

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA142/2010
[2010] NZCA 271**

BETWEEN LYNNE FRANCES SNOWDON
 Appellant

AND RADIO NEW ZEALAND LIMITED
 Respondent

Hearing: 15 June 2010

Court: William Young P, Ellen France and Randerson JJ

Counsel: R Moodie and M J S Okkerse for Appellant
 M F Quigg and J L Bates for Respondent

Judgment: 28 June 2010 at 10.30 am

JUDGMENT OF THE COURT

- A We dismiss the application for leave to appeal.**
- B Ms Snowdon must pay Radio New Zealand costs for a standard application on a Band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by William Young P)

[1] Ms Lynne Snowdon and Radio New Zealand Limited have been involved, for nearly six years, in personal grievance proceedings relating to Ms Snowdon's former employment with Radio New Zealand. In these she alleges unjustifiable actions on the part of Radio New Zealand and that her eventual dismissal (on 11 April 2005)

was unjustifiable. These claims have generated much dispute over discovery, resulting in three judgments of Judge Shaw between 16 December 2005 and 7 December 2006.¹ In the last of these, Judge Shaw concluded that Radio New Zealand had discharged its discovery obligations.

[2] Ms Snowden then commenced separate proceedings in the Employment Court on 17 March 2009, seeking to have the three discovery judgments set aside as obtained by fraud. And, in the context of these fraud proceedings, she has sought additional discovery. This was declined by Judge Travis in the judgment now under challenge,² essentially because he saw the demands for additional discovery as being an abuse of process. Ms Snowden seeks leave to appeal against that judgment under s 214 of the Employment Relations Act 2000.

[3] There are a number of features to Ms Snowden's continuing attempts to obtain further discovery which, in combination, are disquieting:

- (a) Complaints against her of financial mismanagement and her response in the form of allegations of financial misreporting form a significant part of the events which are under review in the substantive personal grievance proceedings.
- (b) Ms Snowden first sought the assistance of forensic accountants while still employed by Radio New Zealand.
- (c) From the very outset of the current proceedings (that is, in the first of the personal grievance applications), Ms Snowden has challenged the financial reporting systems adopted by Radio New Zealand. She has asserted that there were "financial reporting inaccuracies and anomalies" and has been relying on the advice of "forensic accountants".

¹ *Snowdon v Radio New Zealand Ltd* [2005] ERNZ 905; EmpC WC 4/06, 27 March 2006; and EmpC WC 4A/06, 7 December 2006.

² *Snowdon v Radio New Zealand Ltd* [2010] NZEmpC 10.

- (d) The judgments of Judge Shaw delivered between December 2005 and December 2006 address a great many discovery issues. Some of the arguments she dealt with overlap the current fraud allegations (for instance, as to alleged inconsistencies in the material provided by Radio New Zealand, a contention that the information supplied on discovery could not have been in the form in which it was apparently supplied to divisional managers and a suggestion that some documents had apparently been “deleted and destroyed”).
- (e) The attempt to obtain discovery in the fraud proceedings is, in significant respects, a collateral challenge to the discovery judgments of Judge Shaw. In part this is because, as just noted, some of the arguments now relied on in the fraud proceedings had been identified by the time that Judge Shaw gave the last of her judgments. But more generally, the pleadings and the particulars of the discovery sought are redolent of an attempt to circumvent the conclusions of Judge Shaw.
- (f) The relief which Ms Snowdon seeks, on this appeal, in relation to discovery is not far removed from what she would be entitled to if she succeeds in the fraud claim.
- (g) Associated with this last point, some at least of Ms Snowdon’s discovery demands are premised on the assumption that there has been a fraud. Ms Snowdon claims that Radio New Zealand has produced a mass of fraudulently altered/false documents. So she is seeking discovery of the genuine documents which, once produced, will necessarily reveal what she regards as the fraud which has been practised on her and the Court. Of course, if there has not been a fraud (which is what Radio New Zealand asserts) then there is no as yet undiscovered “genuine” documentary database. As a matter of common sense, there is not much point ordering Radio New Zealand to produce documents which it maintains do not exist or requiring further discovery of documents which have already been produced.

[4] In argument before us, Dr Moodie addressed a number of these points. He noted that judgments obtained by fraud can be set-aside.³ It follows that the commencement and prosecution of such proceedings cannot, in itself, be treated as abusive (or in breach of estoppel or res judicata principles) simply because they challenge an earlier judgment. Further, the fraud and personal grievance proceedings are separate with the result that documents discovered in the fraud proceedings could not, without the leave of the Court, be used in the personal grievance proceedings. For this reason, it is not true – or at least not completely true – that Ms Snowdon is seeking to obtain on discovery what she is seeking in the substantive fraud proceedings.

[5] We accept that it may be possible to take issue with some of the reasons given by Judge Travis in his judgment. We also accept that, with perhaps a little effort, it would be possible to identify legal questions associated with his judgment which could be the subject of a grant of leave to appeal under s 214.

[6] That said, we are not prepared to grant leave to appeal.

[7] It is important to recognise that the relevant abuse of process principles are reasonably flexible. Where a litigant is in substance seeking to re-open the same issues and to seek the same redress as on a previous occasion, abuse of process principles can still apply despite all the procedural changes which that litigant may have rung.⁴

[8] In this context, we consider that there was a very reasonable basis for concluding that the discovery demands made by Ms Snowdon against Radio New Zealand are an abuse of process. The suggestions that documents had been deleted or destroyed, that the documents discovered could not have been made available to divisional managers in the discovered format and of inconsistencies were all on the table when Judge Shaw was dealing with discovery in the personal grievance proceedings. To re-advance those same arguments under the rubric of fraud would be an abuse of process and we are inclined to the view that this remains so even

³ See *Shannon v Shannon* (2005) 17 PRNZ 587 (CA).

⁴ See *NZ Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) esp at 89–91.

though these arguments are now, apparently, buttressed by further forensic analysis which had not been carried out by December 2006. In this context, the prospects of success for the proposed appeal are bleak.

[9] The allegations of fraudulent discovery are of direct relevance to the determination of the grievance proceedings because, on our understanding of the case, there is a real sense in which the allegations about discovery are a subset of the broader complaints made by Ms Snowden about financial misreporting. Dr Moodie maintains that he can demonstrate fraudulent discovery on the evidence already to hand. The additional discovery is therefore being sought only on a belt and braces basis. Of course, if during the trial of either or both of the grievance or fraud proceedings, the trial Judge were to conclude that there should be additional discovery, that could be ordered. Against this background we can see little risk of prejudice to Ms Snowden if leave is refused.

[10] Further, we are of the view that the time has come for the procedural music to stop. The substantive litigation has been before the Employment Court for many years. We see any utility (doubtful at best) associated with the proposed appeal as heavily outweighed by the adverse consequence of the further deferral of the determination of the grievance proceedings which would result if we granted leave to appeal.

[11] Accordingly we dismiss the application for leave to appeal. Ms Snowden must pay Radio New Zealand costs for a standard application on a Band A basis and usual disbursements.

Solicitors:
Quigg Partners, Wellington for Respondent