NOTE: EMPLOYMENT RELATIONS AUTHORITY ORDER REQUIRING COMPLAINANT TO BE ANONYMISED AS "MS A" AND PROHIBITING THE PUBLICATION OF ANY INFORMATION THAT MIGHT LEAD TO HER IDENTIFICATION REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA311/2017
CA508/2017
[2017] NZCA 559

BETWEEN	ASB BANK LIMITED Applicant
AND	ANDRE NEL Respondent

Hearing:	20 November 2017
Court:	Miller, Cooper and Asher JJ
Counsel:	S C Dench and S J Kopu for Applicant C W Stewart and E L Taylor for Respondent
Judgment:	5 December 2017 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal in CA311/2017 is declined.

B The application for leave to appeal in CA508/2017 is declined.

C The applicant must pay the respondent one set of costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Asher J)

[1] We have before us two applications for leave to appeal two interlocutory judgments of Judge Corkill in the Employment Court. The first judgment was dated 16 May 2017 and the proposed appeal relates to various orders made granting disclosure.[1] The second judgment was dated 10 August 2017, dismissing an application for strike-out.[2] The two applications have been consolidated and heard together.

[2] The respondent, Andre Nel, was formerly employed by the applicant, ASB Bank Ltd. In 2015 he had been working there for approximately 18 years and was a manager. Ms A reported to him. He developed romantic feelings for Ms A and sent her inappropriate emails, culminating in a Facebook message declaring his love for her. Ms A responded making it clear that she did not share Mr Nel's feelings and he apologised. Ms A lodged a complaint which culminated in Mr Nel being dismissed on 6 October 2015.

[3] Mr Nel raised a personal grievance alleging that his dismissal was unjustifiable, raising amongst other things disparity of treatment.

[4] The Employment Relations Authority rejected Mr Nel's allegation of disparity of treatment.[3] However, it concluded that dismissal was not the appropriate outcome in all the circumstances and that Mr Nel had been unjustifiably dismissed. Mr Nel would have been entitled to seven months of lost wages (less the sum he had received from income protection insurance) and $15,000 for hurt and humiliation, but these amounts were reduced by 90 per cent having regard to his contribution to the dismissal circumstances.[4]

[5] Mr Nel and ASB each filed challenges to the Authority's decision in the Employment Court. An interlocutory application was made by Mr Nel for disclosure, which was opposed by ASB but granted by the Court.[5] ASB later applied for an order striking out a disparity of treatment cause of action, which the

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1 *Nel v ASB Bank Ltd* [2017] NZEmpC 56 [EC disclosure decision].
2 *Nel v ASB Bank Ltd* [2017] NZEmpC 97 [EC strike-out decision].
3 *Nel v ASB Bank Ltd* [2016] NZERA Auckland 323 at [195].
4 At [200]–[202] and [236]–[238].
5 EC disclosure decision, above n 1.

Employment Court dismissed.[6] We will deal first with the proposed appeal against the strike-out decision, as that decision raises squarely the availability of a cause of action based on disparity of treatment which the disclosure related to.

The strike-out appeal

[6] Mr Nel's core pleading as to disparity of treatment was as follows:

> d. The defendant's finding and action of dismissal amount to disparity of treatment against the plaintiff in light of the defendant's workplace culture of alcohol abuse and profane language and other incidents involving serious concerns of bullying, use of recreational drugs, sexual and racial harassment and breach of confidentiality which the defendant was aware but did not investigate and/or take disciplinary action …

[7] This was followed by three particular instances of disparity of treatment. Since Judge Corkill delivered his first decisions on disclosure and strike-out, there has been considerable disclosure. An amended statement of claim has now been filed. It contains the same pleading as para (d) quoted above but now sets out 16 particular instances of disparity of treatment.

[8] It was ASB's key argument that disparity of treatment as pleaded in the original statement of claim was not an argument that could succeed. It was argued that the pleaded circumstances had to be "truly parallel to" or "substantially similar to" the circumstances in which Mr Nel was dismissed, and these plainly were not. It was argued that this Court should follow the English decision of *Hadjioannou v Coral Casinos Ltd* which adopted a restricted meaning of disparity.[7]

[9] There are two difficulties in challenging the strike-out decision in this Court. The first is that it is clear that at least some of the particular examples that are pleaded in the statement of claim of disparity of treatment arguably fall within the stringent test put forward by ASB. For example, one of them refers to a branch manager behaving in a sexually inappropriate manner towards a female employee, where the behaviour was on its face much worse than that of Mr Nel and where the consequences for the employee in his employment were relatively minor. Indeed counsel for ASB, Mr Dench, conceded that this and some other particulars could

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6 EC strike-out decision, above n 2.

7 *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 (EAT).

arguably fall within the test he was propounding. Thus if ASB prevailed in this argument, the disparity cause of action would not be struck out, but it would be a matter of going through the particulars. It could not be said that this exercise would be of general or public importance, unless it was to establish at this interlocutory stage the boundaries of a disparity cause of action.[8]

[10] This leads us to the second point, which is that it is not appropriate at the strike-out stage to determine an argument that there has been a misstatement of the disparity test. There is a considerable body of Employment Court authority relating to the test for assessing disparity. These authorities note that the assessment of disparity is fact specific.[9] Just as the courts should be cautious to strike out a claim alleging a novel duty of care,[10] they should be similarly cautious in assessing a submission of this type, challenging the parameters of a disparity cause of action. The facts have not yet been established and cover a range of possibilities. This means caution "is necessary both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts".[11]

[11] All that was necessary was for the pleaded circumstances to be capable of giving rise to a disparity cause of action for the strike-out application to fail. If the pleading cannot confidently be shown to be wrong on its face, the claim should be allowed to proceed so that the issue of the parameters of the test can be determined against a fully traversed and determined factual background. It would thus be wrong on an interlocutory application to attempt to finally define the correct test.

[12] This Court has firmly discouraged interlocutory appeals that do not materially advance matters below. It ought to have been apparent that this case falls into that category.[12] Because the disparity cause of action cannot be struck out and the arguments raised will only concern the parameters of that cause of action, and

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8 Employment Relations Act 2000, s 214.

9 See for example EC strike-out decision, above n 2, at [47] and [52]; *Sutherland v Air New Zealand Ltd* [1993] 2 ERNZ 386 (EmpC) at 397–398; and *Wikaira v The Chief Executive of the Department of Corrections* [2016] NZEmpC 175, (2016) 10 NZELC 79-073 at [171]–[176].

10 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [2] and [33] per Elias CJ and Anderson J.

11 At [32] per Elias CJ and Anderson J.

12 *Hardie v Round* [2005] ERNZ 455 (CA) at [19].

because in any event a strike-out application is not the appropriate way of determining the appropriate test for assessing disparity in an employment context, we decline leave to appeal.

The disclosure appeal

[13] The Employment Court relevantly ordered disclosure of the following documents:[13]

> G: Email communications, correspondence, notes, minutes, any documentation whatsoever and/or recordings relating to any complaints or concerns raised and/or the investigations, outcomes or disciplinary action in relation to those complaints or concerns raised, in relation to sexual harassment, racial harassment, bullying, intimidation, harassment, use of recreational drugs, alcohol abuse, breach of confidentiality, profane language, and/or breaches of the Code of Conduct within the defendant over the five years prior to the termination of the plaintiff's employment that had been escalated to any member of the defendant's HR team and Mr John Toomey and Mr Paul Duncan who were Managers in his team

[14] Disclosure was ordered on the following terms:[14]

> (a) Disclosure is to be restricted to circumstances that have been escalated to any member of ASB's Human Resources team and/or to Mr John Twomey and Mr Paul Duncan. These circumstances must be confined to the period of five years prior to Mr Nel's dismissal.
>
> (b) The range of circumstances is to be as pleaded in para 42(d) of Mr Nel's statement of claim (EMPC 257/2016).[15]
>
> (c) Disclosure should be by way of a document or documents which summarise the circumstances involved, and the outcome (if any). For the avoidance of doubt, a full set of documents for each particular circumstance is not, at least at this stage, required to be disclosed unless that is necessary to achieve the disclosure which has been ordered.
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> (d) The documents, as disclosed, are to be considered only by Mr Nel's counsel and Mr Nel. They may not be provided to any other person without leave of the Court.
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> (e) Listing may be by reference to a one-line description of any individual complaint or concern, date, and number of disclosed documents.

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13 EC disclosure decision, above n 1, at [80].
14 At [110].
15 See at [6] above (this is a footnote which has been added to the quote).

(f) Disclosure is to be to Mr Nel's counsel, and to Mr Nel, only in the first instance. The parties may need to discuss whether any further protective directions are necessary at the substantive hearing if it is intended that any of the foregoing documents are to be produced.

(g) Any individual instances to be relied on by Mr Nel at trial are to be specifically pleaded in an amended statement of claim.

[15] Following the hearing most of the relevant documents that had been sought in category G quoted at [13] above were disclosed to Mr Nel's counsel on a strictly confidential basis. It was that disclosure which led to the addition of the new particulars, and some of those new particulars obtained through the disclosure are clearly arguable as points of disparity.

[16] Given that most of the documents that had to be disclosed under the challenged disclosure order have in fact been disclosed, no question of law arises that is of general or public importance. More importantly, the submissions that we received challenging the width of the disclosure order relating to disparity were based on the arguments that the test for disparity is narrow and has been wrongly applied. As we have already said, that is not a matter appropriately dealt with on a strike-out application.

[17] The test for disclosure under reg 38 of the Employment Court Regulations 2000 is broad and based on the *Peruvian Guano* test.[16] We do not discern any error in Judge Corkill's approach in making the disclosure orders he made, which related to documents which were or "may" be relevant. The wording of the regulation is wide and includes documents that "directly or indirectly" "supports, or may support" the case of one party. It has not been shown that the documents sought are irrelevant, and indeed they have been the basis of the further particulars provided in the second amended statement of claim, which set out arguable disparity claims.

[18] No point of general or public importance arises, and for the reasons we have set out it is plain that a challenge to the disclosure orders will not succeed.

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[16] See *The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 (CA) for the origins of the test. This test has now been modified in the High Court Rules and replaced by a standard disclosure approach where only documents of actual and direct relevance are disclosed: High Court Rules 2016, r 8.7.

Result

[19] The application for leave to appeal in CA311/2017 is declined. The application for leave to appeal in CA508/2017 is also declined.

[20] The applicant must pay the respondent one set of costs for a standard application on a band A basis and usual disbursements.