

IN THE SUPREME COURT OF NEW ZEALAND

SC 37/2007
[2007] NZSC 64

BETWEEN	HARVEY DOUGLAS WHITE Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD Respondent

Court: Elias CJ, McGrath and Anderson JJ

Counsel: J Haigh QC and K M Beck for Applicant
C H Toogood QC for Respondent

Judgment: 8 August 2007

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The order of the Court preventing publication of the applicant's name is lifted.**
- C The applicant must pay the respondent costs of \$2,500 together with reasonable disbursements.**

[1] Dr White applies for leave to appeal against a judgment of the Employment Court in which the Court refused to make a permanent order prohibiting publication of his name when determining a personal grievance proceeding.¹ In its judgment the Employment Court upheld the applicant's claim that he had been unjustifiably dismissed from his employment with the respondent, the Auckland District Health

¹ *X v Auckland District Health Board* (Employment Court, Auckland, AC 10/07; ARC 52/05, 23 February 2007, Chief Judge Colgan).

Board. The Court made a final order reinstating him in the position which he had continued to occupy under an interim order made shortly after his dismissal.

[2] The respondent first applied to the Court of Appeal for leave to appeal against the Employment Court's substantive findings and Dr White applied for leave to appeal on grounds which included the refusal to order permanent suppression of his name. Both applications were heard together and dismissed in a judgment of the Court of Appeal delivered on 8 June 2007.²

[3] In now seeking to bring an appeal to this Court, the applicant is confronted, first, by a statutory bar on this Court hearing appeals against decisions of the Court of Appeal which are refusals to give leave to appeal to that Court.³ Dr White has, however, applied, under s 214A of the Employment Relations Act 2000, for leave to appeal directly to this Court against the decision of the Employment Court insofar as it refused him permanent name suppression.

[4] We have received and considered written submissions from the parties on the application and do not consider that we would be assisted by holding an oral hearing. The respondent has argued that this Court has no jurisdiction to permit a direct appeal to this Court following the refusal of leave by the Court of Appeal. Mr Toogood QC referred to observations of this Court in *R v Clark*,⁴ in which this Court said:

Whenever provision is made for a direct appeal to the Supreme Court, it is an exceptional "leap-frog" of the Court of Appeal, not a procedure to be resorted to following a Court of Appeal determination.

[5] The point underlying the dictum of the Court in *Clark* was that the statutory policy contemplated that leap frog appeals would be exceptional and were not generally to be resorted to after the Court of Appeal had refused leave to appeal. The judgment should not, however, be read as going as far as saying that there was

² *White v Auckland District Health Board* (Court of Appeal, CA 102/07, 8 June 2007, William Young P for the Court).

³ Section 7(b) Supreme Court Act 2003.

⁴ [2005] 2 NZLR 747 at para [10].

no jurisdiction to apply to bring a direct appeal where leave to appeal to the Court of Appeal had been refused. The later decision of this Court, refusing leave to bring a direct appeal, in *Burke v Western Bay of Plenty District Council*,⁵ has made the position clear:

[W]hen an appeal from the Court of Appeal to this Court is precluded by s 7(b), it cannot be right, save perhaps in very exceptional circumstances, to allow that embargo to be circumvented by a direct appeal from the High Court. While there is no express statutory provision preventing an appeal directly from the High Court to this Court following a refusal of leave to appeal to the Court of Appeal, the policy behind the embargo in s 7(b) suggests that the circumstances in which such a direct appeal could be brought would have to be extremely compelling.

[6] Accordingly, we are satisfied that there is no jurisdictional barrier to the applicant applying for leave to appeal directly to this Court from the Employment Court's judgment, even though leave to appeal has been refused by the Court of Appeal. The application is out of time but was brought promptly once leave to appeal was refused by the Court of Appeal and we consider time should be extended.⁶ The high threshold of extremely compelling circumstances referred to in *Burke* must, however, be met before leave under s 214A will be given.

[7] The application raises three matters as satisfying the requirement of extremely compelling circumstances warranting a direct appeal to this Court, and indicating that it is in the interests of justice for the Court to hear and determine the appeal.

[8] The first matter is a complaint that the Court of Appeal allocated only 45 minutes for hearing the parties' respective applications for leave to appeal, despite the multiplicity of grounds that they had to address. The parties were required to file written submissions in advance.⁷ In that context we see no basis for concern over the time allocated by the Court for the hearing of the leave applications. A further concern here is that the Court of Appeal proceeded to determine the merits of the lower Court's refusal to order suppression on the basis of submissions that only addressed whether leave to appeal should be given. The fact that the Court

⁵ [2005] NZSC 46 at para [4].

⁶ Under r 11(4) Supreme Court Rules 2004.

⁷ Under r 23 Court of Appeal (Civil) Rules 2005.

examined the merits of the proposed appeal on the suppression issue in its judgment does not raise a point that might warrant an appeal to this Court. It must be borne in mind that a court considering whether to grant leave will often have to address whether a potential ground of appeal has sufficient merit in the sense of prospects of success, in the overall context of a case, to warrant giving leave to appeal. The merits of name suppression were properly examined by the Court of Appeal. The evaluation of them legitimately formed part of the Court's reasoning for its overall conclusion that the applicant's proposed appeal had insufficient prospects of success to warrant granting leave to appeal.

[9] The second matter, raised to support the contention that the extremely compelling circumstances test has been met, concerns the likely consequences of refusal of name suppression in this case. It is said these will extend beyond embarrassment and humiliation of the applicant and his family and that the prospects of continuing employment of those who work in his research unit will be put at risk.

[10] Such circumstances are not especially unusual and, we accept, are always relevant to name suppression decisions of the courts. They were explicitly addressed by the Court of Appeal and were, of course, only one aspect of the considerations that had to be taken into account. In the absence of some failure in the process of addressing this matter, consequences for third parties raise no extremely compelling circumstances that warrant the hearing of an appeal by this Court.

[11] The final matter raised by the applicant is whether the private nature of employment grievance disputes, and the need for a person who has a personal grievance to bring proceedings if they are to assert their rights, warrants the Employment Court taking a different approach to name suppression than that applied by other courts, and in particular those exercising the criminal jurisdiction. This question comes closest to raising an issue that meets the criteria for this Court to grant leave to appeal but we are satisfied that, in the circumstances of this case, the point would not provide a sufficient basis for the applicant to advance an argument having any prospect of success in an appeal to this Court.

[12] The decision of the Employment Court that the applicant should be reinstated in his employment, but without further prohibition on publication of his name, was that Court's ultimate assessment of the just outcome of the case which reflected the extent of misconduct and the balance of the various private and public interests involved. The Judge took into account the detrimental impact of publication on the applicant and, implicitly, others associated with him. Although the applicant's counsel, Mr Haigh QC, was critical of that approach insofar as it did not address name suppression as a separate matter, we are satisfied it was open to the Employment Court Judge to determine the case as he did.

[13] Overall, we are satisfied that there are no circumstances of such a compelling nature that would warrant a direct appeal against the Employment Court's judgment to this Court.

[14] The application for leave to appeal against the Employment Court's judgment is accordingly dismissed. This Court's interim stay order, made on 14 June 2007, preventing publication of Dr White's name now ceases to have effect. There is no longer any restriction on the identification of the applicant as a party to the proceedings before the Employment Court, the Court of Appeal and this Court. The applicant must pay costs to the respondent of \$2,500 together with reasonable disbursements.

Solicitors:
Swarbrick Beck , Auckland for Applicant
Kiely Thomson Caisley, Wellington for Respondent