

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 76
ARC 102/13**

IN THE MATTER OF	an application to strike out proceedings
BETWEEN	JOHN MATSUOKA Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED First Defendant
AND	JACOB ROEST Second Defendant
AND	MARIE LYNNE PARK Third Defendant

Hearing: 19 May 2014

Appearances: R B Stewart QC and B Nicholson, counsel for plaintiff
G Pollak, counsel for defendants

Judgment: 19 May 2014

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This matter has come before the Court today on an application in ARC 102/13 by the first, second and third defendants, to strike the proceedings out. There is no need to go into the matter further at this stage. Mr Bruce Stewart QC has appeared with Mr Nicholson this morning for the plaintiff, Mr Stewart being recently brought into the matter. He, having considered the proceedings, has indicated that the plaintiff wishes to file a third amended statement of claim.

[2] This third amended statement of claim, which has been handed up in a draft or proposed draft form this morning, effectively discontinues the proceedings against

the second defendant, Jacob Roest and the third defendant, Marie Lynne Park. It also substantially modifies the previous statement of claim and the alleged causes in that statement of claim which I am bound to say caused me considerable concern prior to this morning's hearing. This is a situation of course where there is another set of proceedings between Mr Matsuoka and the first defendant, LSG Sky Chefs New Zealand Limited. It relates to Part 6A of the Employment Relations Act 2000 (the Act) following the taking over of a catering contract by LSG Sky Chefs New Zealand Ltd, from the former employer of Mr Matsuoka, Pacific Flight Catering and associated companies.¹

[3] The matter came before His Honour Judge Travis before his retirement in a preliminary way for the answer to questions, the answers of which would decide whether Mr Matsuoka, the plaintiff in the proceedings, was in fact an employee covered by Part 6A. Judge Travis decided that he was but then reserved the issue of whether he had been unjustifiably dismissed following him being deemed to be an employee of LSG Sky Chefs. Those proceedings have continued with amended pleadings and seemed in all respects, ready to hear although there was some outstanding disclosure issues. These then became quite difficult to manage. Following all of that, Mr Matsuoka then issued proceedings ARC 102/13 which are the proceedings before the Court today. Those proceedings initially were based on an argument in contract but subsequently amended so that they primarily pleaded a breach by the defendant LSG of a deeming section in the Act. This arose following the answers to the questions by Judge Travis.

[4] The proceedings included causes against the second defendant Mr Roest, and the third defendant Ms Park for contempt of Court and other punitive measures available under the Act. The contempt proceedings, I am bound to say, appeared to be based on a misconception of a section in the Act relating to contempt in the face of the Court as opposed to other wider contempt. There would have been serious jurisdictional issues in the Court dealing with those pleadings. In addition to that there was a pleading that Mr Roest and Ms Park had aided and abetted a breach of an employment contract when the primary cause in the proceedings was that there was no contract, and so there was going to be serious difficulties with all of that. In any

¹ ARC 23/12.

event I am pleased to say that now that Mr Stewart is counsel in the proceedings, this amended statement of claim is to be filed and isolates the causes down to a narrow area which may or may not involve a pleading in reinstatement. But it certainly is directed at a lacuna situation in the facts. This may arise, one way or another, by virtue of the operation of Part 6 of the Act. I will not say any more about the pleadings but in any event, in the face of the amended statement of claim now to be filed, Mr Pollak has formally withdrawn the application to strike out. That is on the basis that the plaintiff accepts that in dealing with the matter in the way he has this morning, he lays himself open to costs. That is in two respects.

[5] Firstly, there is the strike out application itself and an issue that arises as to costs for all three defendant's in respect of that. Secondly, there is an issue of costs, which may be sought by Mr Roest and Ms Park now that the pleadings against them have been amended and effectively the claim against them is withdrawn.

[6] I make the following directions arising out of all of that:

- a) First the application to strike out the proceedings, filed by the first, second and third defendants is formally withdrawn;
- b) Issues of costs arising in that respect are to be dealt with by the defendant filing a memorandum within 14 days. The plaintiff is then to have 7 days thereafter to file a memorandum in answer;
- c) Insofar as the amended statement of claim is concerned it is open to the plaintiff to file that amended statement of claim because the proceedings are not set down and amended pleadings may now be filed in the face of what has happened this morning. That effectively results, as I say, in a withdrawal of the proceedings against the second and third defendants. The memoranda that I have directed to be filed in respect of costs on the withdrawn strike out application are also to consider any issue of costs which arises in respect of the withdrawal of proceedings against the second and third defendants;

- d) Mr Stewart and Mr Nicholson as counsel for the plaintiff, will have 7 days to file the amended statement of claim, although I imagine it can be filed today;
- e) LSG (which is the remaining defendant) will, following filing, have 21 days to file a statement of defence to that amended statement of claim, or to take any other steps in respect of the pleadings if the defendant chooses;
- f) In addition there will be a direction that ARC 23/12 and ARC 102/13, so long as the defendant chooses to plead to the amended statement of claim and not take any other step, are to be heard together;
- g) The Registrar is to allocate a directions conference in 28 days time to review progress on the outstanding disclosure issues and any other outstanding interlocutory matters.

[7] The remaining issue is a police complaint. This, the Court has been notified, has been lodged with the Police by Mr Matsuoka through his lawyers. That complaint, if it were to be investigated by the Police would cause a serious impediment to the future progress of the civil proceedings in view of the fact that two people who are likely to be main witnesses for the defendant would be faced with having to make a decision on issues such as self-incrimination.

[8] Mr Stewart has indicated this morning that he will take instructions from his client as to whether the complaint may be withdrawn. That will require, in addition, the Police confirming that they will no longer pursue any investigation of it. If those matters can be confirmed they are to be confirmed to the Court by the filing of a memorandum.

M E Perkins
Judge

Oral judgment delivered at 10.07am on 19 May 2014