Employment Court of New Zealand

P v A [2018] NZEmpC 42 (7 May 2018)

Last Updated: 10 May 2018

IN THE EMPLOYMENT COURT
AUCKLAND
[2018] NZEmpC 42 EMPC 62/2017 EMPC 170/2017
EMPC 231/2017

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER	of an application by the plaintiff for rehearing
BETWEEN	P Plaintiff
AND	A Defendant

Hearing:	On the papers; application for rehearing and affirmation of plaintiff in support dated 25 August 2017; notice of opposition dated 26 September 2017; memorandum of counsel in support of notice of opposition dated 26 September 2017; submissions of plaintiff in support dated 23 February 2018; submissions for defendant in opposition dated 9 March 2018; submissions of plaintiff in reply dated 16 March 2018.
Appearances:	P, plaintiff in person J Douglas and H Pryde, counsel for defendant
Judgment:	7 May 2018

JUDGMENT OF JUDGE M E PERKINS REGARDING APPLICATION FOR REHEARING

Introduction

[1] This judgment deals with an application for an order granting the plaintiff a rehearing of a successful application by the defendant to extend time for the filing of a statement of defence. The defendant's application extending time was granted in a

judgment dated 28 July 2017.1 The plaintiff did not seek leave to appeal that judgment but instead has filed this application for a rehearing. In documents filed by him he has stated that the reason that he has not sought leave to appeal is that he cannot bear the costs he would incur in an application for leave to appeal.

[2] Subsequent to the application for rehearing being filed, P filed an application for recusal which was dealt with in a judgment dated 27 November 2017.2 The application for recusal was declined. That application was in part related to the application for rehearing. Some of the submissions of P in support of the application for recusal related to his criticism of how the Court had dealt with the earlier application to extend time for filing a statement of defence. In addition, P requested

that the application for rehearing not be dealt with until the application for recusal had been decided.

The application for order granting a rehearing

[3] The grounds for the application for a rehearing are stated in P's own words as being:

...

3. There are many errors of fact and/or law.
4. There are findings/conclusions contradictory to facts and material evidence on record.
5. The submitted documents/submissions have not been fairly and accurately cited/reflected or not at all cited in the judgment, which is inconsistent to the guidelines of the Honourable Supreme Court. (please refer paragraphs 69-71 of EMPC 170/2017 for cited case by ERA earlier).
6. There has been a gross and serious miscarriage of justice by allowing the judgment to be published without due diligence. Matter of fact for me the experience has been worse than ERA, even though names are anonymised.
7. involved an improper admission of evidence via apparently an affidavit.. refer my own affidavit/objection which doesn't even find a mention just like what happened in ERA in some issues.
8. apparent or real bias against me and in favour of other party.

...

1 *P v A* [2017] NZEmpC 92.

2 *P v A* [2017] NZEmpC 149.

[4] The defendant filed a notice of opposition. This was accompanied by a memorandum of counsel in support of the notice of opposition. Matters contained in the memorandum of counsel have subsequently been repeated in the defendant's submissions on this matter. The notice of opposition is based on the following grounds:

a. There is no evidence of material errors in the judgment;
b. There has not been a miscarriage of justice;
c. There is no evidence of bias;
d. There has been no breach of natural justice.

[5] The parties have now filed written submissions which include a submission in reply from P. It has been agreed that the application will be dealt with on the papers.

Principles applying to an application for rehearing

[6] The Court's power to order a rehearing is contained in cl 5 of sch 3 of the Employment Relations Act 2000. That clause reads as follows:

5 Rehearing

(1) The court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.
(2) Despite subclause (1), a rehearing may not be granted on an application made more than 28 days after the decision or order, unless the court is satisfied that the application could not reasonably have been made sooner.
(3) The application—

(a) must be served on the opposite party not less than 7 clear days before the day fixed for the hearing; and
(b) must state the grounds on which the application is made.

(4) Those grounds must be verified by affidavit.
(5) The application does not operate as a stay of proceedings unless the court so orders.
(6) The rehearing need not take place before the Judge by whom the proceedings were originally heard.

[7] The principles applying have been the subject of a number of decisions of this Court.3 Previous case law was summed up in a succinct statement of principle by Judge Ford in the *Davis* case where he stated:

[11] On the face of it, this provision grants the Court a broad unqualified discretion in relation to rehearing applications but, as with any such general discretion, it must be exercised judicially according to principle.
[12] The authorities show that some special circumstance must be found to exist to warrant the ordering of a

rehearing. It would be an impossible burden on this Court if a rehearing under cl 5 could be obtained merely by request and there is a strong countervailing public interest consideration in having finality to litigation.
[13] Traditionally, rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstance. Examples include the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round.* A similar situation, albeit less common, may arise where a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended: *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* and *Yong t/a Yong and Co Chartered Accountants v Chin.* Other special and unusual circumstances will no doubt arise and each will fall to be considered on a case-by-case basis. The threshold test to be applied is whether the applicant can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.
[14] The rehearing jurisdiction is not to be exercised for the purpose of re- agitating arguments already considered by the Court or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case. (footnotes omitted)

[8] In summary, the principles applying are:

- The interests of justice require finality in court proceedings.
- While it appears that the Court has a broad unqualified discretion in relation to rehearing applications, it must be exercised judicially according to principle.
- The most likely ground is that new evidence has been discovered which is material to the outcome of the case and could not have been given at trial.

3. See *Yong t/a Yong and Co Chartered Accountants v Chin* [2008] ERNZ 1; *Idea Services v Barker* [2013] NZEmpC 24; *Davis v The Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27; *Lewis v Greene* [2005] NZEmpC 26; [2005] ERNZ 142; *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84, [2015] ERNZ 720; *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 89.

- The mere possibility of a miscarriage of justice is not a sufficient ground for granting a rehearing. What is required is an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice.
- Rehearings are not to be granted lightly; they are not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases.

Conclusions and disposition

[9] P's application for rehearing and the accompanying documents set out matters which show that he has undertaken meticulous analysis of the judgment of 28 July 2017, which extended the time for the defendant to file a statement of defence. The affirmation in support of the application does not elaborate to any great extent on the points that are contained as grounds in the application. Reading the documents, which also include his submissions in support and reply, I perceive that his primary ground for seeking the application for a rehearing is his belief that the defendant and its legal counsel have somehow misled the Court and perpetrated a fraud. This relates to the fact that he does not believe the assertion made on behalf of the defendant giving the reasons why the challenge was overlooked and why a statement of defence was not, therefore, filed within time. I do not accept the submission P makes in this respect. He states in his submissions that the defendant "should" have known that the challenge had been filed and that the documents it received did not simply relate to his application to have the Employment Relations Authority reopen its investigation and his application relating to the refusal by the Authority to grant a permanent order prohibiting publication. Whether or not the defendant *should* have known of the existence of the challenge, the fact is that it did not. This was clearly because of administrative oversight within the company. It is hardly likely that in the circumstances disclosed the defendant would have endeavoured to conceal the reason for failing to file a statement of defence in time, whatever P perceives that to be. Certainly, I do not accept his submission casting aspersions on the integrity of the defendant's counsel as he has done.

[10] I do not intend in this judgment to consider every item which P has raised and which he has suggested are material errors in the judgment. I accept the submission contained in the notice of opposition and elaborated upon in the submissions of

counsel for the defendant that there is no evidence of material errors in the judgment. Some of the matters which P perceives to be errors arise from his ignorance as a lay litigant in understanding the information contained in the judgment and in the documents which have now been filed by the defendant in respect of his application for a rehearing. One example of this is his apparent objection in his memorandum in reply to the submissions of counsel including the name of both the senior and junior counsel under the signature to the submissions when only senior counsel has signed the submissions. I fail to see how that fact, which in any event does not constitute an error and cannot create confusion and ambiguity as P suggests, is material to his application for a rehearing.

[11] Insofar as his claim to bias is concerned, I am of the view that much of that ground in the application has been dealt with in any event in the judgment dealing with P's application for recusal. I do not accept P's assertions and submissions

that the decision of 28 July 2017 was motivated by bias towards the defendant and against him. The order granting the extension of time to file a statement of defence was made on proper grounds and based on established authority.

[12] Applying the principles contained in the authorities to which I have referred, I find there are no grounds for granting a rehearing. Areas of dissatisfaction to which P has referred, while without substance, are predominantly matters which might normally be the subject of appeal and upon which leave would need to be sought. Certainly, in this case there is no suggestion of fresh or new evidence having been discovered which would place the integrity of the judgment in issue.

[13] As indicated in the judgment extending the time for filing of a statement of defence, reliance was placed upon the Supreme Court's judgment in *Almond v Read.*4 The present case involved a clear administrative oversight within the company. The period of delay following the expiry date and before filing of the draft statement of defence and application to extend time, was only a matter of two days. P could not show that he had suffered prejudice by that period of delay.

4 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

[14] In all the circumstances, therefore, the application for rehearing is dismissed. While Ms Douglas, counsel for the defendant, has made an application that costs be determined on the present application and awarded against the plaintiff in view of the application being devoid of merit, I consider it appropriate to deal with all issues of costs once the substantive challenges have been heard and costs can then be appropriately assessed on the merits. This is not to say that awards of costs on the interlocutory matters will necessarily follow the event on the outcome of the substantive hearing.

[15] It is now essential that P's challenges proceed to a hearing and finality. A directions conference is to be convened so that timetabling can be set to advance these matters to a hearing. Prior to the date allocated for the directions conference, P and Ms Douglas are to file memoranda containing their proposals as to timetabling and giving an accurate assessment of the time which is likely to be required for the hearing of the challenges.

M E Perkins Judge

Judgment signed at 12.30 pm on 7 May 2018
