Employment Court of New Zealand

Allison v Ceres New Zealand LLC [2021] NZEmpC 46 (15 April 2021)

Last Updated: 22 April 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 46
EMPC 218/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to set aside witness summons
BETWEEN	DAVID ALLISON Plaintiff
AND	CERES NEW ZEALAND LLC Defendant

Hearing:	15 April 2021 (Heard at Christchurch)
Appearances:	A Oberndorfer, advocate for plaintiff S Wilson and H Rossie, counsel for Mr Gowda
Judgment:	15 April 2021

ORAL JUDGMENT OF JUDGE K G SMITH

(Application to set aside witness summons)

[1] Swaroop Gowda has been served with a summons to attend the hearing of this proceeding which is scheduled to begin on 28 April 2021.

[2] The summons has two purposes. Mr Gowda is required to attend to give evidence at the hearing. He is also ordered to produce documents. In relation to that part of the summons it reads:

DAVID ALLISON v CERES NEW ZEALAND LLC [2021] NZEmpC 46 [15 April 2021]

And you are ordered to bring with you and produce at the same time and place all emails you exchanged with David McIntyre and/or Monika [Bratownik] referring to the Plaintiff (his performance, disciplinary matter, redundancy and general comment pertaining to the continuation of his employment).

[3] The reference to David McIntyre is to the principal shareholder and director of the defendant. Ms Bratownik is an Accounts Manager for the company.

[4] Mr Gowda has applied to set aside the summons on the ground that it is oppressive within the meaning of reg 34(3) of the Employment Court Regulations 2000.

[5] Before discussing the application, which is opposed by Mr Allison, a brief comment is required about the proceeding. Mr Allison maintains that he was unjustifiably dismissed, and unjustifiably disadvantaged, when he was dismissed by the

defendant from his position as a welder/boilermaker. There is also a claim for an alleged breach of the duty of good faith.

[6] According to the amended statement of claim Mr Allison began working for the defendant, as a contractor, in December 2015. Subsequently he was employed by the defendant. He lived on the business premises.

[7] According to the pleadings Mr Allison's employment ended on 25 October 2018. The reason given for it ending was redundancy. As pleaded, Mr Allison's last day of work was 25 October 2018 and he was paid two weeks wages in lieu of notice.

[8] Generally speaking, the claim for unjustified dismissal arises from Mr Allison's disagreement with the reason relied on for it. He considers that the position he held was not redundant and the decision was a sham.

[9] The claim of unjustified disadvantage stems from steps taken by the company, before terminating the employment, which resulted in the locks on the premises being changed temporarily preventing him from having access.

[10] The starting point for this analysis is reg 34(3) that provides:

> (3) In any proceeding (other than a proceeding to which urgency has been accorded under clause 21 of Schedule 3 of the Act or the court's equity

and good conscience jurisdiction), the court may set aside a summons if the court considers, on the application of the person served with the summons, that the summons—

> (a) is oppressive; or
>
> (b) causes, by reason of distance or short notice, undue hardship to that person.

[11] There have only been a few cases dealing with this regulation the leading one being *Alkazaz v Enterprise IT Ltd*.1 As the Court observed in *Alkazaz*, summonses are administratively issued by the Court Registry on the application of a party to the proceeding.

[12] The Court controls whether it is appropriate for a witness to be summonsed through the mechanism provided in reg 34(3). There are only two avenues available to a summonsed witness to apply to set it aside: that it is oppressive or causes the intended witness undue hardship. It is notable that hardship is restricted to distance or shortness of notice.2

[13] In *Alkazaz* the Court noted that, when dealing with an application to set aside a summons, the decision must be guided by what is required for the case to be disposed of fairly. The exercise of the Court's power must, therefore, be consistent with equity and good conscience. Ensuring the proper use of Court time is one part of the equation that should not be overlooked.3

[14] In this case the argument for Mr Gowda is that the summons is oppressive.

[15] The concept of what amounts to an oppressive summons is a broad one.4 In *Alkazaz* the Court described oppression as likely to include circumstances where a summons had been irregularly issued, for example because it was unlawfully procured or is being used for an improper purpose.

1. *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 138; and see also *Wills v Farmlands Co-Operative Society Ltd* [2020] NZEmpC 178.
2. See *Auckland Council v George* [2013] NZEmpC 79 at [7]; and *Nisha v LSG Sky Chefs New Zealand Ltd (No 19)* [2015] NZEmpC 139 at [14].

3 See for example *Alkazaz v Enterprise IT Ltd*, above n 1, at [7].

4 *Alkazaz v Enterprise IT Ltd*, above n 1, at [9].

[16] Another example of the breadth of the regulation is in *Auckland Council v George*, where the witness summons was issued to circumvent a decision about disclosure.5 That was held to be an abuse of process and therefore oppressive.6

What are the grounds relied on here?

[17] Mr Wilson, counsel for Mr Gowda, relied on the grounds in a memorandum of counsel as follows:

> (a) The summons is highly speculative, calling for evidence of no discernible relevance to issues before the Court constituting both an abuse and an inappropriate fishing expedition for documents.
> (b) It is not clear what the plaintiff expects Mr Gowda to say.
> (c) No reference was made to Mr Gowda by the plaintiff at any time during the redundancy consultation process or when he raised his personal grievance.

(d) Mr Gowda was not the decisionmaker.

[18] From these grounds the point advanced for Mr Gowda was that his evidence is not relevant to the Court disposing of the challenge by Mr Allison.

[19] As to the part of the summons requiring documents to be produced, an unjustified fishing expedition was said to be apparent because:

(a) the documents sought are unlimited as to time; and
(b) it seeks information about a broad range of issues beyond those in the pleadings.

5 *Auckland Council v George*, above n 2.

6 At [17]–[18].

[20] Mr Wilson argued that the plaintiff is attempting to circumvent applying for disclosure and, therefore, the summons is oppressive. There has, in fact, been no application for disclosure which was dealt with on a voluntary basis by the parties.

[21] Dealing with the request for emails between Mr Gowda and Ms Bratownik (wrongly identified in the summons as Bratowski) the argument was that this correspondence is not relevant and Mr Allison had produced no evidence that it was or could be. The same argument was repeated about the emails between Mr Gowda and Mr McIntyre. I should also add that Mr Wilson argued that there was a conflation of issues because of Mr Gowda's previous dealings with Mr Allison, when he was his line manager, and the subsequent decision made by Mr McIntyre to dismiss for redundancy.

[22] These observations were said to support the submission that the requirement to produce documents was a fishing expedition of the sort disapproved of in *Alkazaz*.7

[23] Ms Oberndorfer, advocate for Mr Allison, submitted that the witness summons was appropriate and expecting Mr Gowda to give evidence could not be regarded as oppressive because:

(a) there are genuine reasons for Mr Gowda to give evidence;
(b) the defendant was on notice of the intention to summons Mr Gowda as a result of what was said at a directions conference in October 2020;
(c) Mr Gowda is the most senior employee of the defendant in New Zealand but is not a witness for the company, which only became apparent when the briefs of evidence were filed and served in early February 2021;
(d) as the senior employee in New Zealand Mr Gowda is the "eyes and ears" of the company for Mr McIntyre, who lives in the USA;

7. Such expeditions are not permitted by the Court for good reason, largely to do with the broader administration of justice; *Alkazaz v Enterprise IT Ltd*, above n 1, at [12]; citing *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153 at [40].

(e) as the senior manager Mr Gowda has relevant information of the company's needs for its operational structure, more so than the witness being relied on by the company, Ms Bratownik;
(f) Mr Gowda was a key member of the company's staff and is referred to in correspondence already disclosed and incorporated into the bundle of documents; and
(g) finally, there were disputes between Mr Gowda and Mr Allison which he (Mr Allison) considers explains why he was dismissed and exposes the reason for the decision as a sham.

[24] The starting point is the relevance of the anticipated evidence. If Mr Gowda has evidence that is relevant to the proceeding then it should be given and he can be compelled to give it.

[25] While Mr Gowda's affidavit referred to him not being the person who made the decision to dismiss Mr Allison he is, nevertheless, a senior manager of the defendant company. While the briefs of evidence have not yet been tested, the evidence anticipated to be given is of disagreement and tensions between Mr Gowda and Mr Allison. There is some evidence, albeit slight, that those tensions may have been referred to in an investigative report prepared for the company and completed shortly before Mr Allison was advised that his position was redundant. The proximity between those events is said to be relevant to the plaintiff's case giving rise to Mr Allison's concerns about the genuineness of the decision to dismiss him.

[26] Mr Allison is entitled to be given an opportunity to explore the possibility that, in some relevant way, the problems between him and Mr Gowda played a part in the decision to dismiss him. On the information available it would not be appropriate, or prudent, to decide that Mr Gowda is not able to give relevant evidence.

[27] The documents are more problematic. On the face of the summons it is possible that what is sought is the release of a significant number of documents which in itself might be oppressive, especially given the lack of specificity about them. Unfortunately, there is no evidence from either party to give an indication of how many

documents are likely to be involved in answering the summons. Mr Gowda has not given any indication as to how time-consuming it

might be to attempt to recover the emails, for example, between him and Mr McIntyre.

[28] Ms Oberndorfer anticipated problems with the breadth of the summons. In the plaintiff's notice of opposition she reduced its ambit to requiring Mr Gowda to produce emails between him and Mr McIntyre from 1 March 2018 to 15 March 2018 and from 6 September that year to 1 November that year. I assume those dates are relevant by reference to the pleadings but that was not explored in submissions.

[29] On Ms Oberndorfer's analysis, the basis for this continued request for access to documents is that Mr Gowda, as the defendant's senior manager, must have been in communication with Mr McIntyre about important business decisions. It is, therefore, reasonable to expect correspondence between them to have touched on the issue of Mr Allison's redundancy or the staff review generally.

[30] As to the email correspondence between Mr Gowda and Ms Bratownik, that remains problematic. Ms Bratownik has been employed by the company since July 2018. She is intended to be a witness and has provided a brief of evidence. The evidence she is anticipated to give is about the financial performance of the company during relevant financial years and goes no further. Mr Allison offered no explanation for seeking correspondence between Mr Gowda and Ms Bratownik. I agree with Mr Wilson that this part of the summons is a fishing expedition.

[31] I have reached the conclusion that the witness summons cannot stand in its present form but that Mr Gowda should be able to be the subject of a summons. In the course of arguments today I asked both Mr Wilson and Ms Oberndorfer whether it is possible for me to amend the summons in some way to reflect the views just expressed. Mr Wilson took the position that reg 34(3) creates a binary choice, on the basis that once a decision has been made that the summons is oppressive the regulation does not provide, or at least does not clearly provide, for any option other than to set it aside. He acknowledged that there could be some room for the possibility of severing the summons so that Mr Gowda might, for example, be required to give evidence but not to produce documents.

[32] Ms Oberndorfer took a contrary position, which was that there is no impediment to the Court being able to amend the summons.

[33] There is a potential difficulty in reg 34(3), as Mr Wilson identified. I am not aware of other cases where this situation has been addressed and in the circumstances where this decision needs to be given now, because of the proximity of the hearing, a detailed review of other cases has not been possible. That said, I conclude that the summons can be amended as part and parcel of considering an application to set it aside. Apart from being a pragmatic response to the identified problems with the summons, the broad powers in regs 6(1), 6(2)(a)(iii) and particularly in 6(2)(b) which requires the Court is to dispose of a matter in such manner as is considered to best promote the object of the Act in the interests of justice, support that conclusion.

Conclusion

[34] The witness summons is to be amended as follows:

(a) Mr Gowda is required to give evidence;
(b) he is required to produce email correspondence between himself and Mr McIntyre for the dates referred to earlier in this judgment; but
(c) there is no requirement for him to produce email correspondence with Ms Bratownik.

[35] As amended the witness summons is not oppressive.

[36] In the circumstances, there is no need for the summons to be re-issued.

[37] Costs are reserved.

K G Smith Judge

Judgment delivered orally at 11.34 am on 15 April 2021