IN THE COURT OF APPEAL OF NEW ZEALAND

CA616/2015
[2016] NZCA 21

BETWEEN	SHABEENA SHAREEN NISHA Applicant
AND	LSG SKY CHEFS NZ LIMITED Respondent

Hearing: 15 February 2016

Court: Wild, Winkelmann and Kós JJ

Counsel: D J Goddard QC for Applicant
C M Meechan QC for Respondent

Judgment: 22 February 2016 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay the respondent's costs for a standard application on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Kós J)

[1] The applicant, Ms Nisha, worked for Pacific Flight Catering Ltd (Pacific) as a catering assistant. Pacific lost its catering contract with Singapore Airlines to the respondent, LSG. Ms Nisha elected to have her employment transferred to LSG under Part 6A of the Employment Relations Act (the Act). Shortly before transfer, Pacific began to pay Ms Nisha a supervisor's hourly rate and increased her leave

entitlement. Similar changes were made for 36 of the 39 other transferring employees. Pending investigation of the veracity of this variation of contract, LSG paid Ms Nisha the higher hourly rate. It subsequently concluded that the increases were not genuine and reduced Ms Nisha's wages. Ms Nisha resigned.

[2] Ms Nisha brought a claim in the Employment Relations Authority alleging LSG had breached her financial and contractual entitlements, had unjustifiably disadvantaged her and had constructively dismissed her. That claim failed in the Authority.[1] The Employment Court then reached the same conclusion.[2] It held the purported variation to her employment contract was a sham. It dismissed all of her claims apart from a vestigial claim for disadvantage, holding that she was entitled to compensation of $1,500 for humiliation, loss of dignity and injury to feelings on account of undue delay by LSG.

[3] Ms Nisha seeks leave to appeal to this Court. Her application is brought under s 214 of the Act. The requirements for leave under that provision have been set out at length in this Court's decision in *New Zealand Employers Federation Inc v National Union of Public Employees.*[3] The focus is on the existence of a question of law, and that question being one which by reason of its general or public importance or other reason ought to be submitted to this Court for decision.[4]

Factual findings

[4] An appeal under s 214 of the Act being one of law only, Mr Goddard QC (for Ms Nisha) accepted that his client is stuck with the factual findings made by the Employment Court. Those findings were reached at a seven day hearing at which the Judge had the advantage of seeing and assessing the witnesses in person.

[5] It is worth, therefore, outlining the essential factual findings of the Judge with which Ms Nisha is stuck:

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1 *Alim v LSG Sky Chefs New Zealand Ltd* [2013] NZERA Auckland 472.
2 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171.
3 *New Zealand Employers Federation Inc v National Union of Public Employees* [2001] ERNZ 212 (CA).
4 At [27].

(a) At the time of Ms Nisha's "promotion" to supervisor there was no evidence of any vacancy for a supervisor, or of any need for an additional supervisor. Pacific's workforce was about to contract significantly. It would have made no sense to promote Ms Nisha just before she was to cease working for Pacific.[5]

(b) Ms Nisha was not notified by Pacific of a promotion at all other than via a pay slip showing an increased rate of remuneration (rising from $15.96 per hour to $17.68 per hour) as a supervisor. No one else was notified of her new status either. If she was indeed a supervisor, those she would be supervising would surely have been informed.[6]

(c) Mr Belk, a production sous chef at Pacific, gave evidence for LSG. His period of employment overlapped Ms Nisha's transfer to LSG. He worked closely with supervisors and prepared the rosters. He said he was never told Ms Nisha was a supervisor. Certainly he never recorded her as a supervisor in his roster. Business practice at Pacific was that there was only one supervisor per shift.[7]

(d) Mr Belk also gave evidence that increases in pay rates and leave entitlements were made by Pacific to all but three of the 40 staff about to transfer to LSG.[8]

(e) These increases in pay rate and leave entitlements were made by Pacific without any consultation with the affected employees. They were not told why the increases were implemented.[9]

(f) When Ms Nisha completed an application for employment at LSG in February 2011, she did not say she sought a role as a supervisor. The Judge found it was more likely than not that she would have referred to that status in her application had she genuinely been promoted to

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5 *Nisha v LSG Sky Chef New Zealand Ltd*, above n 2, at [140].
6 At [141].
7 At [129].
8 At [142].
9 At [142].

that position.[10] Nor when interviewed did she say that she had been promoted to supervisor. Rather she said, in a later interview, that her pay rate had increased as a "team leader", which was not a recognised position at all.[11]

(g) The Judge found the evidence given by Mr Belk to be careful, reliable and not self-interested. By contrast he found Ms Nisha's evidence implausible and affected by self-interest.[12]

(h) The Judge found that Ms Nisha was not "promoted to the position of supervisor, and did not work in such a role". The increased hourly rate recorded in her pay slip was an aspect of Pacific's attempts to create financial difficulties for LSG.[13]

(i) In the context of Ms Nisha's impending transfer to LSG, she knew the increases were fictitious.[14]

[6] The Judge went on:[15]

> In short, [Ms Nisha]'s account regarding her alleged promotion, increased hourly rate and enhanced leave entitlements is unreliable. I find that the enhancement of [Ms Nisha]'s terms and conditions, and those of most other transferring employees, was instigated by [Pacific] shortly before the transfer as part of its anti-competitive strategy, with the intention of causing significant financial disadvantage to LSG.

[7] The Judge concluded that Ms Nisha's arrangements with Pacific, which it represented as her terms and conditions applicable at transfer, were in fact a sham. They were an attempt to disguise her actual terms and conditions. The Judge found that Ms Nisha not only went along with Pacific's statements as to the terms and conditions, but "became complicit in representing them as real" when she attempted to justify them.[16]

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10 At [143].
11 At [144].
12 At [148].
13 At [146].
14 At [156].
15 At [154].
16 At [158].

Application for leave to appeal

[8] The application for leave to appeal filed in October 2015 advanced seven different grounds. In submissions filed in November 2015 those seven grounds were recast as five. Before us Mr Goddard QC sensibly recast the argument one further time. His primary argument was that the Employment Court erred in law on the appropriate test for a sham contract. We will start with that point.

Sham contract

[9] Before reaching the factual findings outlined above, the Judge analysed what would amount in principle to a sham contract. He referred to the judgments of Diplock LJ in *Snook v London West Riding Investments Ltd*,[17] of the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue,*[18] and of this Court in *Clayton v Clayton.*[19] However the Judge also went on to refer to another decision of this Court, in a trusts context, in *Official Assignee v Wilson.*[20] As the Judge put it, intention may be established by a variety of circumstances, not only by an express intention not to act on the actual rights and obligations the parties intended to create. "So complicity, ignorance or recklessness may establish the requisite intention."[21]

[10] Mr Goddard submitted that a contract is a sham if and only if there is a common intention on the part of all parties that the document would not give rise to the rights and obligations for which it purports to provide. The Judge's suggestion that complicity, ignorance or recklessness would suffice was based on a misunderstanding of this Court's decision in *Wilson*, and was confusing and wrong. Ulterior motives were irrelevant. The question was whether the parties actually intended the rights and obligations to arise. In this case it was Pacific's intention that Ms Nisha's salary be increased to the supervisor rate, and that her leave balance be increased; she accepted those increases; and the increases were put in place operationally.

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17 *Snook v London West Riding Investments Ltd* [1967] 2 QB 786 (CA) at 802.
18 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [33].
19 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [61]–[62].
20 *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45.
21 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 2, at [121].

[11] We do not consider this point gives rise to a question of general or public importance, for two reasons.

[12] First, the correct test for analysis of an allegedly sham transaction is set out authoritatively in this Court's decision in *Clayton v Clayton*, in these terms:[22]

> [61] To determine whether a particular transaction constitutes a sham, the court will focus on the actual intentions of the parties to the transaction and compare them with the acts done or documents created. In doing so, the court will not be restricted to the legal form of the transaction, but will examine its substance in light of all the relevant evidence relating to the parties' intentions. As the issue will be whether the transaction was intended to be genuine, the focus will be on the actions and words of the parties, both contemporary and subsequent.
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> [62] This approach reflects equity's preference for substance over form and the conceptual basis of the sham doctrine which "lies in the court's ability to see through acts or documents" intended to disguise or conceal the truth of the matter.

The consequence of a finding that a purported contract is a sham is the contract will be inoperative to the extent the parties did not intend to create genuine legal relations.[23] This analytical framework does not require reconsideration by this Court.

[13] Secondly, on any view and applying the approach in *Clayton v Clayton*, the factual findings by the Judge (with which Ms Nisha is stuck) mean that the transaction here was a sham. It is not enough to simply focus on implementation of the financial aspects of the transaction. We are here dealing with a contractual transaction; an alleged variation to a contract of employment. The efficacy of this purported variation is more than simply a question of payment. The variation (and entitlement to the new wage rate) was ostensibly for the performance of new duties which neither existed nor were performed by Ms Nisha. Pacific did not intend Ms Nisha to perform the role of a supervisor, because it needed no such supervisor. Ms Nisha did not intend to perform the role of supervisor, because she did not know

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22 *Clayton v Clayton*, above n 19, at [61]–[62]. Footnotes omitted.

23 *Glatzer & Warwick Shipping Co v Bradstone Ltd* [1997] 1 Lloyd's Rep 449 (QB) at 485; *Esanda Ltd v Burgess* [1984] 2 NSWLR 139 (CA) at 153; and *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] EWCA Civ 280, [2009] 3 All ER 790 (CA) at [73] and [81]. The position is the same where a purported trust is found to be a sham: *Clayton v Clayton*, above n 19, at [63].

that she had been promoted to it and there was no such work for her to do. Ms Nisha might have been paid as if she was a supervisor, but a supervisor she was not and no agreement existed making her one. It follows that on any view the purported variation was a sham and of no legal effect.

Interpretation of s 69I of the Act

[14] Section 69I(2) provides for the transfer of employees to the new employer. That provision states that if an employer elects to so transfer, the employee:

> … is employed on the same terms and conditions by the new employer as applied to the employer immediately before the [transfer] …

Mr Goddard submitted the Judge erred in finding, based on his conclusion as to the existence of a sham, that the relevant terms for the purposes of s 69I(2) were not those arising from the purported variation but those existing beforehand.

[15] This conclusion derives directly from the Court's conclusion that the variation was a sham. We do not consider any other conclusion under s 69I(2) is arguable. In any event we do not find this point, turning as it does on the extraordinary factual circumstances applying in this case, to be one of general or public importance.

Unilateral change to remuneration structure

[16] After investigation and concluding that the purported variation was a sham, LSG refused to apply the variation and restored Ms Nisha to the pre-variation terms and conditions of her employment. Mr Goddard submitted that there was a strong argument that an employer cannot unilaterally restructure remuneration in this way. To do so is inconsistent with the policy of Part 6A.

[17] The short answer is that the Court's conclusion as to sham carries through here also. LSG was not unilaterally restructuring Ms Nisha's remuneration, because the purported variation to her remuneration was ineffective in the first place. No offence against the principles and purposes of Part 6A is committed by an employer implementing the true collective agreement in force with its employee and to which

s 69I(2) applies. This point is fact-driven by the sham conclusion. No point of general or public importance arises.

Further grounds

[18] The further grounds that Ms Nisha sought to advance were based on the treatment of financial loss as a pre-requisite for her personal grievance claims and the extent to which those claims should be diminished for blameworthy contributory conduct. As Mr Goddard recognised in his oral submissions, they depend on the sham argument being reconsidered on appeal. They fall away, therefore.

Result

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

[20] The applicant is to pay the respondent's costs for a standard application on a band A basis together with usual disbursements.

Solicitors:
Kensington Swan, Auckland for Applicant
J M Douglas, Auckland for Respondent