

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA121/2017
[2017] NZCA 266**

BETWEEN JOHN TAKASHI MATSUOKA
 Applicant

AND LSG SKY CHEFS NEW ZEALAND
 LIMITED
 Respondent

Hearing: 12 June 2017

Court: Harrison, French and Winkelmann JJ

Counsel: R B Stewart QC and M W O'Brien for Applicant
 C M Meechan QC and A Borchardt for Respondent

Judgment: 27 June 2017 at 2.15 pm

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant must pay the respondent costs for a standard application for leave to appeal on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The applicant, John Matsuoka, has applied for leave to appeal to this Court from a decision of Judge Perkins in the Employment Court, first, dismissing his application for further and better discovery against the respondent, LSG Sky Chefs

New Zealand Ltd (LSG) and, second, ordering him to pay LSG wasted costs of \$10,000 following the adjournment of an interlocutory fixture.¹ LSG opposes Mr Matsuoka's application.

[2] In order to obtain leave Mr Matsuoka must show that his appeal raises a question of law which by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.² As we shall explain briefly, his application falls well short of satisfying the statutory criteria.

Background

[3] Mr Matsuoka was employed as a ground steward by PRI Flight Catering Ltd (PRI) when it provided food catering services to Singapore Airlines. In 2010 the airline opened provision of its catering services to tender. The airline accepted LSG's tender, thereby displacing Pacific Flight Catering (Pacific), PRI's parent, as its caterer.³ The new arrangement took effect from February 2011. Bad blood has endured between Pacific and LSG.⁴

[4] Pacific is controlled by Terry Hay, Mr Matsuoka's brother-in-law. When LSG won the Singapore Airlines tender, Mr Matsuoka applied to transfer his work as a ground steward to the company.⁵ LSG refused to recognise him as an employee despite the Employment Court's ruling in May 2011 that Mr Matsuoka satisfied the statutory requirements and LSG was required to employ him.⁶ In July 2011 LSG dismissed Mr Matsuoka from employment.⁷

[5] Mr Matsuoka issued a personal grievance claim against LSG, originally in the Employment Relations Authority. The proceeding was later transferred to the Employment Court. Mr Matsuoka alleged that LSG had unjustifiably dismissed him.

¹ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 11 [Discovery and wasted costs decision].

² Employment Relations Act 2000, s 214.

³ PRI Flight Catering Ltd traded under the name Pacific Flight Catering: see *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165 at [6].

⁴ See *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] 2 NZLR 1.

⁵ Under pt 6A of the Employment Relations Act.

⁶ *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44, [2011] ERNZ 56.

⁷ See *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2012] NZEmpC 220, (2012) 10 NZELR 592 at [3].

LSG's defence is that Mr Matsuoka's dismissal was justified because of the nature of his relationship with Mr Hay.

Discovery

[6] Mr Matsuoka has filed at least two substantive applications in the Employment Court for further and additional discovery of documents by LSG. His latest application was for three orders:

- (a) appointing an independent expert to search LSG's computer hard drive using prescribed indicators, additional to an electronic search already carried out by Mr Matsuoka;
- (b) for further particular discovery of communications between LSG and the Service and Food Workers Union Nga Ringa Tota relating to 2011 proceedings and for further documents including those relating to LSG's payroll records and telephone logs; and
- (c) for discovery of further hard copy documents including those created by, sent to or sent by certain named managers or employees.⁸

About 10,000 documents may be in issue.

[7] All this discovery is allegedly relevant to a claim of unjustified dismissal brought by a ground steward. Mr Matsuoka's current statement of claim pleads numerous causes of action and claims substantial damages under various heads. Its comprehensive nature and amount belie the fact that the claim is for losses suffered by an employee on a modest salary who, while he was regarded as a vulnerable employee under pt 6A of the ERA, was always entitled to return to employment with PRI.⁹

[8] Judge Perkins dismissed Mr Matsuoka's application because requiring LSG to discover such large numbers of documents in accordance with the orders sought

⁸ Discovery and wasted costs decision, above n 1, at [21].

⁹ At [45].

would be disproportionate to the issues and the value of the claim.¹⁰ Mr Stewart QC submits that the decision gives rise to discrete errors of law, particularly the proper application of the principle of proportionality and a failure to take into account relevant factors. He accepts that the relevance of the additional documents sought by Mr Matsuoka is limited to his claim for penalties which, in the Judge's view, is untenable.

[9] We are satisfied that the documents sought by way of further discovery are of marginal if any relevance to Mr Matsuoka's case and, while Mr Stewart says Mr Matsuoka will meet all the costs, the exercise will cause considerable disruption to LSG's operations and raises legitimate privacy issues. The amounts truly at issue are not great (we agree with the Judge that Mr Matsuoka's claim for an amount above \$1 million is inflated). Mr Stewart explained that Mr Matsuoka was pursuing discovery of LSG's pay records showing that he was dismissed because of his family relationship with Mr Hay. But Ms Meechan QC confirmed that Mr Matsuoka was dismissed for that very reason and that his dismissal was justified accordingly.

[10] Also as Ms Meechan emphasises, Mr Matsuoka has not set his claim down for trial even though the proceeding was issued six years ago. The history of Mr Matsuoka's contested and unnecessary interlocutory applications supports the inference that he is acting as Mr Hay's surrogate and using the proceeding for an ulterior purpose. As the Judge observed, the proceeding has "degenerated into an enormous fishing expedition for the discovery of documents by [Mr Matsuoka] in the hope that a smoking gun will be located".¹¹

[11] We agree with Ms Meechan that the Judge was simply applying settled principles of law to the facts in concluding that the discovery sought was disproportionate. He did not make an apparent error of a legal nature. Mr Matsuoka's application does not raise a question of law and, even if it did, the issue is not of general or public importance.

¹⁰ At [56].

¹¹ At [55].

Wasted costs

[12] Mr Matsuoka filed his second amended statement of claim six days prior to a two-day fixture which had been allocated to deal with a number of interlocutory applications, expanding his original claim from 10 pages to 37 pages.¹² It includes six causes of action and, as noted, seeks damages in excess of \$1 million. Mr Matsuoka's amended pleading negated or required substantial amendments to LSG's existing interlocutory applications. An adjournment of the fixture was inevitable.

[13] LSG sought wasted costs of \$31,578.90. The Judge carefully analysed the components of its claim. In the end he awarded what Ms Meechan described as a modest \$10,000. Mr Stewart contends that Judge Perkins erred in exercising his discretion because of LSG's failure to identify what costs were truly wasted and because an award of \$10,000 was outside the acceptable range. However, we are satisfied that the Judge applied well settled principles to the facts. The award of \$10,000 may be high but was well justified in the circumstances and cannot be said to be outside the permissible range. Furthermore, the issue is not one of any general or public importance.

Result

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

[15] Mr Matsuoka must pay LSG costs for a standard application for leave to appeal on a band A basis and usual disbursements.

Solicitors:
Kensington Swan, Auckland for Applicant
Garry Pollak & Co, Auckland for Respondent

¹² Mr Matsuoka has "subsequently and less controversially" filed a third amended statement of claim: see Discovery and wasted costs decision, above n 1, at [7].