IN THE SUPREME COURT OF NEW ZEALAND

SC 111/2015
[2015] NZSC 170

BETWEEN MICHAEL KINLIM YAN
Applicant

AND COMMISSIONER OF INLAND REVENUE
Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: G D S Taylor and C A Sawyer for Applicant
S L Hornsby-Geluk and M J Harrop for Respondent

Judgment: 9 November 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

[1] The applicant, Mr Yan, was employed by the Department of Inland Revenue as a solicitor for around 26 years. There were long-standing concerns about his work and in December 2011, he was dismissed for poor performance. This followed an 11 month performance improvement process.

[2] Mr Yan took a personal grievance, alleging that his dismissal was unjustified. The Employment Relations Authority rejected this contention,[1] as did the Employment Court following a de novo hearing of the grievance.[2] Mr Yan then applied for leave to appeal to the Court of Appeal on a question of law, but that

[1] *Yan v Commissioner of Inland Revenue* [2014] NZERA Auckland 6.
[2] *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 (Judge Inglis) [*Yan* (Emp C)].

application was also unsuccessful.[3] Mr Yan now seeks leave to appeal to this Court directly from the decision of the Employment Court.

[3] As the Court has said previously, it has jurisdiction to grant an application such as that made by Mr Yan, but because doing so would effectively negate the Court's inability to hear an appeal from the Court of Appeal's refusal of leave,[4] it will do so only where the applicant shows "extremely compelling circumstances" justifying the grant of leave.[5]

[4] The essential point that Mr Yan seeks to raise is that those who carried out the performance improvement process were not "neutral" as required by the Employment Relations Act 2000 read in conjunction with the State Sector Act 1988. He argues that the statutory context requires that the decision-maker, his or her advisors and any others taking part in the dismissal process come to the process with no substantial prior knowledge of the person whose dismissal is being considered; where the involvement of persons with such prior knowledge is unavoidable, the process and its outcome need to be reviewed by an independent person. He argues that this did not occur in his case.

[5] We are not satisfied that there are "extremely compelling circumstances" sufficient to justify the grant of leave in this case. Bias (including the need for neutrality) was a "central plank" of Mr Yan's challenge in the Employment Court.[6] The Employment Court addressed both the legal and factual arguments in some detail.[7] Having examined the facts closely, the Court found that neither the performance review process nor the decision to dismiss was vitiated by bias. Importantly, the Court made factual findings to the effect that, although two of the three Departmental employees who participated in Mr Yan's performance review process had prior experience of Mr Yan and found dealing with him challenging,

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3 *Yan v Commissioner of Inland Revenue* [2015] NZCA 401.
4 Supreme Court Act 2003, s 7(b).
5 See *C v Air Nelson Ltd* [2010] NZSC 110 at [1], citing *White v Auckland District Health Board* [2007] NZSC 64, (2007) 18 PRNZ 698 at [5]–[6].
6 *Yan* (Emp C), above n 2, at [41].
7 The question of the interrelationship between the Employment Relations Act 2000 and the State Sector Act 1988 does not seem to have been raised, however.

they approached their roles in the process "with professionalism and objectivity";[8] one was involved only in a limited way early in the process and the other was appropriately involved as Mr Yan's manager.[9] But more importantly, the decision to dismiss was made by another employee, who, the Court found, had had very little prior involvement with Mr Yan.[10] Given these factual findings, we see no prospect that Mr Yan could succeed even if he were to persuade us that his arguments as to the law were correct.

[6] The application for leave to appeal is dismissed. The applicant must pay the respondent costs of $2,500.

Solicitors:
Blomkamp Cox, Takapuna for Applicant
Dundas Street, Wellington for Respondent

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8 *Yan* (Emp C), above n 2, at [51].
9 At [57].
10 At [55]–[57].