HCMP 691/2012

# IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 691 OF 2012

(ON AN INTENDED APPEAL FROM DCEO NO 4 OF 2009)

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###### BETWEEN

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| SUNNY TADJUDIN | | | Plaintiff |
| and | | |  |
| BANK OF AMERICA,  NATIONAL ASSOCIATION | | | Defendant |
|  |

Before: Hon Kwan and Fok JJA

Date of Decision: 29 June 2012

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DECISION

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Hon Kwan JA:

Introduction

1. This is an application for leave to appeal to the Court of Appeal by Ms Sunny Tadjudin, the plaintiff in proceedings brought in the District Court (DCEO 4/2009) under the Sex Discrimination Ordinance, Cap 480 against her former employer, Bank of America, National Association. It is the plaintiff’s case that the defendant had unlawfully discriminated against her during her employment between 2000 and 2007 by treating her less favourably than it would treat her male comparators on the ground of her sex, by subjecting her to various detrimental practices and eventually dismissing her on a pretext.
2. The plaintiff has also brought proceedings in the High Court against the defendant (HCA 322/2008) claiming damages of $28.3 million for breach of implied terms of her contract of employment being performance bonuses that should have been paid to her between 2005 and 2007 but for the defendant’s breach. She alleged that she was unfairly assessed in her performance, she had received reduced bonuses and was eventually dismissed and that the defendant’s conduct towards her was irrational, perverse and discriminatory.
3. The plaintiff launched wide-ranging applications in HCA 322/2008 for specific discovery and requests for particulars. Out of a total of 40 requests for discovery and 63 requests for particulars, Deputy Judge M Chan only made orders for 10 items for discovery and 5 items for particulars. In her decision of 22 December 2011, the judge concluded that the whole exercise for discovery and particulars has been “unnecessary, oppressive and unreasonable” and awarded 90% of the costs to the defendant on an indemnity basis. The plaintiff’s application for leave to appeal was dismissed by the Court of Appeal (Tang VP and Fok JA) on 29 March 2012 (HCMP 337/2012). In his judgment, Fok JA fully endorsed the remarks of the Deputy Judge that the interests of the parties would be much better served by actively progressing to trial and expressed the firm view it is high time that the interlocutory skirmishes should come to an end.
4. In DCEO 4/2009, the plaintiff sought leave to amend her statement of claim to plead inter alia a general practice of discrimination against female employees within the division in which the plaintiff was employed (the International Special Situations Group, “the ISSG”), specific discovery of 39 items, and leave to be released from her implied undertaking so as to make use of documents produced by the defendant in discovery in DCEO 4/2009. HH Judge S T Poon heard arguments on these applications over 4 days and made a series of rulings on 13, 14, 15 and 20 February 2012. He disallowed the amendments to the statement of claim objected to by the defendant in various parts of paragraph 19 of the statement of claim, he allowed 6 out of the 39 items requested in specific discovery, he granted leave to release the defendant from her implied undertaking in respect of specific documents but refused leave where the documents were unspecified by her. The order which contained the outcome of these rulings was made on 20 February. Costs were awarded against the plaintiff on an indemnity basis, as the judge was of the view that the applications were “frivolous and unreasonable”.
5. The reasons for the rulings were best encapsulated in the oral decision of the judge when he refused leave to appeal on 29 March 2012:

“Basically, the introduction of the general practice of discrimination has not been supported by proper particulars and the amendment does not help to determine the real questions in controversy between the parties and the discovery sought by the Plaintiff was irrelevant, too wide, unnecessary or being oppressive. I do not think the Plaintiff has demonstrated to me that in disallowing the Plaintiff’s applications I have been [sic] any way erred in law or in principles or I was plainly wrong.”

1. By a summons issued in these proceedings on 12 April 2012, the plaintiff renewed her application for leave to appeal against the order of 20 February 2012 to this court, seeking a 3-hour hearing.
2. We have considered the three box files submitted by the plaintiff, the draft Notice of Appeal annexed to the plaintiff’s summons, the skeleton argument of the plaintiff’s counsel Mr Russell Coleman, SC and Mr Jonathan Wong, and the defendant’s statement in opposition prepared by its counsel Mr Bernard Man. We decline the request of Mr Coleman to hold a ‘rolled up’ hearing for leave to appeal and the substantive appeal. We think it appropriate to determine the application on the basis of the papers before us without an oral haring, pursuant to the powers of this court under Order 59 rule 2A(5)(a) of the Rules of the High Court.

The approach in granting leave to appeal

1. Under section 63A(2) of the District Court Ordinance, Cap. 336, leave to appeal to the Court of Appeal shall not be granted unless the Court of Appeal is satisfied that the appeal has a reasonable prospect of success, or that there is some other reason in the interests of justice why the appeal should be heard. Counsel relies on both limbs in section 63A(2) in seeking leave to appeal.
2. Reasonable prospect of success involves the notion that the prospect of succeeding must be “reasonable” and therefore more than “fanciful”, without having to be “probable” (*SMSE v KL* [2009] 4 HKLRD 125 para 17). Furthermore, it is pertinent to bear in mind that even if there is a reasonable prospect of success on appeal, the court still retains a discretion whether to grant leave to appeal, although the fact that there is, *ex hypothesi*, a reasonable prospect of success would heavily influence the court’s exercise of discretion (*Ho Yuen Ki Winnie & Ors v Ho Hung Sun Stanley & Anr*, HCA 391/2006, 25 May 2009, A Cheung J para 3; and HCMP 1009/2009, 24 August 2009, para 22).
3. In refusing leave to appeal against an order for specific discovery, the remarks of A Cheung J (as he then was) in *Ho Yuen Ki Winnie*, *supra* para 8, which are similar to those of Fok JA in HCMP 337/2012 paras 41 to 43, are particularly apposite to the present situation:

“I take the view that in the light of the progress, or more correctly, lack of progress, in the prosecution of the present action – the parties having reached only the stage of discovery and there having been no real advancement of the case made since mid-2008 when the question of discovery first arose, the parties’ efforts would better be directed to the prosecution and defence of the present action. A further round of argument over discovery at the appellate level would not really do the parties any good, on the assumption that both of them want the real disputes between them to be argued at trial and adjudicated by the court as soon as possible.”

1. I turn to consider the grounds advanced in the draft Notice of Appeal.

The application to amend the statement of claim

1. As mentioned earlier, the amendments refused by the judge relate to an allegation of a general practice of discrimination against female employees within the ISSG and the particulars given in support of that allegation. The judge went through each of these proposed amendments in paras 2 to 9 of his Ruling on 14 February 2012 and gave his comments why he had found each of them wanting.
2. The general reasons why he refused leave were as follows:

“… my main reason for disallowing this line of amendment is that as I look at the particulars given, proposed particulars given as a whole, they simply do not point to a general practice and, in my view, even if the purported particulars are proved, they do not simply suggest a general practice of discrimination, simply being far from sufficient to establish a general practice and this is the main reason for disallowing this line of amendment.” (Ruling on 14 February 2012, para 10)

“The applications of the plaintiff are frivolous and unreasonable. For the amendment application, what the plaintiff had done is to delete the objected part under the striking out application and try to reintroduce it again to the pleadings in some other way and the purported particulars given underneath are simply insufficient for proving the general discriminatory practice as alleged. There is simply insufficient basis provided for the introduction of the prayer.” (Ruling on 20 February 2012, para 10)

1. The reasons given by the judge for the exercise of his discretion are sound and accord with well established legal principles. As stated by Lord Oliver in *Wharf Properties v Eric Cumine Associates* [1991] 2 HKLR 154 at 166F:

“It is for the plaintiff in an action to formulate his claim in an intelligible form and it does not lie in his mouth to assert that it is impossible for him to formulate it and that it should, therefore, be allowed to continue unspecified in the hope that, when it comes to trial, he may be able to reconstitute his case and make good what he then feels able to plead and substantiate.”

1. I agree with Mr Man’s submission that the amendments disallowed are embarrassing and speculative. There is no plea as to which female employees are referred to, and why their circumstances are comparable to the plaintiff. There is no plea in the amendments disallowed as to which male employees are referred to, and why their circumstances are comparable to any and which of the unidentified female employees. The plaintiff cannot plead an allegation of general discrimination practice without basis, and rely on embarrassing and speculative pleas to seek discovery in the hope that the alleged general practice of discrimination against female employees within the ISSG might be substantiated.
2. In ground 3 of the draft Notice of Appeal, Mr Coleman relied on a number of cases to advance a proposition that to make out a general practice of discrimination, statistical evidence may be relied on to establish a discernible pattern in the treatment of a particular group. And even if members in the group are not comparators, the discernible pattern in treatment may demonstrate regular failure of members of the group to obtain promotion and under-representation in particular jobs such that it could give rise to an inference of discrimination against the group. He cited *West Midlands Passenger Transport Executive v Jaquant Singh* [1988] 1 WLR 730; *British Coal Corporation v Smith* [1996] IRLR 404; *Rihal v London Borough of Ealing* [2004] IRLR 642; and *Barton v Investec Securities Ltd* [2003] ICR 1205. The last mentioned case, *Barton*, was invoked as authority for a proposition that “no tribunal should be seen to condone a bonus culture, involving secrecy and/or lack of transparency because of the potentially large amounts involved, as a reason for avoiding equal pay obligations.”
3. These and other authorities were cited to the judge and he must have borne them in mind even though the cases were not mentioned in his ruling. I do not think broad statements from these cases would assist, as they should be read with regard to the factual and statutory context in which they were decided. *Barton* involved the consideration of section 63A of the Sexual Discrimination Act 1975, which reverses the burden of proof on proof of certain facts, and has no equivalent in our legislation.
4. The disallowed amendments relate to statistical allegations. Statistical evidence may not be useful and relevant in every case. In the present case, it would not help in establishing the alleged general practice of discrimination. As pointed out by Mr Man, the team in the ISSG was small. The expertise, experience and performance of its members were diverse and varied. Clearly, their bonuses were assessed by reference to their performance (revenue generating or otherwise), which could not be properly understood even if each of their portfolios are discovered and analysed. There is no attempt to identify the members of staff represented by the statistics, their circumstances, or why they are said to be comparable to the plaintiff. The judge is plainly correct in disallowing the amendments as even if they were proved, they do not establish any general practice of discrimination.
5. Mr Coleman submitted that there was a difference in the approach to pleadings in cases brought under the Sex Discrimination Ordinance between the judge and the previous judge who was responsible for the case management of this matter, HH Judge Lok. He contended that this difference in approach would justify consideration by the Court of Appeal, in particular whether the scope of discovery needed to be resolved first before the determination of the pleading issue.
6. I have read the transcript of proceedings in the hearing before Judge Lok on 14 December 2010. I do not think there is any material difference in the approach of the two judges regarding the pleadings in this case. Judge Lok clearly stated that statistics are not sufficient to substantiate an allegation of discriminatory practice where there are a lot of variables and the plaintiff must have some prima facie basis to substantiate her allegation before she is allowed to raise the allegation and proceed to discovery.
7. There is clearly no basis to interfere with the judge’s discretion in disallowing the amendments sought, and no reason in the interests of justice that the intended appeal should be heard.

The application for specific discovery

1. In the intended appeal, the plaintiff seeks discovery of only some of the items disallowed, being items C21, D36, F40 and 43, G44 to 48.
2. In refusing discovery of these items, the judge had explained his reasons adequately in para15 of his Ruling on 15 February 2012, and in paras 3, 6 and 8 of his Ruling on 20 February. The reasons in general were stated in paras 11and 12 of the Ruling on 20 February:

“For the discovery applications, most of the requests are not sufficiently particularized, they are either too vague or too wide. Besides, the plaintiff had failed to provide basis to suggest that the documents requested are in existence. Such an approach, as submitted by Mr Man, had been adopted by the plaintiff earlier in the High Court action; notwithstanding the court’s firm view given to the plaintiff, they tried it again in this court.

Furthermore, in my view, the whole approach of the plaintiff on this discovery application is in a very oppressive and unreasonable manner. The documents sought are so extensive that being totally disproportionate to the subject matter and the litigation. And, in my view, the court should show its disapproval to this approach of making interlocutory application even in the context of an equal opportunity claim. As I said, the applications by the plaintiff are obviously frivolous and, in my view, there are special circumstances under which the court can depart from the usual order for costs in an equal opportunity claim. I therefore order that costs of the plaintiff’s application for amendment, costs of the defendant’s application of striking out and also costs of the plaintiff’s specific discovery are to the defendant.”

1. It is pertinent to bear in mind that prior to the hearing before the judge in February 2012, there had already been discovery of 17 lever arch files, which were also disclosed in HCA 322/2008.
2. Unless very special circumstances are made out, an exercise of the discretion in refusing specific discovery would not be disturbed on appeal.
3. The judge had clearly balanced all the relevant factors. I cannot see any basis upon which his exercise of discretion can be faulted.
4. The citation of cases in ground 4 of the draft notice of appeal does not help.
5. It was submitted that the judge had failed to have regard to the proposition that the choice of comparator is a matter for the complainant and *M Ainsworth v Glass Tubes & Components Ltd* [1977] IRLR 4 was given as support. I do not think the case was support for that proposition.
6. It was further contended that the judge failed to take into account even if a person does not qualify as a comparator because the circumstances are in some material respect different, the treatment of such a person may still be relevant evidence from which the tribunal may infer how a comparator would have been treated and could found the basis for drawing an inference of discrimination. Mr Coleman referred to *Watt v Ahsan* [2008] 1 AC 696 at paras 36 to 37, *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paras 134 to 136 and 143.
7. I agree with Mr Man it is plainly unarguable that a plaintiff would have the prerogative to choose any comparator, regardless of suitability, and then demand discovery of all documents concerning such comparator. Section 10 of the Sex Discrimination Ordinance provides that where a comparison is made between cases of persons of different sex, the relevant circumstances in one case shall be the same, or not materially different, in the other. As Lord Hoffman has said in *Watt v Ahsan* at para 36, “This is an ordinary question of relevance, which depends upon the degree of similarity of the circumstances of the person in question (the “evidential comparator”) to those of the complainant and all other evidence in the case.” Whether certain persons qualify as such “evidential comparators” would depend on the materiality of the differences between the comparators and the complainant (*Shamoon*, para114).
8. The burden of showing relevance of circumstances with the identified comparators lies with the plaintiff. The judge had considered the circumstances of the pleaded comparators. He exercised his discretion impeccably bearing in mind the relevance factor, the issue of confidentiality, the unfairness of putting the comparator on trial, the necessity of the information to the case, the extent of the discovery sought and oppression to the defendant. There is no reasonable prospect of success in any of the grounds advanced in grounds 4 to 7 of the draft Notice of Appeal.

The application to be released from implied undertaking

1. It is argued here that the judge did not have regard to the plaintiff’s entitlement under the Personal Data (Privacy) Ordinance, Cap 486 and that the plaintiff now seeks a curtailed order, namely only those which she would be entitled to a copy under sections 18 and 19 of the Ordinance.
2. The judge exercised his discretion in refusing the order sought in para 4 of the summons in question for the reason given in his Ruling on 13 February 2012, namely, that the kind of information on the documents referred to are not specific or sufficiently specific for him to consider if the plaintiff should be released from the implied undertaking.
3. The judge’s exercise of the discretion on the way that the summons was worded and proposed to be amended as argued before him cannot be impugned. The fact that the plaintiff has now curtailed the order sought to permit her to make use of “any documents which contain the Plaintiff’s personal data that may be disclosed by the Defendant in these proceedings for any other purposes” is not a sufficient reason for this court to exercise its discretion to grant leave to appeal, as the plaintiff can issue a fresh application for release from the undertaking, properly framed, to be considered by the judge.

The costs order on indemnity basis

1. The judge awarded costs on an indemnity basis against the plaintiff for the reason given in para 13 of his Ruling on 20 February 2012, because “the plaintiff’s application is obviously frivolous and also those applications are made with the full knowledge of the view taken by the High Court [in HCA 322/2008], it is nearly amounting to an abuse of process in the manner the plaintiff has conducted itself [sic] in these applications.”
2. Under section 73B(3) of the District Court Ordinance, in the exercise of its jurisdiction under the Sex Discrimination Ordinance, the court may depart from an order that each party shall bear its own costs where the proceedings were brought frivolously or where there are special circumstances which warrant an award of costs. The circumstances of this case amply justify a costs order against the plaintiff on an indemnity basis.

Conclusion and orders

1. This application for leave to appeal should not have been brought. I would dismiss the plaintiff’s application for leave to appeal. As the application is entirely without merit, I would make a further order pursuant to Order 59 rule 2A(8) that no party may under rule 2A(7) request the determination to be reconsidered at an oral hearing inter partes.
2. I would make an order *nisi* that the plaintiff is to pay the defendant’s costs of this application on an indemnity basis. Costs would be assessed on a gross sum basis. The defendant’s solicitors are to serve their skeleton bill within 7 days upon the costs order *nisi* becoming absolute, and the plaintiff’s solicitors may respond to this within 7 days of service of the bill.

Hon Fok JA:

1. I agree.

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| (Susan Kwan) | (Joseph Fok) |
| Justice of Appeal | Justice of Appeal |

Mr Russell Coleman, SC and Mr Jonathan Wong, instructed by Messrs William K W Leung & Co, for the plaintiff (applicant)

Mr Bernard Man, instructed by Mayer Brown JSM, for the defendant (respondent)