Employment Court of New Zealand

Katz v Mana Coach Services Limited [2011] NZEmpC 92 (21 July 2011)

Last Updated: 2 August 2011

IN THE EMPLOYMENT COURT WELLINGTON

[2011] NZEmpC 92

WRC 22/11

IN THE MATTER OF an application for rehearing

BETWEEN BEATRICE KATZ Applicant

AND MANA COACH SERVICES LTD Respondent

Hearing: (on the papers by memoranda filed 22 June, 4 and 18 July 2011) Counsel: Tanya Kennedy, counsel for the applicant

Bruce Corkill QC, counsel for the respondent

Judgment: 21 July 2011

JUDGMENT OF JUDGE A D FORD

[1] The plaintiff has applied, pursuant to cl 5 of sch 3 of the Employment Relations Act 2000 (the Act), for a rehearing of her challenge to the determination[1] of the Employment Relations Authority which was the subject of my substantive judgment.[2] The stated ground for the application is a miscarriage of justice. It is claimed that I misdirected myself in reviewing and relying upon authorities, particularly Canadian authorities, which were not referred to by counsel or discussed at the hearing; that I misinterpreted and misapplied New Zealand authorities and that the views expressed in my judgment differed from those of Chief Judge Colgan in "this area of the law" – *New Zealand Tramways and Public Passengers Transport Employee's Union Inc v Wellington City Transport Ltd.*[3]

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[2] In response, Mr Corkill submitted that, as the application relates solely to questions of law, the appropriate process was for the plaintiff to seek leave to appeal to the Court of Appeal and he noted that that step had already been taken by application dated 22 June 2011.[4] Relying on *Yong, (t/a Yong and Co Chartered Accountants) v Chin*,[5] Mr Corkill submitted that it was inappropriate for this Court to express opinions on matters that are now before the Court of Appeal. Finally,

counsel for the defendant submitted that I was entitled to distinguish the present case on its facts from the *Tramways* decision.

[3] In submissions in reply, Ms Kennedy contended that *Yong* did not overturn the decision of the full Employment Court in *New Zealand Waterfront Workers Union v Ports of Auckland Ltd.*[6] As counsel expressed it, "the focus is whether there is a possibility of a miscarriage of justice. It is submitted that this is the case in this matter."

[4] With respect, on my reading of the *Ports of Auckland* case it seems that the full Court was really making the point that the mere possibility of a miscarriage of justice was not enough to warrant disturbing a considered judgment and what was needed to warrant a rehearing was either a positive finding of a likelihood of a

miscarriage of justice or the likelihood of a miscarriage of justice.[7]

[5] Section 214 of the Act, with stated exceptions, allows a party who is dissatisfied with a decision of this Court "as being

wrong in law" to seek leave of the Court of Appeal to appeal against that decision. The issue in this case was whether the plaintiff, a bus driver, was entitled to be reimbursed by her employer (the defendant) for legal fees she had incurred in successfully defending a careless driving charge. Her employment agreement was silent on the issue and Ms Kennedy, therefore, based her claim on an employee's alleged implied right to such indemnity at common law. Without wishing in any way to appear to be prejudging a matter before the Court of Appeal, the issue raised would appear to be a

question of law.

[6] I respectfully share the views expressed by Judge Couch in *Yong* in relation to rehearings. His Honour stated:[8]

Thus, where a party is dissatisfied with a judgment of the Employment Court on grounds which may be the subject of an appeal under s 214 of the Employment Relations Act 2000 or an application for judicial review under s 213, the Court should be very reluctant indeed to entertain an application for rehearing on those grounds.

[7] Ms Kennedy seeks a rehearing before the full Court and she stated that if the rehearing was granted then the appeal to the Court of Appeal would no longer need to proceed. The principle as stated by Judge Couch above is no doubt designed to avoid this undesirable type of forum shopping. Given the provisions of s 214 it would be inappropriate, in my view, to grant a rehearing on the ground that my judgment allegedly contained errors of law. The appropriate course in that event is for the aggrieved litigant to seek the leave of the Court of Appeal under s 214 to appeal to that court and, as noted, that step has already been taken in the present case.

[8] The application for rehearing is dismissed. The defendant is entitled to costs on the application. To save the parties incurring further expense associated with the filing of memoranda on the issue, I fix those costs at $600.

A D Ford

Judge

Judgment signed at 10.30 am on 21 July 2011

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[1] WA 192/10, 30 November 2010.
[2] [2011] NZEmpC 49.
[3] [2010] NZEmpC 12.
[4] CA 386/2011.
[5] [2008] ERNZ 1.
[6] [1994] 1 ERNZ 604.
[7] At 607.

[8] At [25].
