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Best Health Foods Limited v Berea [2021] NZEmpC 63 (4 May 2021)

Last Updated: 7 May 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 63](#)

EMPC 398/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER BETWEEN	of an application for recall BEST HEALTH FOODS LIMITED Plaintiff
AND	ROXANNE BEREA Defendant

Hearing: (on the papers)
Appearances: J Gu, agent for Best Health Foods Ltd
R Berea in person
Judgment: 4 May 2021

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

(Application for recall)

Introduction

[1] On 3 May 2021, I issued an interlocutory judgment concerning the plaintiff's application for stay of proceedings.¹

[2] Soon afterwards, Mr Gu sent an email to the Registry, stating that there was a significant error in the judgment. The essence of his email related to the circumstances of termination, as discussed briefly, and on a provisional basis, at paras [14] to [20] of the interlocutory judgment. In those paragraphs, I summarised the findings of the

¹ *Best Health Foods Ltd v Berea* [\[2021\] NZEmpC 61](#).

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Employment Relations Authority (the Authority), which culminated in a conclusion that no notice was given by Best Health Foods Ltd (BHFL) until Ms Berea had been dismissed.

[3] Mr Gu stated in his email:

... A proper notice was given to the defendant at 5:44pm of 21 January 2020 after a short discussion meeting between 4:30pm and 4:40pm on the same day. She wasn't fired at the meeting and she did not leave the office until 5pm. There is a (sic) attendance sheet signed by the defendant to prove this.

...

[4] Mr Gu attached to his email a copy of an email addressed to Ms Berea on 21 January 2020, timed at 4.45 pm.

[5] Mr Gu went on to say that the Authority initially made the same error and that it subsequently issued an amended determination. He requested that the interlocutory judgment be amended accordingly.

[6] Ms Berea responded by stating that she abided the decision of the Court but disagreed with Mr Gu's course of action.

[7] Although Mr Gu did not frame his comments as being in support of an application for recall of my judgment, in the interests of justice, I treat it as such. The categories of recall are well recognised. The question which arises here is whether, for a very special reason, justice requires that the judgment be recalled.²

Further information

[8] At the time I considered the application for stay, I had not been informed that the determination that was placed before me for the purposes of this proceeding was in an amended form. On receiving advice of this, I instructed the Registrar to contact the staff of the Authority to seek clarification.

2 *Zhang v Telco Asset Management Ltd* [2020] NZCA 516 at [5].

[9] As a result, I have been provided with an email exchange which took place between Mr Gu and a Senior Authority Officer at the time the determination was issued.

[10] It appears that the first version of the Authority's determination, which I have now seen for the first time, was issued on 17 November 2020.

[11] The next day, Mr Gu sent an email to the Authority, stating that the determination was in error for a range of reasons, which included his view of the termination events.

[12] The Senior Authority Officer responded on 19 November 2020, stating that the Authority Member acknowledged he had made no reference to a dismissal letter dated 21 January 2020 in his determination, as this had not been referred to in submissions for the Best Health Foods Ltd (BHFL). The Officer stated that, in view of the concerns expressed, the Member intended to issue a replacement determination that would cover the points made by Mr Gu.

[13] On 20 November 2020, a further determination was issued. In a covering letter, the Senior Authority Officer stated that the determination issued on 17 November 2020 should be destroyed and replaced with the determination which was forwarded.

[14] That determination recorded that further submissions had been received from BHFL on 19 November 2020. The date of the determination, however, remained 17 November 2020. It was explained in the covering letter that the period within which a challenge to the determination in the Employment Court could be filed should run from that date.

Analysis

[15] None of these matters were referred to in the submissions that were considered by the Court for the purposes of the application for stay. The essence of the concerns raised by Mr Gu relates to the sequence of events leading up to Ms Berea's termination of employment.

[16] In my interlocutory judgment, I referred to the fact that the Court had not been assisted by any affidavit evidence with regard to the application for stay. In the absence of such evidence, the Court referred to the summary of events contained in the Authority's determination to which the challenge relates.

[17] It is plainly the case that in its final determination, the Authority Member found that, at the meeting which occurred on 21 January 2020, Ms Berea was told that she was not needed any further, and that she collected her belongings and left the workplace.³

[18] It is on the basis of that finding that the Authority went on to conclude that no written notice had been given to Ms Berea until after she had been dismissed at the brief meeting on 21 January 2020, and that she had been "sent away" from the workplace.⁴

[19] On the strength of these findings, I concluded that BHFL's intended challenge as to the sufficiency of notice was only "weakly arguable".

[20] In light of the further information with which I have been provided, it appears BHFL proposes to argue not only that decisions of this Court were incorrectly applied, but also that the findings made by the Authority as to the circumstances of the meeting which preceded the notice of termination were wrong. Relevant to its argument may be the manner in which

the final conclusions of the Authority came to be expressed.

[21] In those circumstances, I conclude that special reasons exist justifying a recall of the Court's interlocutory judgment.

[22] Accordingly:

- a. I amend para [14] following, to reflect BHFL's intended argument for the purposes of the challenge.

3 *Berea v Best Health Foods Ltd* [2020] NZERA 474 at [19] (Member Beck).

4 At [39].

- b. I amend the characterisation of that argument from "weakly arguable" to "arguable".

[23] Those clarifications, however, do not alter my view as to whether the stay should be granted.

[24] It will be seen from my judgment that a consideration of the merits is only one of a number of factors which the Court is required to consider.

[25] For the reasons outlined in the interlocutory judgment, I remain of the view that the application for stay should be dismissed.

Conclusion

[26] The formal order of the Court is that the judgment of 3 May 2021 is recalled. It is amended as indicated above.⁵ I have today reissued it accordingly.

B A Corkill Judge

Judgment signed at 4.30 pm on 4 May 2021

⁵ Above at [21].

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