IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA492/2022
[2023] NZCA 50

BETWEEN	SAENA COMPANY LTD Applicant
AND	HUNMO KANG Respondent

Court:	French and Mallon JJ
Counsel:	M Y Kim for Applicant S Kang for Respondent
Judgment: (On the papers)	10 March 2023 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The interlocutory application for a stay is dismissed.

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

REASONS OF THE COURT

(Given by Mallon J)

Applications

[1] The applicant company (Saena) applies for leave to appeal an Employment Court decision[1] and for a stay of the proceeding and execution of judgment pending the appeal.[2]

Background facts

[2] Saena owns and operates a sushi restaurant in Whangārei. Gyu-ill Hwang is Saena's sole director. He works in the restaurant with his wife, Oksil Weon, who is the head chef.

[3] The Employment Court proceeding concerned the circumstances in which the respondent, Hunmo Kang's, employment with Saena came to an end. Mr Kang had started working at the restaurant from 16 September 2019. His main roles were making donburi dishes and deep frying. His wife, Yoojin Chung, began working at the restaurant a few weeks later.

[4] At about 11 am, on 21 October 2019, there was an incident involving Ms Chung which angered Ms Weon. She confronted Ms Chung, thumped a table with a kitchen implement and made an angry comment about Ms Chung and Mr Kang pairing up against her. Ms Chung took off her apron and cap and left the restaurant to remove herself from the situation. Mr Kang said he would follow her soon but was told by Mr Hwang, in forceful terms, to leave which Mr Kang then did.

[5] At about 4.19 pm that same day, Mr Kang sent a text message to the cell phone number that he had as Saena's contact number from the job advertisement to which he had earlier responded in obtaining work at Saena. In that text he said he had left, as he had been told to leave immediately, and asked what was wanted for tomorrow. He received a text reply at 4.21 pm that said "Let's go our separate ways. I appreciate for what you have done so far". That was followed by a further text at 4.24 pm that said "I think it is an expression of intention to quit here that you said to your wife she leave

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1 *Kang v Saena Company Limited* [2022] EmpC 151 [Employment Court decision].
2 Employment Relations Act 2000, s 214(1); and Court of Appeal (Civil) Rules 2005, r 12(3).

first and that you would follow her soon when your wife said she would quit". Mr Kang responded at 5.02 pm to the effect that he had been misheard.

[6] Mr Kang and Ms Chung then began searching online as to what to do when an employee was dismissed. That same evening, he noticed two job advertisements posted by Saena. The first was posted at 7.03 pm for a full-time "Sushi and Donburi" job. The second was posted at 10.08 pm for two kitchen staff for a job described as "Kitchen and Roll-Maker".

[7] Thereafter there were communications between Mr Kang and Mr Hwang in which Mr Kang negotiated over a draft employment agreement under which Mr Kang would return to work. The negotiations were ultimately unsuccessful.

[8] The Employment Relations Authority held that Mr Kang was not unjustifiably dismissed nor disadvantaged in his employment.[3] It declined to impose a penalty for Saena's failure to provide Mr Kang a written employment agreement at the outset of his employment but imposed penalties of $2,000 for failures to maintain adequate wage and time records, and holiday and leave records.[4]

[9] Mr Kang challenged the findings to the Employment Court. The Court found that Mr Kang's dismissal grievance was established.[5] It further found his disadvantage grievance was not established.[6] Saena was ordered to pay Mr Kang $3,351.06 for lost wages and $20,000 compensation for humiliation, loss of dignity and injury to feelings.[7] No penalty was imposed for Saena's breach in not providing a written employment agreement from the outset of Mr Kang's employment.[8]

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3 *Kang v Saena Company Ltd* [2021] NZERA 196 at [26] and [32].
4 At [36] and [69]; Employment Relations Act, s 130; and Holidays Act 2003, ss 75 and 81.
5 Employment Court decision, above n 1, at [158] and [184].
6 At [165] and [184].
7 At [185].
8 At [181].

Leave grounds

[10] A party dissatisfied with a decision of the Environment Court as being wrong in law may appeal with leave to this Court.[9] This Court may grant leave if it is satisfied that the application raises a question of law of general or public importance.[10]

[11] Saena seeks leave to appeal on the following questions, which it asserts are questions of law:

(a) whether the Employment Court erred in applying s 142ZA of the Employment Relations Act 2000 (ERA) in the grievance jurisdiction;

(b) whether the Employment Court erred in taking into account materially relevant information in applying s 142Z of the ERA;

(c) whether the Employment Court erred in law by failing to consider the social and cultural framework and the language used by the parties in assessing the credibility of witnesses; and

(d) whether the Employment Court applied an objective test and properly considered all the evidence in determining whether a dismissal took place.

Assessment

[12] The first ground is a question of law. It concerns the scope of s 142ZA of the ERA. That section provides for when the conduct of a person on behalf of a company is to be attributed to the company. The ground relates to the text messages sent to Mr Kang at 4.21 and 4.24 pm on 21 October 2019. Those texts were sent by Ms Weon, rather than Mr Hwang. The Employment Court found nevertheless that it was reasonable for Mr Kang to believe that they were sent with the authority of Saena.[11] Saena seeks to argue on appeal that s 142ZA does not apply to the grievance jurisdiction.

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9 Employment Relations Act, s 214(1).
10 Section 214(3).
11 Employment Court decision, above n 1, at [128].

[13] We accept that the correct scope of s 142ZA could constitute a question of general or public importance if there were any doubt about that scope. However, we are satisfied that there is no doubt about its application to the grievance jurisdiction. The section provides when "conduct engaged in on behalf of a body corporate" is to be treated "for the purposes of this Act" as having been engaged in also by the body corporate.[12] On its terms it is a provision that applies to the grievance jurisdiction under Part 9 and is not confined to Part 9A where it is located. This ground therefore does not give rise to a question of general or public importance.

[14] The second ground concerns the Employment Court's application of the test in s 142Z. That section is about attributing to another a person's state of mind. It is said that the Judge failed to take into account that Mr Kang attempted to direct all his communications to Mr Hwang and wrongly found acquiescence by Mr Hwang of Ms Weon's actions in attributing Ms Weon's conduct to Mr Hwang. This ground does not raise a question of general or public importance. Nor is it arguable on the facts as found by the Judge. He found that Ms Weon had the authority not only to hire but to fire and Mr Hwang did nothing initially upon learning about her conduct.[13] Those findings were open to the Judge.

[15] The third ground does not raise a question of law. It relates to the Judge's assessment of the evidence. In any event, it is not arguable. The Judge was cognisant of the Korean context but assessed that, in the circumstances, Mr Kang reasonably understood he was being dismissed and that this was confirmed by the text messages.[14]

[16] The fourth ground concerns the test for dismissal. Saena contends that it is necessary to establish that Mr Hwang intended to repudiate the contract of service. This ground is not arguable and does not raise a question of general or public importance. The question is whether it was reasonable for somebody in Mr Kang's position to have considered his employment had been terminated. That is the test the Judge applied.[15]

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12 Employment Relations Act, s 142ZA(1).
13 Employment Court decision, above n 1, at [129] and [132].
14 At [123], [133] and [140].
15 At [16].

[17] Leave to appeal is therefore declined.

Stay application

[18] The stay application was sought on the basis that it was said the appeal would become nugatory if a stay was not granted. As leave to appeal is declined, a stay pending the appeal is unnecessary. The application is accordingly dismissed.

Result

[19] The application for leave to appeal the decision of the Employment Court is declined.

[20] The interlocutory application for a stay of the Employment Court proceeding and execution of judgment is dismissed.

[21] The applicant must pay the respondent's costs for a standard application on a band A basis and usual disbursements.

Solicitors:
MK Law, Auckland for Applicant
Fairbrother Family Law, Napier for Respondent