IN THE COURT OF APPEAL OF NEW ZEALAND

CA149/2013
[2013] NZCA 108

BETWEEN	LYNNE FRANCES SNOWDON Applicant
AND	RADIO NEW ZEALAND Respondent

Hearing: 8 April 2013

Court: O'Regan P, Wild and White JJ

Counsel: C R Carruthers QC for Applicant
M F Quigg for Respondent

Judgment: 16 April 2013 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The application for a stay of execution of the unless order made by the Employment Court on 1 March 2013 is granted. That order is stayed pending further order of the Employment Court.

C The applicant is to pay the respondent's costs for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Two applications are for decision. The first is an application for leave to appeal, the second an application for stay of execution of the order appealed against.[1]

[2] The applicant is the plaintiff in three proceedings in the Employment Court against the respondent. She commenced those proceedings in 2004, 2005 and 2009. All three proceedings arise from her dismissal by the respondent on 11 April 2005. The Employment Court has described the 2004 proceeding as "the disadvantage grievances", the 2005 proceeding as "the unjustified dismissal grievance" and the 2009 proceeding as "the fraud proceeding".[2] The proceedings are set down for a six week hearing in the Employment Court, beginning on 4 June this year. The Court made that fixture on 21 December 2012, following a directions conference.

[3] The two applications relate to this order made by Judge Ford on 1 March 2013:

> (v) The plaintiff is to pay into Court the sum of $200,000 as security for the defendant's costs or provide to the defendant and the Court a bond from a bank, in a form reasonably acceptable to the defendant by **4.00 pm on Wednesday, 3 April 2013**. (Counsel to note the change of date from 1 April, which is Easter Monday). UNLESS THIS ORDER IS STRICTLY COMPLIED WITH, EACH OF THE PROCEEDINGS BEFORE THE COURT WILL BE STRUCK OUT.

[4] Leave to appeal is sought pursuant to s 214 of the Employment Relations Act 2000. Relevantly, this provides:

> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the Court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision; and section 66 of the Judicature Act 1908 applies to any such appeal.
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> …
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> (3) The Court of Appeal may grant leave accordingly if, in the opinion of that Court, the question of law involved in that appeal is one that,

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1 *Snowdon v Radio New Zealand Ltd* Employment Court, Wellington, WRC8/09, WRC19/05, WRC17/04, 1 March 2013.

2 We take these descriptions from [1] of the reasons for oral interlocutory judgment given by Judge Travis on 29 July 2011.

> by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.
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> …

[5] In his oral submissions to us Mr Carruthers formulated the question of law on the proposed appeal thus: in all the circumstances was the imposition of the unless order manifestly wrong in the sense that it is not within the usual jurisdiction of the Employment Court to impose an unless order in the face of the conduct that is at issue? That substantially simplifies and synthesises four proposed questions of law set out in the leave application.

[6] We do not consider that the proposed question is one of law. The circumstances which prompted the Employment Court to make the unless order were essentially factual. To the forefront were these facts:

(a) following commencement of the applicant's 2005 proceeding, the respondent applied in June 2005 for security for costs;

(b) later in the same month the respondent abandoned that application after the applicant filed an affidavit listing her assets, in particular properties in Oriental Bay in Wellington;

(c) in June 2011 the respondent applied afresh for security, having ascertained that the applicant had, in 2006, transferred the assets listed in her affidavit to a family trust;

(d) on 29 July 2011 the Employment Court ordered the applicant to pay into Court security for costs in the agreed sum of $200,000;

(e) as the applicant had not given the security ordered, on 14 September 2012 the respondent applied to the Court to impose a time limit for compliance;

(f) on 21 December 2012 the Court ordered the applicant to give the agreed $200,000 security for costs by 22 February 2013, either by

payment into Court or by way of a bond from a bank or insurance company;

(g) on 26 February 2013 the Employment Court, in a minute, noted that that order for security had not been complied with;

(h) the Employment Court has, on two occasions, indicated that it is likely to award indemnity costs against the applicant if her proceedings fail;

(i) the parties are awaiting a costs decision from the Employment Court. The respondent had applied for costs in excess of $200,000 in respect of the adjournment, upon the applicant's application, of an earlier (four week) fixture for the hearing of her proceedings. She had applied for the adjournment on 18 July 2011, two weeks before the hearing was to commence on 1 August 2011. In its reasons for decision given on 2 August 2011, the Court indicated that it was likely to indemnify the respondent in respect of its costs lost as a result of the adjournment; and

(j) this Court has already dealt with no fewer than four appeals by the applicant from decisions in the three proceedings she has brought against the respondent relating to her unjustified dismissal.[3]

[7] In this Court's judgment, delivered by William Young P on 28 June 2010, in the fourth of those appeals, the Court said:[4]

> Further, we are of the view that the time has come for the procedural music to stop. The substantive litigation has been before the Employment Court for many years. We see any utility (doubtful at best) associated with the proposed appeal as heavily outweighed by the adverse consequence of the further deferral of the determination of the grievance proceedings which would result if we granted leave to appeal.

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3 *Snowdon v Radio New Zealand Ltd* [2005] ERNZ 43 (CA288/04)); *Snowdon v Radio New Zealand Ltd* CA28/06, 23 June 2006; *Snowdon v Radio New Zealand Ltd* [2009] NZCA 557 (CA318/2009) and *Snowdon v Radio New Zealand Ltd* [2010] NZCA 271 (CA142/2010).

4 At [10].

[8] Mr Carruthers sought to shore up his proposed question of law, by submitting that the unless order was at odds with the principles laid down by this Court in *Anderson v Mainland Beverages Ltd*, subsequently elaborated by the High Court in *Matthews v Scott* and *RIG v Chief Executive of the Ministry of Social Development*.[5] In *Anderson* this Court said:[6]

> Seen in that light, our view is that "unless" orders should generally be reserved for cases where breach or continued breach is objectively measurable and unchallengeable. The consequences of failing to comply with "unless" orders – striking-out, stay or the like – are so significant that, in general, they should not be made in other cases, particularly where the obligations of the party in default are not unmistakably clear. As an example, failure to file a particular document by a particular day can be assessed objectively without possibility of challenge and can, for repeated breach, be properly the subject of an "unless" order.

[9] We endorse what is said there, but it is nothing more than a statement of the sort of circumstances appropriate for an unless order. Whether the Employment Court was correct to hold that those circumstances arose here is not a question of law. We agree with Mr Quigg that the applicant is attempting to dress up what is very much a question of fact, or an assessment of a factual situation, as a question of law. This Court has several times disapproved of attempts to dress up questions of fact as a question of law, for example in *EDS (New Zealand) Ltd v Inglis*.[7]

[10] Secondly, even if some question of law for appeal could be distilled here, we are firmly of the opinion that it would not be one of general or public importance justifying the grant of leave to appeal. Mr Carruthers contended that the applicant's argument that the unless order failed to take into account her "right to justice" affirmed by s 27 of the New Zealand Bill of Rights Act 1990 attached public importance to the appeal. We do not accept that. The s 27 "right to justice" applies to plaintiff and defendant alike. Reflecting that, orders for security for costs are commonplace in civil proceedings where the plaintiff, if unsuccessful, may not be able to pay costs. They always involve the Court balancing the plaintiff's right to have her claim heard against the need to give the defendant some protection for its

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5 *Anderson v Mainland Beverages Ltd* CA137/04, 14 September 2005; *Matthews v Scott* HC Auckland CIV 2010-404-1117, 19 November 2010; and *RIG v The Chief Executive of the Ministry of Social Development* HC Auckland CIV 2008-404-3461, 27 July 2009.

6 At [45].

7 *EDS (New Zealand) Ltd v Inglis* [2001] ERNZ 59 (CA) at [10].

costs in the event the claim fails. That balancing effectively took place here, the applicant initially agreeing both that an order for security was appropriate, and in the sum of $200,000. This appeal is not one of general or public importance.

[11] Nor can we see any other reason justifying leave. We have already referred to the nature of the substantive proceedings in the Employment Court: they are private proceedings arising out of the termination of the employment relationship between the parties.

[12] We have not overlooked the contents of the affidavit sworn by the applicant in support of her application for leave to appeal. In particular, we have not overlooked the deed of acknowledgment of debt she and her husband offered in an effort to satisfy the order for security for costs. It is not hard to see why the Employment Court accepted the respondent's submission that that deed was not satisfactory security.

[13] The strict criteria for leave in s 214 are not made out. We accordingly dismiss the application for leave to appeal.

[14] Although Mr Quigg contended that an order staying the unless order was unnecessary, he did not really oppose a stay. The position is that the applicant, on 27 March 2013, filed a further application in the Employment Court seeking a re-hearing/variation/rescinding of that Court's 1 March 2013 unless order. As the Employment Court has yet to deal with that application, we grant a stay pending further order of the Employment Court.

Result

[15] The application for leave to appeal is dismissed.

[16] The application for a stay of execution of the unless order made by the Employment Court on 1 March 2013 is granted. That order is stayed pending the further order of the Employment Court.

[17] The applicant is to pay the respondent's costs for a standard application on a band A basis with usual disbursements.

Solicitors:
Woods Fletcher, Wellington for Applicant
Quigg Partners, Wellington for Respondent