



# Employment Court of New Zealand

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## Nathan v C3 Limited [2016] NZEmpC 55 (17 May 2016)

Last Updated: 13 June 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 55](#)

ARC 94/12

IN THE MATTER OF      a challenge to a determination of  
                                 the  
                                 Employment Relations Authority

AND IN THE MATTER   of an application for leave to call  
                                 further evidence

BETWEEN                ANDY NATHAN Plaintiff

AND                        C3 LIMITED Defendant

Hearing:                23 March 2016  
                                 (Heard at Auckland)

Appearances:        S Mitchell, counsel for plaintiff  
                                 P Muir and R Rendell, counsel for  
                                 defendant

Judgment:             17 May 2016

### INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

#### Introduction

[1] In the judgment of this Court dated 20 November 2013, Mr Nathan's challenge to a determination of the Employment Relations Authority<sup>1</sup> (the Authority) was dismissed.<sup>2</sup>

[2] He sought leave to appeal against the judgment. The Court of Appeal granted leave on the following question of law:<sup>3</sup>

Did the Employment Court err in law in concluding that the reasons relied

on by the employer for Mr Nathan's dismissal do not amount to

<sup>1</sup> *Nee Nee v C3 Ltd* [2012] NZERA Auckland 457.

<sup>2</sup> *Nee Nee v C3 Ltd* [2013] NZEmpC 207, (2013) 11 NZELR 174.

<sup>3</sup> *Nathan v C3 Ltd* [2014] NZCA 198 at A.

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discrimination on the basis of his status as a union delegate and health and safety representative?

[3] In a judgment of the Court of Appeal dated 4 August 2015 the question was answered in the affirmative.<sup>4</sup> Mr Nathan's challenge was referred back to the Employment Court so that his personal grievance could be reconsidered in light of the Court of Appeal's judgment. That referral back was made pursuant to s 215(1) of the [Employment Relations Act 2000](#) (the Act). Unfortunately, while the Court of Appeal advised the Employment Court of its reasons for the referral back, it did not

give the Court directions in accordance with [s 215\(2\)\(b\)](#) of the Act. Accordingly, the Court will need to reconsider and decide the matter as best it can consistent with the Court of Appeal's decision and as far as it can discern the Court of Appeal's intention in remitting the matter back.

[4] Following the Court of Appeal's decision, Mr Mitchell, counsel for Mr Nathan, had some difficulty in obtaining instructions from him. Mr Nathan was unwell for a period but has now indicated he wishes to pursue the matter further.

[5] Counsel for the defendant indicated that C3 Ltd intended to seek leave to call further evidence when the matter was reheard.

[6] In view of the delays and in order that the matter could be advanced, a directions conference was convened with counsel on 16 December 2015. At that conference it was agreed that if the defendant wished to call further evidence, leave of the Court would be needed. A formal application seeking such leave was then filed. Mr Nathan filed a notice of opposition to that application. A hearing was then arranged to enable counsel to present argument on the defendant's application for leave.

### **Court of Appeal decision**

[7] While the present application merely seeks leave to call further evidence and the substantive rehearing is yet to be set down, the reasoning of the Court of Appeal

on referring the matter back provides necessary background.

4 *Nathan v C3 Ltd* [\[2015\] NZCA 350](#), [\(2015\) 13 NZELR 72](#).

[8] The Court of Appeal held that this Court should not have confined its reasoning on the alleged discrimination point only to a consideration under [s 103A](#) of the Act. The Court was required to consider Mr Nathan's personal grievance in the context of [ss 103\(1\)\(c\)](#), [104\(1\)\(b\)](#) (as defined in [s 107](#)) of the Act and then if necessary consider what remedies should follow. These provisions specifically direct the Court to consider whether the dismissal was unjustifiable on the basis of discrimination. In this case, the inquiry is particularly as to whether the dismissal resulted from Mr Nathan's involvement in the activities of a union or as a health and safety representative.

[9] While it was not specifically pleaded in that way in the proceedings before the Court, the Court of Appeal held that a pleading point of that nature would not preclude the Employment Court from considering the discrimination issue in the correct statutory context.<sup>5</sup> This was primarily because [s 122](#) of the Act expressly permits the Court to make a finding that a personal grievance is of a type other than that alleged. The Court of Appeal considered that in terms of [s 103A](#) of the Act, a fair and reasonable employer could not justify dismissal if the decision made was discriminatory in terms of [s 104](#). That inquiry could not be made under [s 103A](#) and

would need to be made having regard to [ss 103\(1\)\(c\)](#), [104\(1\)\(b\)](#) and [107](#) of the Act.

[10] Therein lies the issue which has led to the present application for leave to call further evidence.

### **The application for leave to call further evidence**

[11] The application is more in the form of a memorandum of submissions of counsel for the defendant. Nevertheless, the grounds of the application can be ascertained as the following:

(a) Further evidence is critical to enable determination of one of the issues raised in the Court of Appeal decision as to whether Mr Nathan would have been dismissed even if he had not been a union delegate

and health and safety representative.

5 At [35].

(b) Because of the way it was pleaded and therefore determinative of the way evidence was led at the hearing, the defendant's witnesses were not given the opportunity to give direct evidence on the weight the defendant placed on the matters taken into account and which now constitute the discrimination argument.

(c) It is in the interests of justice to allow further evidence on the point.

(d) The defendant would suffer prejudice if the matter was determined only on the basis of evidence presently before the Court.

(e) To allow such further evidence would not significantly increase costs or add to the time required to dispose of the matter.

(f) To allow further evidence would be consistent with the Court's equity

and good conscience jurisdiction in the admission of evidence.

(g) That the admission of such evidence is desirable to enable the Court to have all assistance reasonably available to determine the matter and this is consistent with Court precedent.

### **The notice of opposition**

[12] The notice of opposition sets out the following grounds:

(a) The Court does not have jurisdiction to allow further evidence. The defendant closed its case at the conclusion of the evidence (at the substantive hearing).

(b) If the Court does have jurisdiction, the application should be declined because:

(i) The defendant had notice of the discrimination claim which should have been addressed by way of evidence during the hearing. (It was pleaded as an additional factor in the allegation of disparity of treatment between employees.)

(ii) The plaintiff will be unfairly prejudiced by further evidence being allowed following the Employment Court judgment and the judgment of the Court of Appeal.

(iii) Allowing further evidence is not consistent with the Court's equity and good conscience jurisdiction.

### **Counsel's submissions**

[13] As foreshadowed in the grounds for the application, Ms Muir, counsel for the defendant, relied upon the equity and good conscience jurisdiction in [s 189](#) of the Act to submit that the Court has jurisdiction and a broad discretion to accept further evidence. In addition, by analogy, she relied upon [s 7](#) of the [Evidence Act 2006](#). While the [Evidence Act](#) does not apply to the Employment Court, this Court has decided that where appropriate it will have regard to the [Evidence Act](#) in deciding upon evidential matters.<sup>6</sup> [Section 7](#) of the [Evidence Act](#) provides that all relevant evidence is admissible.

[14] The primary submission of the defendant is that while the issue of discrimination was before the Court in the pleadings, the form in which it was put to the Court meant that evidence as to the weight placed on Mr Nathan's role was not sufficiently covered in the context of the issues now specifically to be decided. In summary Ms Muir submitted that the Court does have jurisdiction to admit further evidence, that the evidence is critical to the issue now before the Court on the referral back and the defendant will be prejudiced if not permitted to call that evidence. Accordingly, Ms Muir submits that it is in the interests of justice to admit it.

<sup>6</sup> *Maritime Union of New Zealand Inc v TLNZ Ltd* [[2007](#)] [ERNZ 593 \(EmpC\)](#) at [14].

[15] In making her submissions, Ms Muir relied upon dicta in *TNT Worldwide Express v Cunningham*, where the Court of Appeal held:<sup>7</sup>

... we think it desirable that the Court should if anything err on the side of liberality in the admission of further evidence... It is desirable that the Employment Court have all the assistance reasonably available in arriving at a determination.

[16] While *TNT* was decided under the predecessor legislation, the [Employment Contracts Act 1991](#), Ms Muir submitted that this principle is still relevant and applicable.

[17] Ms Muir also referred the Court to two further cases where the Court of Appeal had remitted them back to the Employment Court. Both considered the issue of further evidence. In *Post Office Union (Inc) v Telecom South Ltd (No 2)*, the Court of Appeal, after upholding the personal grievance claim, had remitted the issue

as to quantification of the claim back to the Employment Court for reconsideration.<sup>8</sup>

The employee sought to adduce further evidence relevant to the compensation issue but in that case the Employment Court declined to admit the further evidence. This was because it was clear that it was intended by the Court of Appeal that the quantification issue was to be reconsidered upon the material facts as they had previously been found. The Court also decided that the proposed evidence disclosed no new matters and would only confirm what the then Labour Court had already reasoned as a basis for assessing the claimant's losses.

[18] Ms Muir distinguished this case from the present on the basis that the matters remitted back in the *Post Office Union* case did not relate to substantive justification but merely concerned compensation, whereas in the present case the defendant's liability is still an issue. In the present case, in contrast to the situation in *Post Office Union*, the Court of Appeal has indicated that it is for this Court also to determine whether Mr Nathan would have been dismissed regardless of his status as a union delegate or health and safety representative.

<sup>7</sup> *TNT Worldwide Express (New Zealand) Ltd v Cunningham* [[1992](#)] [NZCA 587](#); [[1992](#)] [2 ERNZ 1010 \(CA\)](#) at 1013.

[19] The second decision referred to by Ms Muir was *Interchem Agencies Ltd v Morris*.<sup>9</sup> In that case the Court of Appeal had upheld the Employment Court's findings on liability but remitted the question of damages back to the Employment Court for reconsideration; and indicated that the Employment Court had failed to take certain factors into account when assessing damages. The Employment Court, with little discussion, allowed the parties to adduce further evidence in matters concerning liability insofar as they affected the reassessment of damages.

[20] It is clear from those authorities that the particular circumstances in each case will determine whether further evidence will be permitted. As a matter of common sense, the Court in each case will resolve the issue on the basis that where it is necessary for the Court's assistance and to enable it to give a decision finally resolving all matters between the parties, the admission of further evidence must be permissible.

[21] Mr Mitchell, counsel for Mr Nathan, sought in his submissions to limit the evidence upon which the referral back is to be decided to that evidence which is already before the Court. He submitted that the issue was sufficiently pleaded to have enabled the defendant to respond to the point. He also submitted that it would be unfair to the plaintiff to now enable the defendant, to call evidence accepting the discrimination, but trying to argue that unlawful actions would have made no difference to the outcome. I am not sure the defendant is accepting the statements were discriminatory. However, the particular argument by the defendant that the plaintiff would have been dismissed anyway is one of the very questions which the Court of Appeal has left this Court to decide.

[22] Mr Mitchell submitted that given that the Court of Appeal chose not to give directions, the inquiry this Court must now undertake in the referral back, is on a narrow basis without further evidence. Mr Mitchell in his oral submissions suggested that to enable the defendant to lead further evidence, when the issue to which that evidence relates is now known and has been analysed by the Court of Appeal, would mean that such evidence in any event, could be given little weight.

This is on the basis, he suggested, that the witnesses in giving further evidence

9 *Interchem Agencies Ltd v Morris* [2004] NZEmpC 37; [2004] 1 ERNZ 9 (EmpC).

would tailor the evidence to suit the defendant's case. I do not accept the submission that the defendant's witnesses would attempt to manipulate the matter in that way.

### Conclusions

[23] I do not accept Mr Mitchell's submission that because there is an absence of directions from the Court of Appeal as to how the referral back is to be heard, it was intended that the Court would simply rehear the matter on the basis of the evidence already before the Court. The Court of Appeal, by not giving any directions, must have intended that the Court should be free to decide how it deals with the matter.

The Court of Appeal also said:10

It will be for the Court to decide whether, in light of all the relevant evidence, C3 would have dismissed Mr Nathan even if he had not been a union delegate and health and safety representative.

[24] The direction of the Court of Appeal to consider all the relevant evidence in light of the effect of s 122 of the Act would also appear to contemplate that further evidence might be necessary. This is particularly so because of the way in which the pleadings and the form they were in, led to a limitation in the extent of the evidence presented on behalf of the defendant at the substantive hearing.

[25] Prior to the substantive hearing, the defendant had inadequate notice of the full extent of the case which could be presented against it. While the Court of Appeal has pointed out that the pleadings point could not preclude the Court from considering the discrimination issue, now that issue is firmly before the Court to consider, it would be contrary to justice to confine the defendant to its evidence presented on the basis of far more limited pleadings presented by the plaintiff at the commencement of the challenge.

[26] Section 215(2)(b) of the Act imposes a mandatory requirement upon the Court of Appeal to give the Court such directions as it thinks just as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that is referred

back for reconsideration. As stated earlier, in the absence of such directions, this

10 At [39].

Court needs to do its best to reconsider the matter on the referral back consistent with the clear intent of the Court of Appeal judgment in its entirety. In this case it is possible to do that.

[27] In a situation such as the present case, where the effect of the Court of Appeal judgment is to reconstruct the case that the plaintiff requires the defendant to answer, there is a danger that the way that the evidence was presented at the substantive hearing, even if for tactical reasons if nothing else, might now, without the ability to clarify it, prejudice the defendant. As it was not so firmly before the Court at the substantive hearing but now is, the Court must be entitled to hear further from the defendant's witnesses as to the weight that they placed upon the plaintiff's position as a union delegate and health and safety representative in the decision to dismiss him. This further evidence is likely to be quite limited but needs to be taken into account in the overall context. Substantial reasons other than the plaintiff's status in the workforce were presented to the Court for his dismissal and the reason for distinguishing him from other employees who were not dismissed for the same incident. Indeed, one of the very issues which the Court of Appeal indicated this Court would need to decide relates to those factors.

[28] In all of the circumstances it is clearly appropriate in this case and well within the interests of justice, for the defendant to have leave to call further evidence. From previous decisions of this Court and its predecessor Court, it is clear that the circumstances of a case will determine one way or the other whether further evidence should be admitted and jurisdiction to do so has never been in question.

[29] Accordingly, the defendant's application for leave to call further evidence from Warren John Pritchard and Ronald David Neil is

granted. This evidence is to be strictly limited to the consideration and weight given to the plaintiff's status as a health and safety representative and union delegate in the decision-making process when Mr Nathan was dismissed.

[30] It has been agreed that a half day fixture to hear the further evidence and any further submission from counsel is necessary. The Registrar is accordingly directed to arrange such a fixture to suit the convenience of counsel and the parties. Four

weeks before the fixture the defendant is to file and serve further briefs of evidence from Mr Pritchard and Mr Neil. Two weeks before the fixture, Mr Nathan may file briefs of evidence but they are to be strictly in reply.

[31] Costs are reserved.

M E Perkins

Judge

Judgment signed at 11.30 am on 17 May 2016

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