IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 138
EMPC 397/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to set aside witness summonses
BETWEEN	AHMED ALKAZAZ Plaintiff
AND	ENTERPRISE IT LIMITED Defendant

Hearing:	28 August 2020 by telephone
Appearances	Plaintiff in person R Bryant and M McGoldrick, counsel for defendant
Judgment:	1 September 2020

INTERLOCUTORY JUDGMENT (NO 3)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application to set aside witness summonses)

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[1] This matter is set down for hearing with the plaintiff appearing via AVL on 8–9 September 2020. Summonses were issued for eight individuals, all past and present senior employees of the defendant company, seven of whom now seek to have them set aside. The application is opposed by the plaintiff. Written submissions were filed in support of, and in opposition to, the application. I have also heard from counsel for the seven individuals (Mr Bryant) and Mr AlKazaz (in person) by telephone hearing.

[2] In order to deal with the application, it is necessary to be clear about what the proceedings before the Court, and in which the individuals have been summonsed to give evidence, relate to. The proceedings involve a de novo challenge to a determination of the Employment Relations Authority declining to reopen its investigation into Mr AlKazaz's dismissal grievance.[1] The Authority had upheld the grievance and made a number of orders in his favour but had reduced the quantum of compensation and lost wages of $43,749 by 20 per cent for contribution, resulting in total remedies of $34,999.99.[2] Mr AlKazaz did not file a challenge to the determination. Rather, he filed an application to have the Authority's investigation reopened. The Authority declined the application and it is that determination which has given rise to the challenge now before the Court.

[3] Mr AlKazaz's challenge to the determination declining to reopen the investigation into his grievance will not, of course, be a hearing of the substantive matters giving rise to his original claim. Rather, it will be squarely focussed on whether the investigation should be reopened. As the cases make clear, this is only ordered in a limited range of circumstances, where there has (for example) been a miscarriage of justice or where fresh evidence has come to light which could not have been discovered at the time and which would likely make a material difference to the outcome.[3] Mr AlKazaz's challenge will need to establish, by way of reference to relevant factors, that the Court should exercise its discretionary power to order the Authority to reopen its investigation.

[4] Mr AlKazaz was represented by a lawyer in the Authority. In summary, Mr AlKazaz says that his lawyer let him down; that he (Mr AlKazaz) was not aware that he could seek disclosure of documents in advance of the Authority's investigation; that fresh evidence has come to light since the Authority's determination; that he is now aware that the company's witnesses gave perjured evidence in the Authority; and that the perjured evidence impacted adversely on the Authority's findings (specifically the reduction for contribution). He is particularly aggrieved by remarks made by the Authority about his competence.

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1 *AlKazaz v Enterprise IT Ltd* [2019] NZERA 560 (Member Craig).
2 *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400.
3 *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13]–[18].

[5] The starting point for analysis for the purposes of the application to set aside the seven witness summonses is reg 34(3) of the Employment Court Regulations 2000. It provides:

> (3) In any proceeding (other than a proceeding to which urgency has been accorded under clause 21 of Schedule 3 of the Act or the court's equity and good conscience jurisdiction), the court may set aside a summons if the court considers, on the application of the person served with the summons, that the summons—
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> (a) is oppressive; or
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> (b) causes, by reason of distance or short notice, undue hardship to that person.

[6] The case law discussing the scope and application of reg 34(3) is limited. However, the approach can be summarised as follows.

[7] Summonses are administratively issued by the Court registry on application by the parties. The Court may control abuse and the misuse of witness summonses. Regulation 34(3) provides a mechanism for doing so. An applicant who seeks to have a witness summons set aside must show that there are grounds for doing so. Regulation 34(3) provides two potential routes – undue hardship and oppression. The Court must ultimately be guided by what is required for a particular case to be disposed of fairly, and must exercise its powers consistently with equity and good conscience. Ensuring the proper use of Court time is one part of that equation which should not be overlooked.

[8] In *Auckland Council v George*, the Court held that undue hardship is restricted to reasons of distance or short notice.[4] And, in *Nisha v LSG Sky Chefs New Zealand Ltd (No 19)* Judge Corkill observed that inconvenience is a usual consequence of a witness summons and is not by itself indicative of "undue hardship".[5] The short point is, in relation to undue hardship, that the grounds in reg 34(3)(b) do not apply in this case and can be put to one side.

[9] The key issue in terms of the current application is whether the witness summonses are "oppressive" and, if they are, ought they to be set aside? In *George*

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4 *Auckland Council v George* [2013] NZEmpC 79 at [7].

5 *Nisha v LSG Sky Chefs New Zealand Ltd (No 19)* [2015] NZEmpC 139 at [14].

the Court observed that "oppressive", for the purposes of reg 34(3), is a relatively broad concept. Oppression would also likely include circumstances in which a summons had been irregularly issued; had been unlawfully procured or was being used for an improper purpose.[6]

[10] In *George* it was found that the witness summons was issued with the purpose of getting around the discoverability of certain documents, which amounted to an abuse of process and was therefore considered "oppressive".[7] The summons was set aside on this basis. The seven summonsed witnesses argue that a similar abuse of process is occurring in the present case, on the basis that none of them will have anything relevant to say in relation to Mr AlKazaz's challenge, and requiring them to attend the hearing and give evidence will be disruptive to the company's operations and costly.

[11] I do not accept that the mere fact that the company's operations will be impacted by having a number of senior staff members attending at Court to give evidence suffices to meet the criteria in reg 34(3)(a). Indeed I understood Mr Bryant to accept in oral submissions that issues relating to the operational impact could be dealt with in other ways (for example, via staggered attendance). And while there appear to be issues relating to the health of one of the summonsed witnesses, her evidence could also be dealt with in alternative ways. The point is it is unnecessary to make an order setting the summonses aside to deal with issues relating to operational disruption.

[12] The stronger point is that it is not at all clear what Mr AlKazaz expects any of these witnesses to say and how their anticipated evidence might be relevant to the matters now before the Court, beyond a broad assertion that perjury was committed in the Authority and their evidence may establish that this was so. Mr Bryant characterises it as a 'fishing expedition'. Fishing expeditions are generally not

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6 See, for example, the discussion in *MacKenzie v MacKenzie* [2018] NZHC 1744 in relation to the factors that are relevant in considering whether a subpoena ought to be set aside. While this case concerns a subpoena under the High Court Rules 2016, the principles are applicable by analogy. See also *Re Golightly* [1974] 2 NZLR 297 (SC) at 301.

7 *Auckland Council v George*, above n 4, at [17]–[18].

permitted by the Court for good reason, largely to do with the broader administration of justice.[8]

[13] I directed that Mr AlKazaz set out in his notice of opposition what evidence he expected each of the seven witnesses to give and what relevance that anticipated evidence would have for the matters at issue before the Court. I also heard from Mr AlKazaz in relation to this issue at the hearing. It is clear that he anticipates that each of the witnesses will effectively concede that perjured evidence was given in the Authority on behalf of the company under examination-in-chief.[9] While Mr AlKazaz is confident that the witnesses will support his claim that perjury has occurred, and that this will be supported by various documents he has now located, this appears to be a speculative hope. The term 'fishing expedition' is an apt one in these circumstances.

[14] The extent of the expedition which Mr AlKazaz is wanting to embark on can be summarised as follows. He is seeking to adduce oral evidence from the proposed seven witnesses who he hopes will accept that fabricated evidence was given in the Authority. This fabricated evidence, in turn, is argued to have led the Authority Member to conclude (erroneously) that there were difficulties with Mr AlKazaz's performance and that the compensatory relief ordered in his favour ought accordingly to be reduced by 20 per cent. It is said that all of this resulted in a miscarriage of justice of the sort that warrants a reopening of the investigation.

[15] I am satisfied that it would be oppressive to require the seven witnesses to attend the hearing of the challenge. I do not consider that their evidence (which is very uncertain) is required to enable the application to be disposed of fairly. Nor do I consider that requiring their attendance would be consistent with the broader interests of justice. Mr AlKazaz remains able to refer to the documentation which he says has only recently come to light and from which he asserts various inferences can be drawn which support his challenge.

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8 See *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153 at [40].

9 Cross-examination could not occur absent an order declaring each witness to be hostile.

[16] The witness summonses are oppressive for the purposes of reg 34(3)(a) and are set aside on this basis.

[17] Orders are made accordingly.

[18] Costs are reserved at the request of counsel.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 1 September 2020