IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA409/2018
[2018] NZCA 533

BETWEEN	CAROLINE ANN SAWYER Applicant
AND	VICE-CHANCELLOR OF VICTORIA UNIVERSITY OF WELLINGTON Respondent

CA410/2018

BETWEEN	CAROLINE ANN SAWYER Applicant
AND	VICE-CHANCELLOR OF VICTORIA UNIVERSITY OF WELLINGTON Respondent

Court:	Asher and Clifford JJ
Counsel:	Applicant in person M T Scholtens QC and G C Davenport for Respondent
Judgment: (On the papers)	29 November 2018 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal in CA409/2018 is declined.

B The application for leave to appeal in CA410/2018 is declined.

C The applicant must pay the respondent one set of costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The applicant, Ms Sawyer, is a former employee of Victoria University of Wellington. Ms Sawyer made a complaint about two colleagues who were senior members of the law faculty. The investigation resulted in mediation and ultimately the parties entered into a settlement agreement on 24 July 2014 under s 149 of the Employment Relations Act 2000 (the Settlement Agreement). Ms Sawyer then issued proceedings in the Employment Relations Authority claiming she had been constructively dismissed. Those proceedings were dismissed on the basis that the Settlement Agreement was final and binding.[1]

[2] The applicant then filed personal grievance proceedings in the Employment Court, claiming she was unjustifiably disadvantaged and constructively dismissed. Prior to determining the substantive personal grievance proceedings, Judge Smith issued an interlocutory judgment determining that the Settlement Agreement was valid.[2] Ms Sawyer now applies for leave to appeal that decision pursuant to s 214 of the Employment Relations Act.

[3] Ms Sawyer also seeks leave to appeal to this Court against the Employment Court's refusal to grant her an extension of time to appeal against a compliance order granted against her (the Compliance Order).[3] We return to the circumstances in which the Compliance Order was granted later in this judgment.

[4] This Court must not grant leave unless the appeal raises a question of law that, due to its general or public importance or for any other reason, ought to be submitted to this Court for decision.[4]

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1 *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2016] NZERA Wellington 158.
2 *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2018] EmpC 71 (settlement agreement decision).
3 *Sawyer v Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 72 (compliance order decision).
4 Employment Relations Act 2000, s 214(3).

A valid settlement agreement? Leave to appeal

Judgment

[5] In submitting that the Settlement Agreement was invalid, Ms Sawyer claimed she was under duress when she signed it. Judge Smith set out the circumstances in which that agreement was signed and the relevant legal principles (the key one being that if there is illegitimate pressure, then duress will be established if it coerced a party to enter into the contract).[5] On the facts, however, the evidence simply did not support Ms Sawyer's claim that she was under illegitimate pressure or was coerced into signing the Settlement Agreement.[6]

[6] The Judge observed Ms Sawyer claimed she was left alone at times during the mediation, but that was antithetical to illegitimate pressure being applied.[7] As for the comments her lawyer had made at the end of the mediation — that Victoria University "will mince you up" — there was no evidence that those remarks were made by Victoria University. They were instead likely a summary of the position taken by Victoria University or Ms Sawyer's lawyer's opinion of the relative strengths of the parties' positions.[8] Similarly, the Judge found there was no link between any alleged destruction of documents after the mediation and Ms Sawyer being pressured into signing the Settlement Agreement.[9] The other circumstances Ms Sawyer raised did not assist her either, with the Judge emphasising that Ms Sawyer was advised throughout the process and did not dispute the validity of the Settlement Agreement until some 30 weeks after it was signed.

[7] The Judge then considered whether the Settlement Agreement was illegal. He found that it was not. Ms Sawyer reliance on the conduct of Victoria University during the investigation did not explain how the resulting Settlement Agreement was illegal.[10] It only showed Ms Sawyer's sense of dissatisfaction with the way in which her complaint was dealt with. Ultimately, the terms of the Settlement Agreement were

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5 Settlement agreement decision, above n 2, at [31], citing *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [19].
6 At [38].
7 At [38].
8 At [39].
9 At [40].
10 At [63].

conventional — the employment relationship was ended by agreement, a period of leave agreed, there were certain financial terms, the investigation into Ms Sawyer's complaint was brought to an end, a non-disparagement clause was included, and the Settlement Agreement was expressed as full and final. None of those terms was illegal.

[8] Finally, the Judge rejected Ms Sawyer's arguments that the entity described as the employer on the Settlement Agreement was not her actual employer, and that the person who signed the agreement (a Mr Miller) did not have authority to do so.[11]

Submissions

[9] Ms Sawyer has filed lengthy submissions in support of the application for leave to appeal. She says that the Employment Court erred in finding the Settlement Agreement was valid and in reversing the burden of proof. The burden of proof lay with Victoria University. However, Victoria University adduced no evidence and made no submissions in support. In those circumstances, the facts of the case fell to be determined by Ms Sawyer's uncontested evidence, which clearly established duress. Ms Sawyer points to the narrative of the employment dispute and Victoria University's conduct throughout.

[10] Ms Sawyer also maintains that the Settlement Agreement was illegal and that Mr Miller did not have authority to sign it. As regards the former, she says that the Employment Court failed to have regard to s 66 of the Employment Relations Act (which relates to fixed term agreements) in determining the legality of the Settlement Agreement. As regards the latter, she says it was not open to the Court to find the signature of [Mr] Miller valid on the facts". Finally, Ms Sawyer also raises concerns about the process in the Employment Court, including that there were "no directions … other than interlocutory orders refusing … all of [the applications for] disclosure … and witness summonses".

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[11] At [70] and [73].

Analysis

[11] We are satisfied that the proposed appeal is not one that, due to its general or public importance or for any other reason, ought to be submitted to this Court for decision.

[12] First, we note that — as counsel for Victoria University submitted — the Employment Court came to its conclusion as to the validity of the Settlement Agreement on the evidence before it. In those circumstances, there is no room to argue that the Employment Court reversed the burden of proof. Further, to challenge the Employment Court's finding on the validity of the Settlement Agreement is ultimately to challenge the Employment Court's factual conclusions regarding Ms Sawyer's allegations of blackmail, collusion, duress and threatening conduct. As is reasonably evident, that does not amount to a question of law for the purposes of s 214 of the Employment Relations Act.

[13] Secondly, and as regards Ms Sawyer's submission that Mr Miller did not have authority to sign the Settlement Agreement, the submission is that "it was not open to the Court to find the signature of [Mr] Miller valid *on the facts*". Again, this does not amount to a question of law for the purposes of s 214 of the Employment Relations Act.

[14] Thirdly, we accept that questions about the legality of settlement agreements may give rise to questions of law of general or public importance. However, we are satisfied that is not the case here. Ms Sawyer maintains that the contract was created illegally because it was procured following victimisation and blackmail. That is the very factual basis upon which the Employment Court declined to set aside the Settlement Agreement for duress — a factual basis which, as we noted above, is not amendable to a grant of leave pursuant to s 214 of the Employment Relations Act. Insofar as Ms Sawyer says the terms of the settlement agreement are illegal, we agree with the Judge that the terms of the settlement agreement were conventional.

[15] Finally, and as regards the concerns about the process in the Employment Court, we note that the questions of disclosure and witness summonses were determined in separate judgments to the judgment Ms Sawyer now seeks leave

to appeal.[12] Ms Sawyer cannot use the present application for leave to appeal to impugn those judgments.

The Compliance Order — leave to appeal against the refusal to grant an extension of time

Judgment

[16] As noted above, the Settlement Agreement required Ms Sawyer not to make disparaging remarks about Victoria University and its staff. After the Settlement Agreement was entered into, Victoria University became aware that Ms Sawyer had in fact made certain disparaging remarks. Victoria University sought a compliance order in the Employment Relations Authority. Ms Sawyer's consent was conveyed to the Employment Relations Authority by her lawyer by email on 3 March 2017. The Compliance Order was subsequently entered by consent, with the claim for penalties to be defended.

[17] Ms Sawyer later claimed she never consented to the Compliance Order. She sought to challenge it. By this time, she was some 91 days out of time. She sought an extension of time from the Employment Court to appeal to that Court under s 219 of the Employment Relations Act. A hearing was convened to receive evidence on the issue of Ms Sawyer's consent from Ms Sawyer and her lawyer. Her lawyer was able to give evidence because of an interlocutory judgment finding that Ms Sawyer had waived privilege until 3 March 2017.[13] Following that hearing, the Employment Court declined to grant Ms Sawyer an extension of time.

[18] As regards the reasons why Ms Sawyer had failed to appeal in time, the Employment Court preferred the evidence of Ms Sawyer's lawyer over Ms Sawyer. It generally considered Ms Sawyer untruthful.[14] There was no substance to her contention that she was unaware of her lawyer's communication with the Employment Relations Authority or the subsequent issuing of the Compliance Order by consent.[15]

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12 *Sawyer v Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 29; and *Sawyer v Vice Chancellor of Victoria University of Wellington* [2018] NZEmpC 25.
13 *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2017] NZEmpC 154 at [46].
14 Compliance order decision, above n 3, at [26].
15 At [41].

The Judge also considered the other relevant considerations when an application for an extension of time to appeal is sought — the length of the delay, prejudice and the substantive merits of the proposed appeal. These all pointed away from the grant of an extension of time. First, the length of the delay — some 91 days — was so great, the Judge reasoned, that the application for an extension of time would have been unsuccessful on that ground alone.[16] Second, Victoria University would also be prejudiced if the Compliance Order were to be re-opened.[17] Finally, the substantive merits of the proposed appeal were weak — the evidence established that Ms Sawyer made a tactical decision in consenting to the Compliance Order.[18]

[19] Ms Sawyer now seeks leave to appeal to this Court the Employment Court's refusal to grant an extension of time to appeal.

Submissions

[20] Ms Sawyer firstly submits that the Employment Court erred in assessing her credibility and making other factual findings regarding her knowledge of other matters before the Employment Relations Authority. For example, Ms Sawyer says the Employment Court erred in finding that the Employment Relations Authority was correct to find that she had been served in time, and that she knew a determination was made in March 2017.

[21] Ms Sawyer secondly submits that the Employment Court erred in law in admitting documents and oral evidence in breach of privilege. This ground stems from the decision of the Employment Court restricting the waiver of privilege to 3 March 2017.[19] Ms Sawyer says the Employment Court — in declining to grant the extension of time — considered evidence that came into being after that date and hence in breach of privilege.

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16 At [43].
17 At [46].
18 At [48].
19 *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2017] NZEmpC 154 at [46].

Analysis

[22] We are satisfied that the proposed appeal is not one that, due to its general or public importance or for any other reason, ought to be submitted to this Court for decision.

[23] As regards the first grounds of appeal, we are satisfied that these involve questions of fact, rather than law. Ms Sawyer is ultimately trying to challenge the Judge's findings of credibility. This is not amenable to a grant of leave to appeal against the refusal of an extension of time.

[24] The second ground of appeal — that the Judge erred in admitting documents and oral evidence in breach of privilege — may involve a question of law. The earlier judgment limited waiver of privilege until 3 March 2017. Ms Sawyer points to the evidence her lawyer gave during the hearing about an email sent to Ms Sawyer on 7 March 2017 (being some four days after the waiver of privilege). The email would appear to disclose Ms Sawyer's lawyer sending her a copy of the judgment granting the Compliance Order. We accept that material may have been privileged and ought not to have been admitted. We also note that the Judge would have appeared to consider the email of 7 March 2017 when considering why the application for an extension of time was not made in time.[20] However, it was not the only factor the Judge considered here.

[25] The Judge also emphasised Ms Sawyer's deliberate decision to consent to the Compliance Order, and her knowledge that strict timeframes exist when seeking to challenge orders made by the Employment Relations Authority. Moreover, and as the Judge pointed out, Ms Sawyer failed to adequately explain why, despite that knowledge, she did not act. We also note that, when considering an application for an extension of time, the reason for the failure to bring the challenge in time is not the only consideration. There are other factors at play such as the lengthy of the delay, the merits of the proposed appeal, and any resulting prejudice to other parties. The Judge expressly considered all of these factors when declining to grant the extension

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[20] Compliance order decision, above n 3, at [39].

of time. We agree with his conclusion that these all point away from the grant of an extension of time. In doing so, we emphasise the lack of merit in the proposed appeal.

Result

[26] The application for leave to appeal in CA409/2018 is declined.

[27] The application for leave to appeal in CA410/2018 is declined.

[28] The applicant must pay the respondent one set of costs for a standard application on a band A basis and usual disbursements.

Solicitors:
McBride Davenport James, Wellington for Respondent