IN THE COURT OF APPEAL OF NEW ZEALAND

CA239/2010
[2010] NZCA 320

BETWEEN	RAYMOND CLENDON LEWIS Appellant
AND	HOWICK COLLEGE BOARD OF TRUSTEES Respondent

Hearing: 20 July 2010

Court: Stevens, Randerson and Stevens JJ

Counsel: B P Henry and G Church for Appellant
R M Harrison for Respondent

Judgment: 27 July 2010 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs for a standard application on a Band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

[1] The applicant applies for leave to appeal against a decision of Chief Judge Colgan in the Employment Court[1] holding that, while the applicant had been unjustifiably dismissed (and was entitled to compensation for remuneration loss and non-pecuniary losses), he would not be reinstated. Leave was also sought to appeal against the disallowing of the applicant's claim for costs, apart from a court filing fee disbursement.

The test for reinstatement – practicability

[2] In dealing with the reinstatement remedy, Judge Colgan considered and applied the correct statutory test.[2] He also applied the test of practicability endorsed by this Court in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* (*NZEI*).[3] The Court there affirmed a legal test for practicability articulated in the Employment Court[4] as follows:[5]

> Whether … it would not be practicable to reinstate Mr Bell involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[3] The Court added[6] that, where the law has been correctly stated, the assessment of whether reinstatement was practicable was an assessment of fact and cannot be attacked as an error of law. The only exception would be that:[7]

> In rare cases however the appellate court may conclude that even though the lower court correctly stated the legal test the facts found by it were such that no person acting judicially and properly instructed as to the relevant law

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1 *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4.
2 Employment Relations Act 2000, s 125.
3 *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA).
4 Interpreting the similarly worded s 228(1) of the Labour Relations Act 1987 requiring reinstatement to be the primary remedy "whenever practicable".
5 At 416.
6 At 417.
7 At 417–418

> could have come to the determination under appeal. In some cases it is put on the footing that the findings in the court below were inconsistent with the evidence and contradictory to it.

[4] To seek to avoid this difficulty, Mr Henry for the applicant sought to distinguish the *NZEI* case on the basis that the approach to practicability only applies to dismissals unjustified for purely procedural reasons. He submits that as the applicant's dismissal was unjustified, both procedurally and on the merits, different balancing factors should be applied. In particular, reinstatement should only be refused in the face of "the strongest of evidence" and that the effects of reinstatement on those responsible for the unjustified dismissal should be given little or no weight. The applicant therefore seeks to argue that there should be a "strong presumption" for reinstatement where dismissal is unjustified on the merits. Further, the applicant submits that delay should not be taken into account unless the party seeking reinstatement has caused delay through utilising court processes. Mr Henry invited the Court to consider the approach adopted by the Employment Court in *Hobday v Timaru Girls' High School Board of Trustees.*[8]

[5] Mr Harrison for the respondent submits that the Chief Judge correctly applied the law to the facts of the case. He also submits that there should be no bright line between procedural and substantive grounds for unjustified dismissal and in any event the *NZEI* case involved a similar factual mix to the present involving both procedural and substantive grounds, rather than merely procedural grounds. Mr Harrison notes that, as recorded by the Chief Judge in the present case[9] it may be difficult, if not impossible, to separate procedural and substantive grounds for dismissal. Further, the applicant's approach does not take into account the impact of contributory conduct in the practicability analysis.

[6] We are not satisfied that the applicant has identified a question of law in this case that, by reason of its general or public importance or for any other reason, ought to be submitted for the decision of this Court.[10] The test for practicability requires an evaluative assessment by the decisionmaker and the factors to be considered have been clearly identified by this Court in the *NZEI* case. We see no basis on the

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8 *Hobday v Timaru Girls' High School Board of Trustees* [1994] 1 ERNZ 724.
9 At [74].
10 As required by s 214(3) of the Employment Relations Act.

wording of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach to the issue of reinstatement is preferable.

[7] There is no dispute between the parties that the onus of proof of lack of practicability rests with the employer. In the Employment Court the Chief Judge identified the correct test and then applied it to the facts in deciding that reinstatement was not practicable. Also, we do not consider that the decision is one of those rare cases where a person acting judicially and properly instructed could not have come to the decision he reached.

Costs

[8] So far as the question of costs is concerned, the Chief Judge was required to consider the fact that there were several significant offers of settlement made by the respondent on the basis of being "without prejudice except as to costs" (the *Calderbank* offers). The Chief Judge considered the nature of the offers made and compared those with the result that the applicant had achieved in the litigation. He concluded that the offer of an opportunity to have the end of his employment treated as a resignation or retirement would, in all the circumstances, have been a better outcome than he had achieved in the litigation.[11] The Chief Judge noted the observation of this Court in *Health Waikato Ltd v Elmsly*[12] of the need to be "steely" in relation to *Calderbank* offers.

[9] We consider that the Chief Judge did not err in law in the exercise of his discretion on the issue of costs. Accordingly, there is no basis upon which the applicant should be granted leave to appeal on this ground.

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11 *Lewis v Howick College Board of Trustees (Costs judgment)* [2010] NZEmpC 39 at [12].
12 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

Result

[10] The application for leave to appeal is dismissed on both grounds. The applicant must pay the respondent costs for a standard application on a Band A basis, together with usual disbursements.

Solicitors:
J Chamley, Auckland for Applicant
Harrison Stone, Auckland for Respondent