IN THE COURT OF APPEAL OF NEW ZEALAND

CA427/2015
[2016] NZCA 54

BETWEEN	YASODHARA DA SILVEIRA SCARBOROUGH Applicant
AND	MICRON SECURITY PRODUCTS LIMITED Respondent

CA578/2015

BETWEEN	YASODHARA DA SILVEIRA SCARBOROUGH Applicant
AND	MICRON SECURITY PRODUCTS LIMITED Respondent

Court:	Stevens, Cooper and Kós JJ
Counsel:	Applicant in person D J France for Respondent
Judgment: (On the papers)	9 March 2016 at 12.00 pm

JUDGMENT OF THE COURT

A Leave to appeal in CA427/2015 and CA578/2015 is declined.

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

REASONS OF THE COURT

(Given by Kós J)

[1] Ms Scarborough applies for leave to appeal against two costs decisions in the Employment Court. No appeal against the substantive judgments of that Court is sought.

[2] Ms Scarborough was employed by Micron Security Products Ltd (Micron) as an assembler of medical emergency response products for three months. She was made redundant on 16 December 2013. She made a claim in the Employment Relations Authority that this was an unjustified dismissal. The Authority found the redundancy dismissal was substantively justified, but awarded Ms Scarborough $750 for humiliation and loss of dignity because Micron had not provided Ms Scarborough with information about its proposal to make her redundant in advance. Ms Scarborough challenged the Authority's decision to the Employment Court, which dismissed the challenge and various related applications and awarded costs.

[3] It is convenient to set out the relevant procedural history before addressing the matters on which leave to appeal is sought.

(a) 11 June 2014: the Authority determined Ms Scarborough's dismissal was substantively justified but procedurally flawed, and awarded $750 as "distress compensation" to Ms Scarborough.[1] No costs were awarded.

(b) 7 July 2014: Ms Scarborough filed a notice electing to challenge the Authority's determination in the Employment Court on a de novo basis pursuant to s 179 of the Employment Relations Act 2000.

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1 *Scarborough v Micron Security Products Ltd* [2014] NZERA Auckland 231.

(c) 8 August 2014: Ms Scarborough's application for a stay of the Authority's determination pending the Employment Court proceedings was dismissed.[2] Costs were not expressly reserved.

(d) 25 September 2014: interlocutory judgment of Chief Judge Colgan declining an application to join Micron's directors as defendants, declining an application for judicial review of the Authority, declining an application to remit the proceeding to the Authority for investigation, and making timetabling directions.[3] Costs were reserved.

(e) 19 November 2014: interlocutory judgment of Judge Perkins declining a second application to remit the matter to the Authority and dismissing a complaint about disclosure of documents.[4] Costs were reserved.

(f) 30 March 2015: substantive judgment of Judge Inglis dismissing challenge to Authority's determination and declining a third application to remit the matter to the Authority.[5] Costs were reserved.

(g) 18 May 2015: interlocutory judgment of Judge Inglis declining application for stay of proceedings in relation to the substantive judgment of 30 March 2015 (item (f) above) pending an application for rehearing of the challenge to the Authority's determination.[6] Costs were reserved.

(h) 3 July 2015: costs judgment of Judge Inglis awarding to Micron:[7]

(i) increased costs for the substantive challenge hearing (item (f) above);

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2 *Scarborough v Micron Security Products Ltd* ARC61/14, 8 August 2014 (Minute of Chief Judge Colgan).
3 *Scarborough v Micron Security Products Ltd* [2014] NZEmpC 183.
4 *Scarborough v Micron Security Products Ltd* [2014] NZEmpC 216.
5 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39.
6 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 69.
7 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105.

(ii) increased costs for the applications for stay, for joinder of the directors as defendants, for judicial review, and the first application to remit the matter to the Authority (items (c) and (d) above);

(iii) indemnity costs for the second and third applications to remit the matter to the Authority (items (e) and (f) above);

(iv) costs of $350 on the application for costs.

(i) 6 July 2015: Ms Scarborough filed a memorandum asking for Judge Inglis or another Judge to review the costs decision of 3 July (item (h) above). The Court Registry responded on 9 July 2015 indicating this would not be considered as Judge Inglis had determined the question of costs.

(j) 31 July 2015: judgment of Judge Perkins dismissing application for rehearing of challenge to Authority determination.[8] The Judge said this was simply an attempt to relitigate the decision of the Court, and there was no basis for a rehearing such as the availability of fresh evidence. Costs were reserved.

(k) 7 August 2015: Ms Scarborough filed a memorandum requesting Judge Perkins or Chief Judge Colgan reconsider the application for rehearing. The Court Registry responded the same day indicating the application for rehearing had been determined and the memorandum would not be forwarded to a Judge.

(l) 7 September 2015: costs judgment of Judge Perkins awarding indemnity costs to Micron in respect of the application for stay of proceedings and application for rehearing (items (g) and (j) above).[9]

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8 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 130.
9 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 153.

[4] The two applications for leave to appeal before this Court are against the costs decisions of 3 July 2015 and 7 September 2015 (items [3](h) and [3](l) above).

Approach on applications for leave

[5] The applications for leave are brought under s 214 of the Employment Relations Act 2000 (the Act). That section requires there to be a question of law which by reason of its general or public importance or other reason ought to be submitted to this Court for decision.

[6] The two applications are for leave to appeal against costs decisions. When considering an application for leave against a costs decision, it must be borne in mind that costs are a matter of discretion for the Employment Court and an appeal can only succeed if the appellant shows the Court erred in principle, took into account an irrelevant consideration, overlooked a relevant consideration or arrived at a result which was clearly wrong.[10] If the result of a costs decision seems to be within the range of outcomes which could reasonably be arrived at by application of orthodox principle and calculations, this Court will not intervene.[11]

CA427/2015 — application for leave to appeal against costs decision of 3 July 2015

[7] The ten proposed questions on which leave is sought are set out in a memorandum dated 20 August 2015. Questions one to nine are directed at decisions of the Employment Court other than the costs decision of 3 July 2015. They are not relevant to this application for leave.

[8] The tenth proposed question of law relates to the relevant costs decision:

> Q10 In the assumption that Judge Inglis was under a legal obligation to uphold the [reg] 64(2) [of the Employment Court Regulations 2000], and Ms Scarborough's application for a stay of proceedings and the memorandum of opposition to the costs memorandum; and that Judge Inglis did not have a legal right to be functus when Ms Scarborough pleaded her to reconsider the costs judgment; as well the Chief Judge; and the authority conferred on Chief Judge Colgan to reconsider Judge Inglis' decision, as the manner in which the costs order was achieved, substantially affected

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10 *New Zealand Fire Service Commission v McCulloch* [1999] 2 ERNZ 426 (CA) at [13].

11 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [59] and [64].

> Ms Scarborough and undermined the fairness and integrity of the judicial system, causing a miscarriage of justice. Shouldn't the costs judgment be regarded as a decision that is liable to be challenged, appealed against, reviewed, or called in question, and then quashed pursuant to s 193(1) of the Employment Relations Act 2000?

[9] There seem to be three issues contained within this question:

(a) Was Judge Inglis under a legal obligation to "uphold" reg 64(2) of the Employment Court Regulations? The intended meaning of "uphold" here is unclear. It seems Ms Scarborough wishes to argue Judge Inglis was obliged to stay proceedings, or at least to consider staying proceedings, such that there should be no liability for costs on the stay application.

(b) Was the matter of costs properly before the Employment Court such that it may not be challenged or reviewed as contemplated by s 193(1) of the Act?

(c) Should Ms Scarborough's memorandum of 6 July 2015 have been referred to Judge Inglis or Chief Judge Colgan to review or reconsider the costs judgment of 3 July 2015?

[10] These issues do not raise any arguable point of sufficient importance to grant leave for the following reasons.

(a) The wording of reg 64(2) is clear; the Employment Court has a power to stay proceedings, but that does not oblige it to do so.

(b) The Employment Court had jurisdiction because Ms Scarborough had sought to challenge the Authority's determination. Under cl 19 of sch 3 of the Act, the Court has jurisdiction to make a costs award.

(c) Whether the memorandum of 6 July 2015 should have been referred to a Judge is of no significance. Once the matter of costs in the Employment Court was determined, the proper avenue for challenge

was to apply for leave to appeal in this Court (as Ms Scarborough has done).

[11] These three issues aside, there is no question of law arising from the costs judgment of 3 July 2015. Judge Inglis considered and applied well-established principles relevant to awarding increased and indemnity costs in exercising her discretion. Ms Scarborough has not pointed to any error of principle in her analysis. This issue does not give rise to a matter of general or public importance. Neither is there any other reason why a question of costs should come to this Court in the present circumstances.

[12] This application for leave to appeal is declined.

CA578/2015 — application for leave to appeal against costs decision of 7 September 2015

[13] Ms Scarborough raises the following proposed questions of law:

(a) Does the payment of a subsidy by Work and Income New Zealand to Micron towards the cost of employing Ms Scarborough mean the redundancy dismissal was not substantively justified?

(b) Did counsel for Micron Mr France intentionally fail to place evidence before the Employment Court at the rehearing stage in order to produce a favourable costs judgment?

(c) Did the failure by the Court Registry to refer the memorandum of 7 August 2015 to a Judge cause a miscarriage of justice?

(d) Did the application for rehearing have a legal basis in the Employment Court?

[14] None of these questions meet the test under s 214 of the Act.

[15] The first and second of these questions do not relate to the relevant costs judgment. In any event, they raise questions substantially or wholly of fact, not questions of law.

[16] The third question has been dealt with above at [10](c).

[17] The fourth question raises no arguable point. Ms Scarborough had applied for a rehearing under cl 5 of sch 3 of the Employment Relations Act and so the Employment Court had a proper basis for considering that application. The Employment Court had jurisdiction to award costs in relation to the application for a rehearing.[12]

[18] In addition, Ms Scarborough has not pointed to any error of principle in Judge Perkins' decision to award indemnity costs. No matter of general or public importance is raised and there is no other reason here for referring a costs question to this Court.

[19] This application for leave to appeal is declined.

Result

[20] The applications for leave to appeal are declined.

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

Solicitors:
Kiely Thompson Caisley, Auckland for Respondent

[12] Clause 19 of sch 3 of the Act.