

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2015] NZEmpC 106
ARC 22/14**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for leave to file
interlocutory applications

BETWEEN SHABEENA SHAREEN NISHA (NISHA
ALIM)
Plaintiff

AND LSG SKY CHEFS NEW ZEALAND
LIMITED
Defendant

Hearing: By written submissions filed on 25 and 30 June 2015

Appearances: MW O'Brien and B Nicholson, counsel for plaintiff
J Douglas, counsel for defendant

Judgment: 7 July 2015

INTERLOCUTORY JUDGMENT (NO 8) OF CHIEF JUDGE G L COLGAN

[1] The plaintiff has applied for leave to file three further interlocutory applications. Leave is required because of a direction to this effect made by the Court in a Minute issued to the parties on 19 June 2015. LSG Sky Chefs NZ Limited (LSG) opposes the grant of leave. Whether leave is granted must, therefore, be dealt with as the first issue.

[2] Before doing that, however, it is necessary to outline briefly the nature of the further interlocutory applications that the plaintiff wishes to bring.

[3] The first is one that challenges the defendant's assertion of its privilege in certain documents which the defendant says does not require their disclosure, even if

they are relevant. The plaintiff says that to the extent that the head of privilege claimed is litigation privilege, documents which may have attracted litigation privilege in proceedings between the defendant and the plaintiff's former employer about issues associated with those in this case, the conclusion of that earlier litigation extinguishes the privilege that can be asserted in those documents.

[4] The second interlocutory application the plaintiff wishes to file seeks a variation of disclosure orders previously made by the Court or, in the alternative, orders requiring particular disclosure of documents by the defendant.

[5] Third, the plaintiff seeks leave to apply to the Court for the recall of its Interlocutory Judgment (No 7) issued on 24 June 2015 on the grounds that the Court has omitted to deal, or to deal at least sufficiently, with several issues raised by the applications determined by that earlier interlocutory judgment.¹

[6] The defendant's opposition to these applications for leave can be summarised as follows. In respect of the litigation privilege challenge, the defendant says that it has reasonable grounds to object to disclose the documents by asserting its privilege in them. The defendant says the documents were created for the "dominant purpose of preparing for legal proceedings" and litigation related to that now concluded original litigation is ongoing.

[7] That is a substantive objection rather than one going to whether leave should be granted to argue it. The documents that have been disclosed already as part of the interlocutory preparation of the case before the Court, preceded the imposition of the requirement for leave. In that sense, what is in effect the plaintiff's challenge to an assertion of privilege is not a new matter but, rather and in this case, the logical outcome of it. The legal question to which the plaintiff's intended challenge relates is not well settled in employment law. It is whether litigation privilege continues to attach to documents prepared for earlier and now concluded litigation in another forum and, even if it does continue to attach to current related proceedings, whether these proceedings are sufficiently related.

¹ *Nisha v LSG Sky Chefs New Zealand Ltd (No 7)* [2015] NZEmpC 97.

[8] Dealing next with the defendant's opposition to the plaintiff's second intended interlocutory application, the defendant says that such orders would be "unnecessary and disproportionate to the plaintiff's claims".

[9] Finally, in opposing the plaintiff's application for leave to apply for the Court to recall its Interlocutory Judgment (No 7),² the defendant says it is "taking steps to comply with that judgment which adequately deals with all matters properly before the Court". Further, the defendant says that a number of the plaintiff's claims in this regard were the subject of earlier Interlocutory Judgments (No 5) and (No 6) and the plaintiff's requests for further disclosure "are unjust in the light of the absence of reciprocity".³

[10] More generally in relation to all three proposed interlocutory applications, the defendant says that the orders sought are "disproportionate to the subject matter of the proceeding" and do not take into account the need to reduce the scope and burden of document disclosure and inspection. It says that the plaintiff's proposed applications for a further disclosure or particular disclosure are "unnecessary or undesirable or both".

[11] The defendant's opposition is supported by an affidavit of its Human Resources Manager, Marie Park, sworn on 30 June 2015. Ms Park deposes to the plaintiff failing or refusing to comply with earlier disclosure orders made against her by the Court. In particular, the defendant says that the plaintiff has still not complied with directions in the Court's Interlocutory Judgment (No 6) that she must list "any document including emails, letters, file notes, memoranda, and other correspondence, evidencing an agreement regarding support or funding of Ms Alim's claims against LSG Sky Chefs New Zealand Ltd" and any correspondence with the representatives named in subpara 21(a)(iii) of those orders. Ms Park says that the plaintiff has not completed parts 4 and 5 of the standard form of affidavit of documents, including the identification of all relevant documents which she no longer has, or which have never been in her control. Ms Park says that the plaintiff has not explained when each such document ceased to be in the plaintiff's control

² *Nisha*, above 1.

³ *Nisha v LSG Sky Chefs New Zealand Ltd (No 5)* [2015] NZEmpC 64, *Nisha v LSG Sky Chefs New Zealand Ltd (No 6)* [2015] NZEmpC 65.

and/or who has control of such document or documents. Ms Park says that such (as yet) incomplete disclosure may be relevant in respect of documents in the control of Pacific Flight Catering Ltd (PFC) or PRI Flight Catering Ltd, documents concerning the Service & Food Workers Union Inc (SFWU) and, as already mentioned, documents relating to the plaintiff's funding of this litigation.

[12] Ms Park's evidence is that despite having, among other things, requested these documents of the plaintiff's solicitors by letter dated 26 June 2015, the defendant's counsel wrote again to the plaintiff's on 30 June 2015, attempting to explore whether the matters contained in the plaintiff's intended applications could be advanced directly between the parties without need for court orders. These proposals include the defendant supplying to the plaintiff the documents which the plaintiff will claim, if leave is granted, should have been the subject of the Court's Interlocutory Judgment (No 7).

[13] I consider that the defendant's reciprocity argument (that is that the plaintiff has not (yet at least) met her disclosure obligations) is decisive of the plaintiff's proposed second interlocutory application which, if leave were to be granted, would seek a variation of the disclosure orders made previously by the Court or, alternatively, require particular disclosure of documents by the defendant. Further, I consider that this proposed application would, at least in part, seek to revisit orders already made limiting the defendant's required disclosure and, thereby, either constitute a collateral attack on those previous requirements, or seek, by a back door, to revisit them.

[14] The plaintiff has leave to file its application challenging the defendant's assertion of privilege in documents. It arises out of, and relates to, earlier interlocutory applications that were brought as of right and determined. If the plaintiff is correct, any litigation privilege in those documents has now expired by reason of the disposal of the associated litigation in the High Court and Court of Appeal by a judgment late last year of the Supreme Court.⁴ That is a matter that the plaintiff is entitled to have determined. I will give directions at the end of this judgment about how that issue is to be determined.

⁴ *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158.

[15] Similarly, the plaintiff's application for leave to seek the recall of the Court's Interlocutory Judgment (No 7) deals with matters begun before the requirement for leave. If the plaintiff is correct, an omission by the Court to deal with applications made to it is a matter that should be reviewed and dealt with. Leave is granted to do so.

[16] However, for the foregoing reasons, the plaintiff's application for leave to file an interlocutory application seeking a variation of disclosure orders previously made by the Court (or, in the alternative, orders requiring particular disclosure of documents by the defendant) is refused.

[17] In respect of the two interlocutory applications for which leave has been granted, the plaintiff must file and serve these within three working days of the date of this judgment. That is a short period but takes account of the imminent fixture next month and the preparatory work that will already have gone into those applications for the purpose of seeking leave. Once those applications have been filed, they should be served immediately on the defendant which may then have the period of five working days to file and serve any notice of, and affidavit evidence in support of, its opposition.

[18] I apprehend that the privilege question raised by the plaintiff's first interlocutory application will be determined largely as a matter of law with the Court giving directions to the defendant as to the extent, if any, of privilege that may be asserted. For the foregoing reasons of time, therefore, the plaintiff must file a synopsis of argument in support of her contentions, first, that the current proceedings in this Court are not associated with those commenced in the High Court and determined by judgment of the Supreme Court and, second, even if so, the litigation privilege in such documents as the defendant may have been entitled to assert in that earlier litigation, does not attach to those same documents in these proceedings. The plaintiff must file and serve her submissions in support of that position in writing within one week of the date of this judgment.

[19] The defendant may have a further week after service of such written submissions upon it, to file and serve its written submissions on this point. If there

are any matters arising from the defendant's written submissions which the plaintiff has not dealt with in its submissions, the plaintiff may have the period of two working days after service upon her of the defendant's written submissions to file and serve any further any written submissions strictly in reply. That issue will then be dealt with on the papers filed.

[20] I reserve costs on the matters dealt with in this further interlocutory judgment.

GL Colgan
Chief Judge

Judgment signed at 10 am on Tuesday 7 July 2015