IN THE COURT OF APPEAL OF NEW ZEALAND

CA205/2015
[2015] NZCA 401

BETWEEN	MICHAEL KINLIM YAN Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 24 August 2015

Court: Ellen France P, Wild and Cooper JJ

Counsel: Applicant in Person with M J Scott as McKenzie friend
S L Hornsby-Geluk and M J Harrop for Respondent

Judgment: 31 August 2015 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal to this Court is dismissed.

B The applicant is to pay the respondent's costs as for an application for leave to appeal on a band A basis with plus usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

[1] Mr Yan applies under s 214 of the Employment Relations Act 2000 for leave to appeal on a question of law. The application relates to a judgment of Judge Inglis delivered in the Employment Court at Auckland on 24 March 2015.[1]

[1] *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36.

[2] This court may grant leave if of the opinion "… the question of law … is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision".[2]

[3] Mr Yan's application for leave to appeal sets out six grounds but does not formulate any question(s) of law for determination by this Court, in terms of s 214(3). His application does, however, state:

> 10. The issue of bias by way of animosity in the instant case raises a question of law capable of bona fide and serious argument in a case involving a public interest of sufficient importance to outweigh the cost and delay of the further appeal.
>
> …
>
> 12. The purpose of the bringing of this appeal is to clarify the law re bias by way of animosity, and to determine whether that law has been properly construed and applied by the Employment Court.

[4] In oral submissions Mr Yan accepted the question of law he seeks to argue on appeal is: did bias by animosity exist (on the part of the Department of Inland Revenue (IRD) as his employer)? Mr Yan submitted Judge Inglis was wrong to find no such bias existed.

[5] More broadly, we discern Mr Yan's concern is that IRD did not engage someone from outside the Department to conduct the process which resulted in Mr Yan's dismissal. So, the question on appeal could be more broadly expressed along the lines: in order to avoid the possibility of bias by way of animosity, did IRD need to engage an independent, outside person to conduct the process which led to Mr Yan's dismissal?

[6] Mr Yan was dismissed by IRD after working for the Department for about 26 years as a solicitor. His dismissal was the culmination of concerns going back about 20 years and an 11 month performance improvement process (PIP).

[7] The IRD officers involved in the earlier stages of the PIP were Messrs Haycock and Oomen. Mr Yan was, in the hearing before the Employment Court,

---

[2] Section 214(3).

and remains on this application, concerned that these two officers had an animus toward him resulting from their concerns about Mr Yan's unpredictable behaviour and the possibility he may physically harm them or their families or their property.

[8] Mr Yan submitted this animosity was evidenced by the concerns Messrs Haycock and Ooman expressed during the approximately 22 meetings they had with Mr Yan during the course of the PIP (which Mr Yan termed "the disciplinary process").

[9] Mr Yan accepts another IRD officer, Mr Ridling, took over the PIP process and made the decision to dismiss Mr Yan. But he submits:

(a) Mr Ridling uncritically adopted the decision of Mr Ooman in regard to the first PIP period, without which the disciplinary process would not have continued.

(b) While being aware of Mr Haycock's sentiments toward Mr Yan, Mr Ridling retained him as team leader of Mr Yan until conclusion of the disciplinary process and heavily relied on Mr Haycock in all steps up to and including Mr Yan's dismissal.

(c) Mr Ridling took over and completed an existing disciplinary process (we take this to be a submission that Mr Ridley simply completed the process to a predetermined end).

[10] Standing firmly in the way of our granting leave on the proposed question is Judge Inglis' finding that neither "… the process or the ultimate decision to dismiss can be impugned on the basis of bias in this case".[3]

[11] That general finding of fact is supported by the following subsidiary findings of fact by Judge Inglis:

---

3 *Yan v Commissioner of Inland Revenue*, above n 1 at [58].

(a) Her rejection of Mr Yan's submission that the apprehensions Mr Haycock and Mr Ooman held would lead a fair-minded observer to conclude they were unable to bring an impartial mind to bear. The Judge held:[4]

> Even putting to one side the degree of neutrality point, I do not accept that an informed fair-minded observer would draw such a conclusion.

(b) Quite apart from (a), the Judge's finding:[5]

> In any event, the fundamental difficulty with the submission advanced [for Mr Yan] is that neither Mr Oomen nor Mr Haycock was the decision-maker.

(c) The Judge's finding: [6]

> Mr Ridling was the ultimate decision-maker and he never expressed, or harboured, any concerns about Mr Yan presenting a perceived threat to his safety.

(d) Mr Ridling's knowledge of the concerns held by Messrs Haycock and Oomen did not provide an evidentiary basis for holding that Mr Ridling also was biased against Mr Yan. The involvement in the early stages of the PIP process by Mr Haycock and Mr Oomen was not "problematic". Mr Oomen had limited involvement, and at the early stages of the process. Mr Haycock was appropriately involved as Mr Yan's manager throughout and undertook some, but not all, peer reviews.[7]

(e) The further finding: [8]

> Mr Ridling was ultimately tasked with the decision-making process and it was Mr Ridling who dismissed Mr Yan for poor performance following the process involving feedback from a range of people. As Mr Yan pointed out in evidence, he had had very little involvement with Mr Ridling prior to the PIP.

---

4 At [55].
5 At [55].
6 At [56].
7 At [57].
8 At [57].

[12] In terms of the general or public importance of the proposed question of law, Mr Yan submitted that this Court's judgment in *Board of Trustees of Marlborough Girls' College v Sutherland* and the Employment Court's decision in *Smith v Attorney-General* left bias in the disciplinary context in a state of "animated suspension".[9] We do not accept that. The point made by this Court in *Marlborough Girls' College* was that the statements of principle of bias developed in relation to courts, tribunals and other bodies that operate independently of the parties do not neatly apply in the employment context. That is because the employer is very much interested in the decision whether or not to dismiss an employee.[10] Judge Inglis correctly drew that point from *Marlborough Girls' College*.[11]

[13] Mr Yan also submitted the Judge in the Employment Court erred in not applying the principle in *R v Inner West London Coroner, ex parte Dallaglio*, that when those involved in a decision-making process exhibit gravely adverse views towards the subject of the decision, amounting to animosity, their decision may be vitiated.[12] He submitted it would be "extraordinary" if that principle did not apply in the employment context. But there is no need to go further into the law. That is because Mr Yan cannot overcome the fundamental obstacle that the Employment Court found, on the evidence it heard, that the decision to dismiss Mr Yan was not vitiated by bias on the part of any of Messrs Haycock, Oomen or Ridling.

[14] In the result, we dismiss Mr Yan's application for leave to appeal to this Court.

[15] Mr Yan is to pay the respondent's costs on a band A basis with usual disbursements.

Solicitors:
Dundas Street, Wellington for Respondent

---

9 *Board of Trustees of Marlborough Girls' College v Sutherland* [1999] 2 ERNZ 611 (CA); *Smith v Attorney-General* [2009] ERNZ 467 (EmpC).

10 *Board of Trustees of Marlborough Girls' College v Sutherland*, above n 9, at [24]–[25].

11 *Yan v Commissioner of Inland Revenue*, above n 1, at [47].

12 *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139 (CA Civ).