Employment Court of New Zealand

Matsuoka v LSG Sky Chefs New Zealand [2018] NZEmpC 34 (27 April 2018)

Last Updated: 9 May 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 34
ARC 23/12 ARC 102/13 EMPC 192/2017

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of further interlocutory applications for enforcement, particular discovery, inspection of documents and removal of restrictions and for security for costs
BETWEEN	JOHN MATSUOKA Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND Defendant

Hearing:	On the papers - applications, notices of opposition and supporting and accompanying affidavits and affirmations and other documents filed between 8 August 2017 and 19 March 2018
Appearances:	R E Harrison QC and M O'Brien, counsel for plaintiff C Meechan QC, A Borchardt and D Erickson, counsel for defendant G Pollak, counsel for non-parties Zambion Ltd and PSG Payroll Ltd
Judgment:	27 April 2018

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS REGARDING:

1. **AN APPLICATION BY THE PLAINTIFF FOR ENFORCEMENT OF THE COURT'S INTERLOCUTORY JUDGMENT OF 15 FEBRUARY 2017**
2. **AN APPLICATION BY THE PLAINTIFF FOR PARTICULAR DISCOVERY**
3. **AN APPLICATION BY THE PLAINTIFF SEEKING REMOVAL OF RESTRICTIONS IN RESPECT OF DISCOVERED DOCUMENTS AND**

INSPECTION OF DOCUMENTS

4. **AN APPLICATION BY THE PLAINTIFF SEEKING PROVISION OF MEMORY-STICK FROM NON-PARTIES AND REMOVAL OF**

RESTRICTIONS ON USE OF INFORMATION

JOHN MATSUOKA v LSG SKY CHEFS NEW ZEALAND NZEmpC AUCKLAND [2018] NZEmpC 34 [27

April 2018]

5) AN APPLICATION BY DEFENDANT FOR ORDER GRANTING SECURITY FOR COSTS

Introduction

[1] This judgment deals with a series of further interlocutory applications filed by the parties in these proceedings. The fact

that further interlocutory applications of this type continue to be filed is now of considerable concern. The Court Registrar informs that in these proceedings since 11 February 2013, 45 interlocutory applications have been filed, most on behalf of the plaintiff. This number of applications would be well exceeded if the history of the proceedings before that date was considered. The proceedings effectively began in 2011 when Mr Matsuoka applied for and was granted an order declaring him to be an employee covered by Part 6A of the Employment Relations Act 2000 (the Act). The time has now arrived where the Court must take control of the proceedings. This will be dealt with more fully later in this judgment.

[2] The applications now requiring a decision from the Court are as follows:

(a) An application dated 8 August 2017 by the plaintiff for enforcement of the Court's interlocutory judgment of 15 February 2017;1
(b) An application dated 22 August 2017 by the plaintiff for particular discovery;
(c) An application dated 25 August 2017 by the plaintiff seeking removal of restrictions in respect of discovered documents and inspection of documents;
(d) An application dated 25 August 2017 by the plaintiff against Zambion Ltd and PSG Payroll Ltd (being non-parties) seeking provision of memory-stick from non-parties and removal of restrictions on use of information;

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

(e) An application dated 3 November 2017 by the defendant for an order granting security for costs.

[3] There are a substantial number of supporting documents filed in respect of each application. Each of the applications is opposed. The respective notices of opposition which have been filed are also supported by a substantial number of documents.

[4] I have read and considered the affidavits, affirmations, annexed documents and submissions of counsel filed in support of and in opposition to the applications and documents that have been filed relating to matters which are effectively collateral to the proceedings. Apart from one application and part of another, the applications are without merit and can be dealt with briefly.

Application for enforcement of judgment

[5] Insofar as the application for enforcement is concerned, the application relies upon assertions contained in affidavits filed in support, which are substantially in conflict with the affirmation filed by Marie Park, the human resources manager for the defendant, following the judgment of this Court dated 15 February 2017. The plaintiff is now seeking to enforce several orders made in that judgment based on the allegation that the defendant has not complied.

[6] The conflict in affidavit and affirmation evidence is mainly between Ms Park and Andrew Sellar, who was previously employed by the defendant between 2015 and 2017. Mr Sellar had previously been an employee of other companies related to the defendant outside New Zealand. Mr Sellar's assertions are largely speculative. Ms Park has been the human resources manager with the defendant throughout this matter and more particularly in 2011 when the events giving rise to Mr Matsuoka's claims arose. Mr Sellar's employment with the defendant was considerably later than that time. Having read Ms Park's affirmation of 15 March 2017 and despite what Mr Sellar is asserting from what I regard as his limited knowledge, I am satisfied that there has been compliance with my judgment of 15 February 2017.

[7] I am also satisfied that there is no need to order that Tanja Schlitter should file and serve an affidavit as requested in the application. The issue of documents which may have been held by her has been appropriately dealt with in Ms Park's affirmation.

[8] The application dated 8 August 2017 for enforcement of the judgment of 15 February 2017 is accordingly declined.

Further application for particular discovery

[9] This application seeks further discovery of many categories of documents. The discovery sought is extensive. The first category relates to documents which may be held by H K Cheung, who is resident in Hong Kong. In my earlier judgment, I indicated that LSG was to carry out a further search for hard copy documents which may be held by Mr Cheung. That was done. In Ms Park's affirmation of 15 March 2017, she states that no documents were found. The present application seeks orders for a search of Mr Cheung's electronic material. That application repeats part of an earlier application which has been dismissed. The grounds that were set out for that dismissal still apply. For the same reasons, the present application in relation to Mr Cheung is dismissed.

[10] The balance of the categories of documents now sought to be disclosed relate primarily to Mr Matsuoka and his counsel's continuing assertion that Ms Park was not the decisionmaker in LSG's decision to deny Mr Matsuoka's eligibility for transfer to LSG and then to terminate his employment. This extends to a belief that employees of LSG's Hong Kong and Frankfurt offices were involved in and made those decisions. While it is important that a dismissed employee is to be able to

confront the decision maker, it is only one of the many aspects of procedural fairness. In this case, Ms Park has categorically stated she was the decision maker both in respect of the decision not to accept transfer and then to dismiss Mr Matsuoka.

[11] Further categories also include an attempt to "feed off" documents which were required to be disclosed because of a finding in the earlier judgment that privilege had been waived in respect of those documents.

[12] In response to the application, the defendant's notice of opposition states that the documents sought have already been disclosed or do not exist. This is confirmed in Ms Park's affirmation in support of the opposition. The notice of opposition also relies upon the earlier finding of the Court that requiring disclosure to this extent is oppressive; the attendances required in compliance would be disproportionate having regard to the extent and value of the plaintiff's claim. I agree with the defendant's submissions in respect of this application. The application is dismissed.

Application seeking removal of restrictions in respect of discovered documents and inspection of documents

[13] This application can be quickly dealt with. The restrictions are to remain in view of the grounds of the defendant's opposition. It is appropriate that Mr Harrison QC view the unredacted documents in view of the fact that Mr Stewart QC, who earlier viewed them, has now withdrawn as counsel. The defendant does not oppose that. It is to be arranged accordingly.

Application against Zambion Ltd and PSG Payroll Ltd seeking provision of memory stick from non-parties and removal of restrictions on use of information

[14] I agree with the complaint by the plaintiff as to difficulties which he faces in respect of the information held on the memory stick following the preservation order. The format in which the hard copy information has been provided is unsatisfactory. The information in its present form is confusing. Where tables have been printed over several pages, they cannot be properly collated, aligned and assessed. Either the hard copy information is to be provided in a properly collated and aligned form, or the memory stick is to be provided to Mr Matsuoka's counsel.

[15] The restrictions on use of the information are to remain except to the extent that Mr Matsuoka must obviously be able to show the information to a payroll expert or tax adviser as part of the preparation of his case. The order restricting use is modified accordingly. However, to make the position abundantly clear, no information is to be shown to Mr Hay.

Application for order granting security for costs

[16] The defendant has now made an application that the plaintiff pay security for costs. The sum sought is $150,000 or such other amount as determined by the Court. The defendant also seeks that in default of payment of any such award, the proceedings be stayed. The application seeks an order that any sum set as such security for costs be paid to the Registrar or satisfactorily secured.

[17] The sole ground for the application appears to be that Mr Matsuoka is impecunious and would be unable to pay costs awarded in the defendant's favour if his claims are dismissed. The application, however, also introduces as an allegation in support of the application, that Mr Matsuoka is a citizen of the United States of America and is free to relocate back to the United States of America at any time. The inference of the assertion seems to be that if costs are awarded against him, he would so relocate to avoid payment.

[18] The application is opposed by Mr Matsuoka. In his affidavit in support of the notice of opposition, he sets out details of his financial position. He also sets out convincing reasons why he would not leave New Zealand. While he is no longer funded in the proceedings as he was previously, he discloses ownership of, or interest in, reasonably valuable assets.

[19] As with the other applications being dealt with in this judgment, I intend to deal with the defendant's application briefly. I record that I have read and considered all the documents filed both in support of and in opposition to this application. The principles that apply to such an application have been considered in a number of previous decisions of this Court.2 The Court has jurisdiction to order a party to pay security for costs and stay the proceedings until payment has been made or security in the quantum ordered by the Court has been given. As no procedure for ordering security is provided for in the Act or the Employment Court Regulations 2000, the

2. Recent decisions considering the issue are *Davidson v Great Barrier Airlines Ltd* [2017] NZEmpC 46; *Quality Consumables Ltd v Hannah (No 2)* [2017] NZEmpC 155; and *TKR Properties t/a Top Pub & Route 26 Bar and Grill v MacDonald* [2018] NZEmpC 10.

application is to be dealt with in accordance with the procedures provided for in the High Court Rules 2016.3

[20] A threshold test applies in exercising the discretion as to whether to grant the application.4 An order may be made if

the plaintiff is resident out of New Zealand (which on the facts disclosed is not the case here) or where there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings. If the threshold in either respect is met, the Court may order the giving of security for costs if it considers that such an order is just in all the circumstances. In the present case, the defendant's application is advanced on the basis that Mr Matsuoka will be unable to pay his costs if the challenge fails.

[21] In deciding whether it is just in all the circumstances to make an order, the Court ought to include in the exercise of its discretion, regard to the merits of the challenge.5 Usually, the Court will have limited information to enable it to make an assessment on the merits and will only do so on an inferential basis, having regard to the pleadings and other documents filed. In the present case, because of the nature of the interminable interlocutory applications which needed to be considered, the Court has more information than might usually be the case. The previous judgments of Judge Travis dated 18 May 2011 and 21 December 2012 also provide helpful information.6 Nevertheless, dealing with the matter on an inferential basis, Mr Matsuoka has set out substantial and arguable grounds for his personal grievance claim.

[22] In exercising the discretion, there is also a need to balance the interests of the plaintiff and the defendant in the overall exercise. As the Court of Appeal observed in *A S McLachlan v MEL Network Ltd*:7

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in

3 Employment Court Regulations 2000, reg 6; High Court Rules 2006, r 5.45.

4 *Davidson v Great Barrier Airlines Ltd*, above n 2, at [13].

5 At [14].

6. *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, [2011] ERNZ 56; *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2012] NZEmpC 220, (2012) 10 NZELR 592.

7 *A S McLachlan Ltd v MEL Network Ltd* [2002] NZCA 215; [2002] 16 PRNZ 747 (CA).

which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.

[16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[23] From the documents filed in this matter, I am not satisfied that the defendant has demonstrated that Mr Matsuoka would be unable to meet any likely award of costs in the matter if he is unsuccessful in his claim. Certainly, if an order for security for costs was made, I would regard the claim of $150,000 as excessive and comment that it has the hallmarks of an endeavour to prevent Mr Matsuoka from pursuing his claim or at least putting substantial financial impediments in his way. As I have indicated, it cannot be alleged that Mr Matsuoka has no prospects of success in his claims against LSG. Nevertheless, the proceedings have become over-complicated and unnecessarily protracted.

[24] In considering the overall issue of what is just in all the circumstances and balancing up the respective interests of the parties, I am of a view that it is not in the interests of justice in this case to make an order for security for costs against Mr Matsuoka. I make the point, which I have also considered, that the application has been made very late in the piece and as will be seen from my subsequent comments in this judgment, has been made at a time where the proceedings are now to be set down for trial.

[25] In all the circumstances, the application for security for costs is dismissed.

Future conduct of the proceedings

[26] Earlier on in these proceedings, I was hopeful that the parties could sensibly resolve most of interlocutory matters between themselves. Several meetings with counsel were conducted where some agreement was reached and a way forward was agreed for dealing with those matters where the parties could not be reconciled. I indicated on more than one occasion at these meetings that I was anxious to ensure that all interlocutory matters were resolved before the proceedings were set down for hearing. An earlier hearing date had to be vacated because it was apparent that with

the date approaching, there would be no way for the then substantial matters still subject to dispute to be resolved in time to allow for preparation for trial to be completed. I was also concerned to ensure that, once set down, there was not a repeat of what happened in the *Nisha v LSG Sky Chef NZ Ltd* proceedings, where 12 interlocutory applications, requiring urgent consideration by the Court, were filed between the setting down and the hearing date. The majority, if not all, of those applications were filed on behalf of the plaintiff Ms Nisha. I therefore indicated that I would not set the present proceedings down until counsel were prepared to certify that all

interlocutory matters were completed. In view of what has now transpired, my earlier belief that counsel would act responsibly in bringing these proceedings to an early conclusion was mistaken. To be fair to the defendant and its counsel, it has indicated for a considerable time now that it is ready to accept a fixture.

[27] Mr Matsuoka has been led by his legal advisors into an apparently never- ending spiral of interlocutory applications. Out of concern particularly for Mr Matsuoka, but also the interests of the defendant, I have decided that this situation now must come to an end. The proceedings (ARC 23/12, ARC 102/13 and EMPC 192/2017) are now set down for hearing. No further interlocutory applications are to be filed or leave sought to file them. Counsel are to confer with the Registrar to indicate availability for hearing and the estimated length of hearing. In view of the failure of counsel in previous hearings to be able to reasonably estimate hearing time, a further five days is to be added to counsel's estimates to avoid the hearing being adjourned part-heard as has occurred in earlier hearings. To progress the matter to hearing, the following timetabling directions are to apply:

(a) The plaintiff's case will be presented first.
(b) The plaintiff's briefs of evidence are to be filed and served no later than 42 days from the date of this judgment.
(c) The defendant's briefs of evidence are to be filed and served 64 days from the date of this judgment.

(d) Any evidence in reply may be given orally at the hearing, unless it is extensive or likely to surprise the defendant. In that event, briefs of evidence in reply are to be filed and served no later than 14 days before the hearing.
(e) I am not confident that the parties will co-operate in the production of a common bundle of documents. This is unfortunate, as it will probably lead to a duplication of references to documents in the briefs of evidence and production of documents at trial. However, if the parties can agree on a common bundle, then this will need to be prepared and provided to the Court when the plaintiff's briefs of evidence are filed, so that those briefs refer to the appropriate document and page numbers in the bundle. If the parties cannot agree on a common bundle, then each of the parties is to file their own separate bundle when their briefs of evidence are filed so that again, the briefs refer to the appropriate document and page numbers in their respective bundles. Documents in any bundle filed should be indexed. The pages of the bundle should be consecutively numbered.
(f) If a common bundle of documents is to be filed, and either party objects to the admissibility of a document included in that bundle, then such objection is to be recorded in the bundle itself so that the objection may be determined by the Court at the hearing. Extra evidence may then be necessary to prove the authenticity or admissibility of a document. Unless a document in a common bundle is subject to a specific objection, each document contained in the common bundle will be regarded as having been produced by consent when it is referred to in evidence by a witness or in submissions (other than in closing), and each document will be considered to:
(i) be admissible; and
(ii) be accurately described in the index to the common bundle; and
(iii) be what it appears to be; and
(iv) have been signed by any apparent signatory; and

(v) have been sent by an apparent author and to have been received by any apparent addressee; and
(vi) have been produced by that party indicated in the index to the common bundle.
(g) If a common bundle cannot be agreed and separate bundles are to be filed, then as a courtesy to both the Court and the opposing party, any objection and the nature of such objection to production of a document must be notified at least four weeks prior to the hearing commencing.
(h) Each brief of evidence to be filed is to contain all the evidence-in-chief it is intended that the witness will give. References to documents in briefs of evidence should be to the page numbers in whichever bundle of documents is to be relied upon. This direction must be complied with in the briefs filed and served in accordance with the timetabling given in this judgment so that only one set of briefs will be circulating. Hopefully, counsel will be able to liaise with each other at an early stage as to how the matter of documents is to be handled, but these directions have been given in the more likely event, having regard to the way that proceedings have so far been conducted, that counsel will not be able to agree.
(i) The parties are reminded that no documents are provided to the Court by the Authority. It is unlikely in this case that there will be documents still held by the Authority, which the parties will wish to provide at the trial of this matter, but if there are, it is the obligation of the parties to recover any such documents from the Authority they wish to make available to the Court.
(j) The parties are asked to file briefs of evidence in the form of MS Word files transmitted electronically. Those files should be free from unnecessary formatting such as tracked changes. This will assist in the preparation of the transcript of the hearing. However, in addition, the parties must file three hard copies of the briefs of evidence.

[28] For the sake of it being placed on the record, these proceedings are not subject to the Court's Practice Direction Guideline Scale. Issues of costs overall will need to be decided once the outcome of Mr Matsuoka's applications on their merits have been decided. In respect of this judgment, costs are reserved.

M E Perkins Judge

Judgment signed at 4.30 pm on 27 April 2018

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