

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 129
EMPC 284/2019**

IN THE MATTER OF a declaration of contempt of the Court

BETWEEN ANZ SKY TOURS LIMITED T/A ANZ
 SKY TOURS
 Plaintiff

AND HSU-YIN WEI
 Defendant

Hearing: 19 and 20 August 2020
 (Heard at Auckland)

Appearances: C Stewart and E Taylor, counsel for plaintiff
 M Moncur, advocate for defendant

Judgment: 20 August 2020

ORAL JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This judgment deals with a collateral proceeding to a challenge to a determination of the Employment Relations Authority (the Authority) dated 21 June 2018.¹ The judgment deals with an application by the plaintiff ANZ Sky Tours against the defendant Ms Wei for declarations that she is in contempt and imposing substantial fines against her.

¹ *Wei v ANZ Sky Tours Ltd t/a ANZ Sky Tours* [2018] NZERA Auckland 193 (Member Fitzgibbon).

Background

[2] Some background is necessary. Ms Wei succeeded in her claims before the Authority. The determination held that she had been constructively dismissed by ANZ Sky Tours and she was awarded unpaid wages, compensation and reimbursement for lost remuneration.

[3] ANZ Sky Tours claims in the challenge that Ms Wei resigned voluntarily in order to take up employment with another employer to enhance her immigration status. The allegation made is that she was making efforts to obtain alternative employment for this purpose whilst still employed with ANZ Sky Tours and this is what motivated her decision to resign.

[4] ANZ Sky Tours accordingly alleges that the Authority's determination that she was constructively dismissed was wrong and the remedies are not available to Ms Wei. The substantive challenge proceedings are now set for a hearing in September 2020. This judgment does not deal with the merits or otherwise of that challenge.

[5] The issue of disclosure of documents became a point of considerable dispute between the parties and resulted in several interlocutory applications by ANZ Sky Tours against Ms Wei. One such issue related to disclosure of documents held on a file of an immigration consultant employed by Ms Wei to assist with and resolve her immigration status. Another issue related to a request for Ms Wei to disclose documents relating to any attempt she had made to obtain employment with another employer. This request included documents relating to attempts made, both prior to and after the date of termination of Ms Wei's employment with ANZ Sky Tours being 28 June 2017.

[6] With regard to the immigration consultant's file, ANZ Sky Tours believed that as Ms Wei's attempts at obtaining alternative employment related to enhancing her immigration status, that file would contain documents relating to that issue. Clearly in respect of all disclosure sought the date of any application for alternative employment would be significant. I was persuaded throughout the disputes over

documents that the disclosure of the documents sought by ANZ Sky Tours was relevant to the pleadings filed in their challenge.

[7] The disputes over documents could not be resolved between the parties. The issue ANZ Sky Tours had was compounded by the filing of briefs of evidence in preparation for the hearing of the challenge. Ms Wei's brief disclosed she had made online job applications with three or more employers. ANZ Sky Tours sought disclosure of any documents relating to these applications. Ms Wei disclosed documents relating to a job application with one other employer. This employer required a Privacy Act request before providing the documents to Ms Wei.

[8] A request for disclosure of documents from the immigration consultant's file had resulted in only three documents being disclosed.

[9] As a result of the disagreements over disclosure, formal applications were made. This resulted in orders of the Court being made against Ms Wei. In a Ruling dated 9 April 2019, I made a direction that while a non-party disclosure application against the immigration consultant may be required, a further attempt was to be made by Ms Wei and her advocate to ascertain what the consultant's file contained. All of the documents on that file were to be itemised and disclosed to ANZ Sky Tours' counsel for the purpose of deciding what documents to inspect and/or be produced at any hearing. Clearly any such document would need to be relevant.

[10] In addition, I ruled that Ms Wei was to contact the potential employers to whom job applications had been made by her and retrieve such documents as they had in relation to her applications. An affidavit from Ms Wei was to be filed setting out the steps taken and provide a verified list of documents provided. That was to be done by 7 May 2019. An affidavit was provided, but not until 18 June 2019 (I just note that it originally did have the date of 7 May 2019 on it but that was altered).

[11] That affidavit set out steps taken to procure documents from the immigration consultant and the prospective employers. The documents from the one employer, referred to previously, were procured and listed. The other employers were stated to have not replied. Documents procured from the immigration consultant were listed.

[12] Counsel for ANZ Sky Tours formed the view that by the nature of the documents disclosed from the immigration consultant, the list of documents was incomplete. Formal applications for further disclosure and for non-party disclosure against the consultant, were made on 16 May 2019 and 24 May 2019 respectively.

[13] These applications were served on Ms Wei, but no steps were taken. Accordingly, the applications were granted by default. The orders made were that a further attempt with a Privacy Act request was to be made to the prospective employers in the hope that documents would be forthcoming and that the immigration consultant was to provide details of all documents from her file to counsel for ANZ Sky Tours.

[14] The full file from the immigration consultant was then provided and indeed documents had been omitted from the previous disclosure. Ms Wei did not indicate that documents had been recovered from the prospective employers.

[15] The documents recovered from the consultant show that Ms Wei, early on from the requirement for documents from the consultant to be disclosed, had requested the consultant not to disclose certain documents, in particular those dated prior to termination of her employment on 28 June 2017.

Contempt proceedings

[16] I turn now to the contempt proceedings. ANZ Sky Tours has now sought the declarations for contempt and imposition of fines in two respects. The first is that Ms Wei has attempted to obstruct or interfere with the course of justice, or that there was a real risk of such interference. The second is that the failure to provide documents from the prospective employers indicates that Ms Wei has disobeyed the orders requiring further contact with them for further disclosure. The applications are defended by Ms Wei. I have now completed hearing evidence in the matter. ANZ Sky Tours relied upon evidence from its Director, Sherry He, and the immigration consultant. Ms Wei did not give evidence.

[17] Ms He's evidence dealt mainly with the formalities, referring to the Court documents containing the orders, correspondence dealing with disclosure and so on.

The immigration consultant's file had disclosed a BISL Client Management System Diary in which she and her staff had methodically recorded, in considerable detail, the communications with Ms Wei, particularly relating to the requirements of the disclosure orders. The consultant gave evidence confirming the information in the diary and the correspondence which emanated between herself, Ms Wei, Ms Wei's advocate (Ms Moncur) and counsel for ANZ Sky Tours. These materials show blatant attempts by Ms Wei to interfere in the disclosure process resulting from the Court's orders and I find that she is in contempt.

[18] It appears from the notes and correspondence that Ms Wei was concerned that personal and private information would be disclosed, but it is also clear that the primary motivation was to withhold information going directly to the employment issues raised by ANZ Sky Tours in its challenge.

[19] No attempt was made by Ms Moncur to seek to modify the orders at the time they were made if Ms Wei was concerned about the release of personal irrelevant information. And indeed as I have indicated, the applications for the non-party disclosure and further disclosure were unopposed. It is clear, however, that Ms Moncur was not aware at the time of Ms Wei's attempt to obstruct the disclosure by the immigration consultant. I am bound to say that if I had been informed of the extent and nature of the documents contained in the immigration consultant's files I would have been amenable to some modification of the orders made or certainly given directions as to protection of any personal or confidential information.

Jurisdiction

[20] Insofar as jurisdiction is concerned this Court has jurisdiction to make a finding of contempt and therefore impose penalties for the same. Such jurisdiction has been the subject of a judgment of the full Court in *Hynds Pipe Systems Ltd v Forsyth*.² I will not repeat the findings in that decision in this oral judgment but record that I rely upon them.

² *Hynds Pipe Systems Ltd v Forsyth* [2017] NZEmpC 89.

[21] I also record that this Court in previous judgments has dealt with contemptuous acts of the kind involved in the present case and I refer here to *Talbot v Air New Zealand Ltd*³ and *Ho v Chief of Defence Force*.⁴

Onus of proof and findings

[22] This is a criminal proceeding. ANZ Sky Tours is asking that a fine of \$20,000 be imposed for each of the two alleged acts of contempt. The onus resting upon ANZ Sky Tours is to prove the alleged acts beyond reasonable doubt.

[23] The evidence of the immigration consultant, and I record here that she appeared having been formally summoned as a witness rather than voluntarily, is quite overwhelming as to the steps taken by Ms Wei to obstruct the consultant from complying with the earlier disclosure orders. Her evidence is well supported by contemporary documents which includes the elaborate diary entries and the correspondence which took place at the same time. As already indicated I find Ms Wei in contempt for these acts.

[24] As far as the second allegation is concerned, I am being asked to find that the failure to provide documents from prospective employers shows that Ms Wei did not obey the order made to request such documents by way of Privacy Act requests. That would require an inference which I am not prepared to make. Applying the standard of proof resting upon ANZ Sky Tours, I find that the second alleged contempt has not been proved. Ms Wei did not have to give evidence as was her right. If ANZ Sky Tours was to prove that Ms Wei did not obey the order, evidence would have been required from the employers concerned. It is not for Ms Wei to prove she made the requests, it is for ANZ Sky Tours to prove she did not. The evidence falls short of reaching that standard. I find that Ms Wei is not in contempt on this ground.

[25] I also note that by way of the affidavit of Ms Wei referred to earlier, details of the job applications had been given. If this was regarded as inadequate, an application for further compliance should have been sufficient.

³ *Talbot v Air New Zealand Ltd* [1995] 1 ERNZ 609.

⁴ *Ho v Chief of Defence Force* [2005] ERNZ 93.

Sentence to be imposed

[26] I now turn to the sentence to be imposed. As to what sentence should be imposed in this case it is clear that the Court should mark its disapproval of Ms Wei's actions. On the other hand I have some sympathy for her concerns at her personal information being released. Nevertheless, as I have found, her evidence discloses she was motivated to try to cover information which may be relevant to the challenge and not within her interests.

[27] I have regard to the consequences of a substantial fine on a young person who is a new immigrant trying to establish herself and gain immigration status in order to do that. I also have regard to the fact that she has not been well represented by her advocate. When I asked Ms Moncur at the conclusion of evidence why she did not intervene to modify or take steps to oppose the orders sought, she conceded that she had let Ms Wei down. Ms Moncur, to be fair to her, is not legally qualified but nevertheless has a measure of experience in proceedings before this Court. She put her failure in this case down to immense pressure of work she is under in representing other clients.

[28] In the circumstances I have considered the matter carefully. While an attempt to obstruct or interfere with the course of justice is a very serious matter, there are some mitigating circumstances in this case.

[29] I have decided that imposing a fine is not appropriate. I have decided that an admonishment and the recording of the Court's displeasure at Ms Wei's actions in this judgment is sufficient punishment. I also repeat that this judgment does not deal with the merits of the challenge which have yet to be determined.

Costs

[30] Insofar as costs are concerned, the procedure having to be adopted by the Court under its rules for the commencement of an action of this kind is unusual. Being a criminal proceeding a costs award would not be the norm, unless there were elements of the prosecution being frivolous or vexatious. That does not apply here. Each of the

parties have succeeded to some extent and in all the circumstances I consider that no award of costs should be made against either party and I order accordingly.

M E Perkins
Judge

Judgment delivered orally at 4.20 pm on 20 August 2020