Employment Court of New Zealand

Matsuoka v LSG Sky Chefs New Zealand [2017] NZEmpC 140 (10 November 2017)

Last Updated: 13 November 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 140

ARC 23/12

ARC 102/13

IN THE MATTER OF	of proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application to exclude evidence
AND IN THE MATTER	of applications for leave to cross-examine deponents
BETWEEN	JOHN MATSUOKA Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND Defendant

Hearing:	On the papers filed on 29 September and 2, 6, 11, 24, 27 and 31 October, 2 November 2017
Appearances:	R Harrison QC and M O'Brien, counsel for plaintiff C Meechan QC and D Eriksen, counsel for defendant G Pollak, counsel for non-parties Zambion Limited and PSG Payroll Limited
Judgment:	10 November 2017

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS IN RESPECT OF

1) DEFENDANT'S APPLICATION FOR ORDERS IN RELATION TO THE AFFIDAVIT OF ANDREW NORMAN SELLAR

2) PLAINTIFF'S APPLICATION FOR ORDER FOR ATTENDANCE OF NEIL RICHARD BRYANT FOR THE PURPOSE OF CROSS-EXAMINATION

3) PLAINTIFF'S APPLICATION FOR ORDER FOR ATTENDANCE OF ALLAN PUMPHREY FOR THE PURPOSE OF CROSS-EXAMINATION

JOHN MATSUOKA v LSG SKY CHEFS NEW ZEALAND NZEmpC AUCKLAND [2017] NZEmpC 140 [10 November 2017]

[1] Several interlocutory applications are pending in this long-drawn-out matter. A date had been set for the hearing of those applications. Before the hearing could take place, the parties belatedly filed applications relating to evidential matters. The three applications relating to such issues are:

a) the defendant’s application that paragraphs 5 to 12 and exhibits “A” to

"F" in an affidavit of Andrew Norman Sellar sworn on 12 September

2017 not be read and that no person be permitted to inspect that affidavit on the court file;

b) the plaintiff's application seeking an order for the attendance of Neil Richard Bryant at the hearing for the purposes of his being cross- examined on his affidavit sworn on 23 August 2017;

c) the plaintiff's application seeking an order for the attendance of Allan Pumphrey at the hearing for the purposes of his being cross-examined on certain issues specified in the application.

[2] So far as the defendant's application in relation to the affidavit of Andrew Norman Sellar is concerned, that was filed on 29 September 2017. Even though I considered that the application had been filed too late, I directed that a response from the plaintiff was to be filed on or before 4 pm on 6 October 2017. As the hearing set for the interlocutory applications was due to be heard on Monday 9 October 2017, I directed that this further application would need to be dealt with at the hearing on that day. A notice of opposition was filed by the plaintiff on 6 October 2017, but prior to that, on 2 October 2017, the plaintiff filed the applications seeking attendance for the purposes of cross-examination of Mr Bryant and Mr Pumphrey. Even though I had already given directions in respect of the defendant's application in the hope that the fixture could still proceed, that application, and certainly the plaintiff's applications, were filed too late effectively for the opposing parties to adequately respond or for the Court to properly consider them. Accordingly, once the plaintiff's applications were filed the hearing set for interlocutory applications on

9 October 2017 was vacated. If the application to have the deponents cross-

examined on their affidavits or affirmations had been granted, there would in any event have been inadequate time allocated for the hearing.

[3] On 10 October 2017, I issued a minute, setting timetabling for the filing of submissions in respect of the three evidentiary applications, and directed that the applications were to be dealt with on the papers. Submissions have now been received.

[4] Mr Sellar's affidavit, which is the subject of the application by the defendant, reveals a great deal of information concerning an agreement reached between Mr Sellar and LSG Sky Chefs New Zealand Ltd (LSG) to settle what was clearly an employment relationship dispute between Mr Sellar and LSG. The affidavit appears to have been filed in a petulant retaliation to a letter annexed to an affirmation of Maree Lynne Park dated 5 September 2017. That letter, which is Exhibit "D" in Ms Park's affirmation, was written by Mr Sellar to counsel acting for LSG and alleges a breach of the settlement agreement. In the letter, Mr Sellar alleges that part of that breach involves comments which Ms Meechan QC made in proceedings heard in the Employment Court before Judge BA Corkill. Those proceedings are similar to the present proceedings but involve a different plaintiff.

[5] It needs to be pointed out that the interlocutory applications which are currently pending before the Court relate to disclosure of documents. The submissions which have been filed by counsel for both sides in respect of Mr Sellar's affidavit deal with issues of breach of confidentiality and privilege. I do not propose to deal with the competing arguments on these issues. It is extremely difficult to ascertain exactly how the contents of Mr Sellar's affidavit and, for that matter, the letter annexed to Ms Park's affirmation, are relevant to the applications dealing with the disputes between the parties relating to disclosure of documents. There are assertions that issues of credibility arise. The short point is that the assertions contained in Mr Sellar's affidavit and Exhibit D to Ms Park's affirmation are irrelevant.

[6] There will be an order that paragraphs 5 to 12 and exhibits "A" to "F" in the affidavit of Mr Sellar dated 12 September 2017 not be read. Exhibit D, being a letter

dated 4 September 2017, annexed to Ms Park's affirmation of 5 September 2017, will similarly not be considered in dealing with the applications relating to disclosure of documents.

[7] The applications that Mr Bryant and Mr Pumphrey be cross-examined can be equally shortly disposed of. The applications by the plaintiff rely upon reg 6 of the Employment Court Regulations 2000 and thereby to r 7.28 of the High Court Rules. Rule 7.28 of the High Court Rules authorises a court, in dealing with an interlocutory application, to require the attendance of a deponent of an affidavit in support to attend court for the purposes of cross-examination. The Court has a wide discretion under this rule, but there must be some special circumstances in order for cross-examination to be permitted.1 Cross-examination will be allowed where injustice would otherwise arise.2 However, this should be balanced against the increase in cost and delay arising from such an allowance.3

[8] Mr Pumphrey has sworn an affidavit which has been filed in these proceedings. However, that is not referred to in this application to have him cross- examined. The grounds of the application reveal a far wider agenda than dealing simply with issues of disclosure of documents. The application is clearly an attempt by the plaintiff to use the impending interlocutory applications as a means of collaterally delving into evidence more appropriately to be dealt with at the substantive hearing of this matter, if indeed it is at all relevant. The application to have Mr Pumphrey available at the hearing for cross-examination is dismissed.

[9] So far as the application in respect of Mr Bryant is concerned, I am not persuaded that there are special circumstances existing to require Mr Bryant to be available for cross-examination on his affidavit. Nor am I persuaded that an injustice will result if he is not ordered to be so available. The impression I gain strongly from the memorandum of Mr O'Brien dated 2 October 2017 and Mr O'Brien's submissions in support of the applications dated 24 October 2017 is that the issues upon which cross-examination is proposed are far wider than issues relating

specifically to the disclosure of documents or the application for enforcement orders.

1 *Kidd v Van Heeren* [1997] NZCA 384; (1997) 11 PRNZ 422 (CA) at 424.

2 *Sleeman v ANZ Banking Group (NZ) Ltd* [1994] NZHC 1722; (1994) 7 PRNZ 508 (HC) at 510.

3 *Smith v Smith* [2016] NZHC 1197 at [32]- [33].

Further, I do not accept for a moment the statement made by Mr O'Brien on more than one occasion in his submissions that cross-examination is more likely to result in putting all matters of discovery to bed before trial. In view of the history of this matter, such a result is most unlikely.

[10] The authorities referred to by both counsel establish that in interlocutory applications such as those presently before the Court, ordering a deponent to appear for cross-examination will rarely be granted. As mentioned above, it would require that special circumstances exist or an injustice is likely to result if the application is not granted. The applications in respect of the attendance of both Mr Bryant and Mr Pumphrey disclose proposed cross-examination which goes well beyond the parameters set by the rule and in the authorities. As already stated in the case of Mr Pumphrey, the application itself is completely misguided because the proposed cross-examination does not even relate to an affidavit sworn by him. In the case of Mr Bryant, there also appears to be a wider agenda, which, if relevant, involves matters which are more appropriately to be raised at trial. The increase in the cost and delay, in a matter that has already been lengthy and expensive for both parties, is not warranted here.

[11] Both of the applications to have the deponents available for cross- examination are dismissed.

[12] I have now reviewed the interlocutory applications which are pending. These applications are as follows:

a) the plaintiff's application (filed on 8 August 2017) for enforcement of the interlocutory judgment of 15 February 2017;4

b) the plaintiff's application for particular discovery (filed on 22 August

2017);

4 *Matsuoka v LSG Sky Chefs Ltd* [2017] NZEmpC 11.

c) the plaintiff's application against Zambion Ltd and PSG Payroll Ltd seeking provision of a memory stick from those non-parties and removal of restrictions on use of information (filed on 25 August 2017);

d) the plaintiff's application seeking removal of restrictions in respect of

discovered documents and inspection of documents (filed on

25 September 2017); and

e) the defendant's application seeking an order granting security for costs

against the plaintiff (filed on 3 November 2017).

[13] Having reviewed all of these applications, I am no longer persuaded that a hearing needs to be allocated. In dealing with the matters in dispute, the Court will need to spend considerable time, following any submissions from counsel, in comparing the contents of a substantial number of documents which have been filed. The applications can be more efficiently dealt with by a hearing on the papers, following written submissions being received from counsel.

[14] So far as the application for security for costs is concerned, it is suggested that, if a hearing had taken place on the other applications, that application could be dealt with at the same time. That would have the potential of substantially prolonging any court hearing on these matters. In any event, I consider that the application for security for costs can also be dealt with on the papers. Presently, the Court is awaiting any documents to be filed by the plaintiff in opposition to the application, and once that is done, timetabling can be set for the filing of submissions.

[15] In respect of applications (a)-(d), which now await resolution, counsel for the plaintiff are to file submissions in support of the plaintiff's applications by 4 pm on Thursday 30 November 2017. Submissions in response by counsel for the defendant and the non-parties are to be filed by 4 pm on Tuesday 19 December 2017, which is the day when the Court closes for the Christmas/New Year vacation. The Court will not reopen until Thursday 1 February 2018 when consideration of the applications will commence.

[16] So far as the application for security for costs is concerned (e), similar timetabling directions will be considered once the time limit for the filing of documents in opposition has expired.

[17] The only remaining matter to be mentioned is that which was contained in the minute issued on 1 November 2017 relating to Mr Pumphrey's proposal to file further "evidence in chief". In view of the fact that Mr Pumphrey will not be cross- examined, there is no need for him to file further "evidence in chief". In any event, my perception of the matters upon which Mr Pumphrey wishes to make further comment are not relevant to the matters presently before the Court in the interlocutory applications.

M E Perkins

Judge

Judgment signed at 3 pm on 10 November 2017