first instance.

[31] While I recognise that removal to the Employment Court in effect removes one right of challenge, I consider that the lengthy nature of this litigation (it has been underway since 2012), the number of judgements that have been issued by the employment institutions and the Court of Appeal together with Mr Matsuoka's engagement of other authorities such as the Privacy Commissioner and the District Court, are factors that suggest that this is an appropriate matter for the Employment Court deal with in the first instance.

[32] The Employment Court is well versed in the history of this matter and it has already conducted extensive interrogatories including a formal discovery process.

[33] I am concerned that if the Authority declined the removal application it would just be delaying the resolution of this matter which would be likely to involve additional delay and expense for the parties in finally resolving all issues between them.

[34] I am therefore satisfied that two grounds for removal have been established – s.178(2)(c) and (d) of the Act. I am not satisfied that there are any factors that weigh against the Authority's exercise of its discretion to order removal.

[35] Accordingly, the substantive matter under AEA 3015011 is to be removed to the Employment Court to determine in the first instance.

Costs

[36] LSG as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement.

[37] If that is not possible then LSG has seven days within which to file a costs application. Mr Matsuoka has seven days within which to respond with LSG having a further three working days within which to file any submissions in reply.

Rachel Larmer
Member of the Employment Relations Authority