

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 67/2022
[2022] NZSC 117

BETWEEN	ANA SHAW Applicant
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: S R Mitchell for Applicant
A P Pearce for Respondent

Judgment: 14 October 2022

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
- C The applicant must pay the respondent costs of \$2,500.**
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REASONS

[1] The applicant, Ms Shaw, has applied out of time for leave to appeal against two Employment Court judgments (a substantive judgment¹ and a costs judgment²).

¹ *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 10 (Judge K G Smith) [NZEmpC judgment].

² *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 112 (Judge K G Smith) [NZEmpC costs judgment].

Background

[2] The Bay of Plenty District Health Board (the respondent, now called Health New Zealand) summarily dismissed Ms Shaw in March 2015 for serious misconduct on the basis that she had breached patient privacy.³

[3] In July 2014, Ms Shaw had sent an email to all the staff in her department complaining about the way patient records for referrals were dealt with.⁴ One of the employees who received this email described it as offensive because it implied that Ms Shaw was the only employee who competently carried out this process.⁵ The respondent decided to investigate this as a complaint.⁶

[4] As part of this investigation process, Ms Shaw criticised the working environment of the Bay of Plenty District Health Board (the DHB). She had criticised the DHB's work environment before, including in her performance reviews in 2012 and 2015. When asked to provide more information on this matter, she handed the investigator a folder containing a significant amount of confidential patient information dating back several years.⁷

[5] A new investigation began into the potential breach of patient privacy. Ms Shaw argued that she had collected this information as evidence of workplace bullying towards her, such as people interfering with her work.⁸

[6] Several senior DHB staff found that there had been a breach of patient privacy in line with its Health Information Privacy Standards Policy.⁹ Ultimately, as noted above, this led to the Chief Executive of the DHB summarily dismissing Ms Shaw.

[7] Ms Shaw raised two personal grievances with the DHB for unjustified disadvantage (failure to provide a safe workplace free from bullying and harassment) and unjustified dismissal.

³ NZEmpC judgment, above n 1, at [80].

⁴ At [11].

⁵ At [12].

⁶ At [13].

⁷ At [97]–[99].

⁸ At [106] and [108].

⁹ At [107], [109], [134] and [137].

Judgments below

Employment Relations Authority determinations

[8] The Employment Relations Authority (the Authority) made two determinations on this matter.¹⁰ Regarding the claim for unjustified disadvantage, the Authority found that Ms Shaw had not identified any unjustified actions of the DHB.¹¹ Further, she did not raise her personal grievance for unjustified disadvantage within the 90-day time limit in s 114(1) of the Employment Relations Act 2000.¹² There were no exceptional circumstances that would enable the Authority to exercise its discretion to allow the personal grievance to be raised outside the 90-day time period as per s 114(4).¹³ Regarding the claim for unjustified dismissal, the Authority held that Ms Shaw’s dismissal was a “decision open to a fair and reasonable employer” and was therefore justified.¹⁴

Employment Court judgment

[9] Ms Shaw appealed to the Employment Court.¹⁵ The Court upheld the decision of the Authority, finding that the personal grievance for unjustified disadvantage was not raised within the 90-day time limit.¹⁶ It also held that the dismissal was justified in light of the breach of patient privacy.¹⁷ In a separate judgment, the Employment Court awarded the respondent costs totalling \$48,960.¹⁸

Court of Appeal judgment

[10] Ms Shaw then applied for leave to appeal to the Court of Appeal.¹⁹ The Court considered that she was seeking to challenge findings of fact rather than law and, even

¹⁰ *Shaw v Bay of Plenty District Health Board* [2017] NZERA Auckland 322 (Member Fitzgibbon) [2017 NZERA determination] and *Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390 (Member Fitzgibbon) [2018 NZERA determination].

¹¹ 2017 NZERA determination, above n 10, at [31].

¹² At [32]–[33].

¹³ At [35]. Nor had the District Health Board consented to Ms Shaw raising her personal grievance outside the 90-day period.

¹⁴ 2018 NZERA determination, above n 10, at [129].

¹⁵ NZEmpC judgment, above n 1.

¹⁶ At [78].

¹⁷ At [161].

¹⁸ NZEmpC costs judgment, above n 2, at [35].

¹⁹ *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 (French and Katz JJ).

had they been questions of law, they were without merit and were not issues of general or public importance.²⁰

Extension of time

[11] The reason there was a delay in applying to this Court for leave to appeal is that Ms Shaw first applied for leave to appeal against the substantive Employment Court decision in the Court of Appeal. She did file her application for leave to appeal in this Court within 20 working days of the Court of Appeal judgment. In these circumstances, we grant her application for an extension of time.

Application for leave to appeal against substantive decision

Our assessment

[12] Ms Shaw largely reprises the arguments she made in the Courts below. We agree with the Court of Appeal that the questions she wishes to argue are questions of fact rather than law. They are in any event related to the particular circumstances of her case and therefore do not raise issues of general or public importance.²¹ Nothing raised by Ms Shaw suggests a risk of a miscarriage of justice.²² The case involved an orthodox application of the law to the facts. In any event, there is nothing about the circumstances that make them “exceptional” and therefore justify this Court granting leave to appeal directly from an Employment Court decision.²³

Application for leave to appeal against costs decision

Our assessment

[13] Ms Shaw has not identified any error of law in the Employment Court’s approach. Contrary to her submissions, the Court did consider her financial circumstances and access to justice issues.²⁴ In any event, the issues raised by Ms Shaw relate to the particular circumstances of this case and have no wider

²⁰ At [21] and [25]–[27].

²¹ Senior Courts Act 2016, s 74(2)(a).

²² Section 74(2)(b). For the threshold required for a miscarriage of justice in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd* (in liq) [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

²³ Senior Courts Act, s 75.

²⁴ NZEmpC costs judgment, above n 2, at [25]–[26].

implications. There is no risk of a miscarriage. The Employment Court applied an orthodox approach to setting costs with a small uplift for wasted costs. There are no exceptional circumstances warranting a direct appeal to this Court.²⁵

Result

[14] The application for an extension of time to apply for leave to appeal is granted.

[15] The application for leave to appeal is dismissed.

[16] The applicant must pay the respondent costs of \$2,500.

Solicitors:

Garry Pollak & Co, Auckland for Applicant

Holland Beckett Law, Tauranga for Respondent

²⁵ Senior Courts Act, s 75.